

Dispute Resolution

Contributing editor
Sophie Lamb



2017

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Dispute Resolution 2017

Contributing editor
Sophie Lamb
Latham & Watkins

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2003
Fifteenth edition
ISSN 1741-0630

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	7	Hungary	101
Sophie Lamb Latham & Watkins		Csaba Pigler and Viktor Jéger Nagy és Trócsányi Ügyvédi Iroda	
Australia	8	India	108
Colin Loveday and Alexandra Rose Clayton Utz		Vivek Vashi, Kanika Sharma and Hrushi Narvekar Bharucha & Partners	
Austria	14	Israel	120
Philipp Strasser and Dieter Heine Vavrovsky Heine Marth Rechtsanwälte GmbH		Jeremy Benjamin and Ido Pirkes Goldfarb Seligman & Co	
Belgium	19	Italy	126
Hakim Boularbah, Olivier van der Haegen and Charlotte Van Themsche Liedekerke Wolters Waelbroeck Kirkpatrick		Stefania De Michele Carnelutti Law Firm	
Brazil	30	Japan	132
Gilberto Giusti and Fernanda Marques Dal Mas Pinheiro Neto Advogados		Tetsuro Motoyoshi and Akira Tanaka Anderson Mōri & Tomotsune	
Canada - Ontario	37	Liechtenstein	138
Shaun Laubman and Ian Matthews Lax O'Sullivan Lissus Gottlieb LLP		Stefan Wenaweser and Christian Ritzberger Marxer & Partner Attorneys-at-Law	
Canada - Quebec	43	Luxembourg	145
James A Woods, Christopher L Richter, Marie-Louise Delisle and Léanie Cardinal Woods LLP		Joram Moyal and Claver Messan MMS Avocats	
Cayman Islands	48	Macedonia	150
Guy Manning, Mark Goodman and Kirsten Houghton Campbells		Tatjana Popovski Buloski and Aleksandar Dimic Polenak Law Firm	
Cyprus	54	Mexico	157
Andreas Erotocritou and Antreas Koualis A G Erotocritou LLC		Fernando Del Castillo, Carlos Olvera and Roberto Fernández del Valle Santamarina y Steta	
Denmark	60	Netherlands	162
Morten Schwartz Nielsen and Mikkel Orthmann Grønbech Lund Elmer Sandager		Jeroen Stal, Niek Peters and Maarten Drop Cleber NV	
Dominican Republic	66	Nigeria	168
Enmanuel Montás and Yanna Montás MS Consultores		Babajide O Ogundipe and Lateef O Akangbe Sofunde, Osakwe, Ogundipe & Belgore	
Egypt	71	Norway	173
Zaki Hashem & Partners		Terje Granvang Arntzen de Besche Advokatfirma AS	
England & Wales	76	Panama	178
Sophie Lamb, Kavan Bakhda and Aleksandra Chadzynski Latham & Watkins		Evans Gonzalez and Fernando Aued Patton, Moreno & Asvat	
Germany	87	Romania	183
Karl von Hase Luther Rechtsanwaltsgesellschaft mbH		Cosmin Vasile Zamfirescu Racoți & Partners Attorneys at Law	
Hong Kong	94	Russia	188
Simon Powell and Chi Ho Kwan Latham & Watkins		Sergey Chuprygin Ivanyan & Partners	

Singapore	201	United Arab Emirates	243
Edmund J Kronenburg and Tan Kok Peng Braddell Brothers LLP		Faridah Sarah Galadari Advocates & Legal Consultants	
Spain	209	United States - California	248
Javier Izquierdo and Marta Maciá Gómez-Acebo & Pombo Abogados, SLP		Peter S Selvin TroyGould PC	
Sweden	216	United States - Federal Law	255
Erik Wernberg and Fredrik Forssman Advokatfirman Cederquist		Robert M Abrahams, Robert J Ward and Caitlyn Slovacek Schulte Roth & Zabel LLP	
Switzerland	223	United States - New York	261
Roman Richers and Roman Baechler Homburger AG		Robert M Abrahams, Robert J Ward and Caitlyn Slovacek Schulte Roth & Zabel LLP	
Turkey	229	Venezuela	267
Sidika Baysal, Mustafa Basturk and Gizem Oner B+B Law Firm		Carlos Dominguez Hoet Peláez Castillo & Duque	
Ukraine	235		
Pavlo Byelousov and Oleksandr Mamunya Aequo Law Firm			

Preface

Dispute Resolution 2017

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Dispute Resolution*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Austria, Italy, Liechtenstein, the Netherlands, Panama and Spain.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Sophie Lamb of Latham & Watkins, for her assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
June 2017

Introduction

Sophie Lamb

Latham & Watkins

Welcome to the 2017 edition of *Getting the Deal Through - Dispute Resolution*.

I write these introductory remarks as I pass my first anniversary at Latham & Watkins as the Global Co-Chair of the International Arbitration Practice. Change is a theme that we are witnessing on a global scale – whether it is legal, political or professional – not least over this past year.

Within the legal industry we have been left considering the potential impact of Brexit on the UK's financial sector and the relationship between the English courts and other EU courts as we move forward. For now, all EU legislation will be transposed into domestic law under the UK's Great Repeal Bill. Looking to the future, there are plans to introduce a legislative framework for the UK similar to the Brussels Regulation, which addresses issues of jurisdiction and enforcement of judgments between EU member states.

The status of London as a pre-eminent seat for international arbitration has never depended on membership of the EU, as it is the New York Convention that provides the legal infrastructure for the recognition and enforcement of arbitral awards in over 150 countries. Other leading centres for international arbitration, including Hong Kong and Singapore and those in Switzerland, have thrived wholly outside of the EU. While the wider impact of Brexit remains to be seen, Brexit may even strengthen the UK's offering as an arbitration centre to the extent that, for example, the EU prohibition on anti-suit injunctions (including in cases where arbitration agreements are breached) will no longer apply.

The English common law will not be negatively impacted by Brexit. It has long been chosen by commercial actors and is one of the preferred governing laws in contracts the world over for reasons that are unrelated to the UK's membership of the EU. Its certainty and predictability in commercial matters over a sustained period of time together with the stellar reputation of the English judiciary are enduring factors on which Brexit can have no impact.

There have been some noteworthy changes affecting certain other jurisdictions within the dispute resolution market. For instance Russia has implemented several changes to its arbitral landscape, notably that arbitral institutions must now be registered with the Russian Ministry

of Justice. In the UAE, article 257 of the Penal Code has been amended so that arbitrators who fail to maintain 'integrity' and 'impartiality' may face criminal liability. Finally, transparency continues to be a key focus. At the end of 2015, the International Chamber of Commerce announced that it would publish reasons for its decisions on administrative matters. In January 2016 it was announced that the names and nationalities of all arbitrators and chairs presiding over ICC matters would also be published. The drive to achieve greater transparency has gathered momentum. In April 2017, Switzerland ratified the Mauritius Convention, which extends the application of the UNCITRAL rules on transparency to investor-state disputes under investment treaties.

Any discussion of reform, and indeed change, would be incomplete without mention of important initiatives to improve diversity in the field of dispute resolution. In recognition of the under-representation of women on international arbitral tribunals, many members of the international arbitration community, including institutions, law firms and practitioners, have signed a formal pledge for the equal representation of women in arbitration. Certain institutions have also made their own individual commitments to improving diversity including through the publication of diversity statistics. The data published by the International Court of Arbitration of the ICC indicated that women arbitrators represented 14.8 per cent of all arbitrators appointed by ICC arbitration parties, co-arbitrators or directly by the Court in 2016, up 4.4 per cent from 2015 statistics. According to ICC figures, of 1,411 arbitrators appointed in 2016, 209 were women, compared with 136 of 1,313 total arbitrators in 2015. Figures published by the London Court of International Arbitration show that of the 195 arbitrators appointed by the LCIA, 28 per cent were female, though out of 254 appointments by parties or co-arbitrators only 6 per cent were women. In the Stockholm Chamber of Commerce, out of the 101 appointments made by the institution 27 per cent were female, though only 7 per cent of the 178 appointments made by parties or co-arbitrators were women. The courts of England and Wales too have set up a Judicial Diversity Committee to report on progress in this area.

So change is afoot, but with it comes opportunity. I would like to conclude by thanking each of the authors for their insight and contributions to this year's edition.

Australia

Colin Loveday and Alexandra Rose

Clayton Utz

Litigation

1 Court system

What is the structure of the civil court system?

The High Court of Australia is the highest court and exercises both original and appellate jurisdiction. The majority of the court's matters are appeals from the appellate divisions of the state and territory Supreme Courts and the Federal Court of Australia after special leave to appeal is granted. Matters heard by the High Court of Australia in its original jurisdiction include challenges to the constitutional validity of laws. Significant matters including constitutional matters are heard by a full court of seven justices assuming they are able to sit. Most other matters are heard by at least two justices. High Court of Australia decisions are binding on all lower courts.

Each of Australia's six states and two territories has a Supreme Court which is the highest court in that state's court system (subject only to the High Court of Australia). Each has unlimited civil jurisdiction. The Supreme Court constituted by a single judge hears, at first instance, monetary claims above a certain threshold based on the amount claimed in the proceedings, or claims for equitable relief. In most state Supreme Courts, there are commercial lists that are expressly designed to manage large commercial disputes. Such lists provide intensive case management and a streamlined procedure designed to promote the just, quick and inexpensive resolution of matters.

The appellate division of state courts is the Court of Appeal or Full Court. Typically three judges will hear appeals from single judges of the Supreme Court and from certain other state courts and tribunals. The Court of Appeal has both appellate and supervisory jurisdiction in respect of all other courts in the state system.

Most states have two further levels of inferior courts, which hear matters below the threshold limits for the Supreme Courts. The District Court (in some states called County Court) is the middle court and has jurisdiction over most civil matters within a monetary threshold. Some district courts have commercial lists. There is then the local court (in some states called the Magistrates' Court), which handles smaller, summary matters.

In keeping with the hierarchy of courts established under the laws of each state, there is also a hierarchy of courts which deal with disputes relating to federal law. The Federal Court of Australia has jurisdiction covering almost all civil matters arising under Australian federal law. Most notably, the court has jurisdiction to hear disputes on issues including competition and consumer protection laws, bankruptcy, corporations, industrial relations, intellectual property, native title and taxation. The Family Court of Australia has jurisdiction to resolve most complex family law disputes. The Federal Circuit Court hears less complex disputes relating to child support, administrative law, bankruptcy, industrial relations, migration and consumer laws.

There are also various tribunals designed to hear specific categories of disputes.

2 Judges and juries

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

Under Australia's Constitution, the separation of powers doctrine means that the judiciary is independent from the other arms of

government. Judges must act to apply or determine the law independently and without interference from the parliament or the executive.

Most civil actions are heard by a judge alone. By way of example, in New South Wales the Supreme Court Act stipulates that all civil proceedings are to be tried without a jury unless the court otherwise orders, but the court may make an order for trial by jury on application of a party if the court is satisfied that 'the interests of justice require a trial by jury in the proceedings'. Parties in defamation proceedings may elect to have a jury appointed unless the court otherwise orders.

3 Limitation issues

What are the time limits for bringing civil claims?

Limitation periods are governed by state and territory legislation and are treated as substantive rather than procedural. Limitation periods vary in terms of length and how they are calculated depending upon the cause of action.

In tort, the cause of action generally accrues from the time the damage was suffered. In contract, the cause of action accrues from the time of the breach.

Parties may agree to suspend (or toll) time limits.

4 Pre-action behaviour

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

In the federal and several state jurisdictions, legislation imposes pre-litigation requirements on parties involved in civil disputes before commencing proceedings. Generally, a failure to comply with pre-litigation requirements will not invalidate the proceedings, but the court can take it into consideration when awarding costs.

In the Federal Court of Australia, the parties to a dispute must file a 'genuine steps statement', which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

5 Starting proceedings

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 process and payment of the applicable filing fee with the registry of the court in which the claim is sought to be heard. Defendants to an action are typically first made aware of a filed claim when it is served on them in accordance with the court rules. In many jurisdictions it is also possible to conduct a search of the court files to determine whether claims have been filed but not served.

Where a document is personally served by the document being left with a person or put down in his or her presence, service is generally effected at that time.

For service of an originating process outside Australia, the relevant court rules will generally provide a power to serve an originating process outside Australia where there is a connection between the jurisdiction and the person's acts or the consequences of those acts. Australia is a signatory to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters. The Convention is designed to simplify the process for serving court documents on international litigants and receiving court documents relating to foreign litigation. It applies in all civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.

Australia is a highly litigious jurisdiction and many courts have a heavy caseload. A variety of means are implemented to manage this caseload including specialist lists, docket judge management, streamlined interlocutory processes and case management conferences.

6 Timetable

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

Rules relating to the service of an originating process can be located in the civil procedure rules of the relevant jurisdiction. For example, in New South Wales, an originating process must be personally served on each defendant. For most other documents, service can be effected by ordinary service which includes sending documents by post, facsimile and email (where the other party consents). A claim in the Supreme Court once filed is valid if served within six months. A statement of defence must be filed within 28 days after service of the statement of claim, unless otherwise ordered by the court. This time frame does not take into account the fact that in some circumstances it will be necessary to seek further and better particulars of the matters pleaded in the statement of claim in order to better understand it.

Timelines for civil claims vary considerably depending upon the complexity of the claim, the volume of evidence to be addressed and the court hearing the dispute. Commercial disputes in specialist lists can be heard and determined within one year. Representative (class action) proceedings may take more than five years.

7 Case management

Can the parties control the procedure and the timetable?

Australian courts have broad case management powers which are generally defined by the relevant court rules. Each court has its own allocation system. Judges have a wide discretion to manage cases as they see fit to ensure that the real issues in dispute are identified and the matter is progressed to trial as soon as possible. Some courts issue standard directions or practice notes that set timetables that the parties are expected to comply with absent special circumstances.

Australian court systems have, over time, introduced methods of court-instigated 'management' of litigation. The reforms have involved shifting control of aspects of the conduct of litigation from lawyers to the courts. Australian courts have a wide discretion to impose sanctions (which may include adverse costs orders) on a party that has not complied with court orders or directions.

8 Evidence – documents

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

There are both common law and statutory requirements to preserve evidence pending trial. Severe sanctions may apply for the destruction of evidence. The disclosure process is referred to as 'discovery'. Discovery is an interlocutory procedure whereby a party can obtain from an opponent the disclosure and subsequent production of documents that are relevant to a fact in issue in the proceedings. Disclosure must be made of all existing documents that the party has in their possession, custody or power. Failure to comply will trigger court sanctions.

While in many jurisdictions an application can be made for pre-action or preliminary discovery, documentary discovery usually occurs once pleadings have closed but before witness statements or affidavits are served.

In most jurisdictions, discovery will be ordered by the court or obtained by filing a notice to produce for inspection of documents contained in pleadings, affidavits and witness statements filed or served by the other party. General discovery involves discovery of all documents relevant to a fact in issue, which includes documents that are unhelpful to a party's case. While most jurisdictions permit an order for general discovery to be made, courts and the parties will usually avoid general discovery by limiting the documents to be discovered to those falling

within a particular category or class. In the Federal Court of Australia, a party must not apply for an order for discovery unless it will facilitate the resolution of the proceedings as quickly, inexpensively and efficiently as possible.

In most jurisdictions, where an order for discovery is made by the court, the parties must compile and exchange lists of discoverable documents in the appropriate form prescribed by the relevant court rules. Documents that are not relevant to a fact in issue do not need to be disclosed. After lists have been exchanged, documents will be produced for inspection by the other party.

9 Evidence – privilege

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

At common law, there are three elements necessary to establish legal professional privilege over communications passing between a legal adviser and client:

- the communication must pass between the client and the client's legal adviser;
- the communication must be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of actual or contemplated litigation; and
- the communication must be confidential.

The uniform Evidence Acts create a privilege for confidential communications made, or prepared, for the dominant purpose of a lawyer providing:

- legal advice; or
- professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is, or may be, or was, or might have been, a party.

'Dominant' in this context means the ruling or prevailing purpose. The purpose or intended use for which a document is brought into existence will be a question of fact. Legal professional privilege may be waived or lost where there is conduct inconsistent with the maintenance of the privilege. Advice from lawyers including in-house lawyers must pass these tests in order to be privileged.

Other types of privilege also exist including for example 'without prejudice privilege'. This involves communications between parties that are generally aimed at settlement. These communications cannot be put into evidence without the consent of parties in the event that negotiations are unsuccessful or later in relation to an application for costs following the determination of liability and damages.

10 Evidence – pretrial

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

Generally in Australia, witnesses provide written statements of their evidence, in the form of affidavits, statutory declarations or witness statements before the hearing. These documents are usually signed under oath or affirmed.

For expert evidence, if a party intends to call expert evidence, the rules of most courts require notice of that intention and an expert witness report to be served in advance of the hearing. There are two possible expert reports that can be admitted in proceedings, a joint report (arising out of a conference of experts) and an individual expert's report. Unless otherwise ordered, an expert's evidence in-chief must be given through one or more expert's reports.

11 Evidence – trial

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

As a general rule, witnesses of fact give oral evidence, although some courts can order service of a witness statement in advance. Written statements exchanged before trial may form the basis for evidence-in-chief of a witness at trial. Such documents are 'read' onto the record in court, and serve as evidence-in-chief for that witness. Witnesses are then usually cross-examined and re-examined in court by counsel.

With the leave of the court, a hostile or unfavourable witness may be questioned by the party that called the witness as though it were cross-examining the witness with the leave of the court. In re-examination, the witness may only be questioned about matters arising out of the cross-examination, and leading the witness is not permissible.

12 Interim remedies

What interim remedies are available?

Courts have a wide discretion to determine whether to grant interim relief to a party in order to prevent the court process from being frustrated. In general terms these involve:

- *Mareva* injunctions to prevent a defendant from disposing of assets to deprive a claimant of the benefit of a judgment; and
- possession orders to allow a claimant to take possession of property that a defendant has retained in breach of a proven prima facie right to possession.

Superior courts have the power to grant relief such as a *Mareva* injunction to support foreign proceedings. There are two kinds of transnational freezing orders:

- orders that apply to foreign assets in aid of Australian judicial proceedings (worldwide orders). These are freezing and ancillary orders made against a person over whom the court has jurisdiction even if they reside overseas and in relation to overseas assets. To prevent harassment of a respondent in multiple actions around the world, the Australian example form of freezing order contains undertakings that must be given by the claimant to the court. These reflect 'Dadourian guidelines', which have been laid down by the English Court of Appeal; and
- orders that apply to Australian assets in aid of foreign judicial proceedings.

The primary elements for obtaining such an order from an Australian court are:

- a foreign judgment or 'good arguable case' in a foreign court;
- a sufficient prospect of registration or enforcement of the foreign judgment or prospective judgment in the Australian court;
- a danger that the foreign judgment will go unsatisfied; and
- satisfaction of discretionary matters (such as the effects on the respondent and third parties and the diligence and expedience of the applicant in bringing the application).

13 Remedies

What substantive remedies are available?

A judgment is a formal order by a court which concludes the proceedings before it.

The judgment can relate to the substantive question in the proceedings, or to a question in an interlocutory application such as an application for an injunction or a notice of motion seeking orders for discovery. Courts are also empowered to make consent, summary and default judgments.

Generally, damages are awarded by to compensate the plaintiff for loss suffered as a result of the defendant's wrongdoing. In some circumstances, the court can make orders for other types of damages including exemplary damages, restitutionary damages, nominal damages and liquidated damages.

While costs orders are generally discretionary, courts will usually make orders in accordance with the principle that 'costs follow the event', whereby the unsuccessful party in the litigation pays some portion of the successful party's costs.

Courts are empowered to order interest on awards of damages and costs.

14 Enforcement

What means of enforcement are available?

Domestic judgments can be enforced by writ of execution, garnishee order or charging order.

The registration and enforcement of foreign judgments in Australia is governed by both statute and common law principles. Within the statutory regime, the Foreign Judgments Act 1991 (Cth) governs the procedure and scope of judgments that are enforceable.

Registering a judgment under the Act is a straightforward and cost-effective procedure.

Where Australia does not have an international agreement or the circumstances are not caught by the statute, the foreign judgment can be enforced at common law.

15 Public access

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

The default position is that court proceedings are conducted in an open court. In commercial disputes, a court can order a confidential hearing or make confidentiality orders to protect intellectual property, trade secrets or commercially sensitive information. Certain court documents such as court orders in the Federal Court of Australia are now available to the public via online portals. In most cases, however, the public must apply for access to documents on the court file. Subject to special circumstances and confidentiality orders, access will normally be granted in respect of materials that been tendered into evidence or otherwise disclosed in open court.

16 Costs

Does the court have power to order costs?

Courts have broad discretion over the costs of all proceedings. In effect, a court can make whatever order as to costs is justified in the circumstances, but there are generally court rules that govern the exercise of that power.

Ordinarily, costs follow the event, which means a successful litigant receives costs in the absence of special circumstances justifying some other order. A party is usually entitled to costs of any issue on which it succeeds assessed on an ordinary basis.

There are two main classes of costs:

- Those that arise by virtue of the retainer with the client and are governed by contract (solicitor/client costs).
- Those that arise by order of the court, which can either be on an ordinary basis (party/party costs) or an indemnity basis (solicitor/client costs). Indemnity costs are usually awarded against a party in circumstances where that party has engaged in unreasonable behaviour in connection with the conduct of the proceedings. An offer of settlement can entitle the party making the offer to obtain costs on an indemnity basis. The offer will not be the only issue that determines the court's decision on this issue, but it is certainly a key factor.

17 Funding arrangements

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 are often offered by plaintiff law firms in certain cases. Many class action plaintiff firms offer a 'no win, no fee' retainer for group members who otherwise could not afford to fund the litigation. In the case of a win, the retainer agreement often contains a provision for payment of an 'uplift' fee, in addition to professional costs. This arrangement is permissible subject to the court supervision inherent in Australian class actions.

Third-party funding of claims is permitted in Australia and is becoming increasingly prevalent in class actions. The involvement of third-party funders with no pre-existing interest in the proceedings, but who stand to benefit substantially from any recovery from the proceedings, is a material consideration in the courts deciding whether to grant security for costs. The courts proceed on the basis that funders who seek to benefit from litigation should bear the risks and burdens that the process entails. Courts have recently recognised the option to make a 'common fund' order in class actions where third-party litigation funders are recompensed from the common fund of proceeds obtained by the class as a whole in any settlement or judgment (and not just from class members who have signed a funding agreement).

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

Most corporate entities are insured for public liability, professional indemnity and directors' and officers' liability.

Litigation insurance is not common in Australia but it is possible for parties to obtain coverage, for example, by way of 'adverse costs insurance'.

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

The Australian representative proceeding (class action) regime is a key feature in the litigation landscape. Outside of North America, Australia is the place where a corporation is most likely to find itself defending a class action.

The Australian representative proceeding regime comprises essentially identical rules in the federal court system and the courts of New South Wales, Victoria and Queensland. It has the following important features:

- There is no certification requirement, meaning that there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a class action. Once a class action is commenced it continues until finally resolved by judgment or settlement, unless the defendant can convince the court to terminate the proceedings on certain limited grounds.
- There is no requirement that common issues predominate over individual issues.
- The rules expressly allow for the determination of 'sub-groups' or even individual issues as part of a class action.
- A representative plaintiff can define the class members by description. This means that a person who meets the criteria set out in the class definition will be a class member unless they opt out of the proceedings. If a class member fails to opt out by the specified date, they are included in the proceedings. Therefore, a person can be a class member and bound by the outcome of the proceedings without their knowledge or consent, simply on the basis that they fall within the definition.

To commence representative proceedings, claims must satisfy three threshold requirements:

- at least seven persons must have claims against the same person or persons;
- the claims of all these persons must rise out of the same, similar or related circumstances; and
- the claims of all of these persons must give rise to at least one substantial common issue of law or fact.

While public funding via legal aid services is technically available, vigorous means and merit tests are applied to determine eligibility for aid.

As a general rule, public funds will not be available in commercial disputes.

However, third-party funding of claims is permitted in Australia and is becoming increasingly prevalent in class actions.

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

Grounds for appeal must identify a significant and relevant error of fact or law in the first instance judgment.

Judgments of a civil court in Australia can be appealed to a superior court.

Leave will be required in order to appeal.

The relevant court legislation or procedural provisions set out the relevant rules of appeal.

The appellate division of most states is the Court of Appeal or Full Court, which hears appeals from single judges of the Supreme Court and from certain other state courts and tribunals.

The High Court of Australia is the ultimate court of appeal.

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

The registration and enforcement of foreign judgments in Australia is governed by both statute and common law principles. Within the statutory regime, the Foreign Judgments Act 1991 (Cth) governs the procedure and scope of judgments that are enforceable. Registering a judgment under the Act is a straightforward and cost-effective procedure. Where Australia does not have an international agreement or the circumstances are not caught by the statute, the foreign judgment can be enforced at common law.

22 Foreign proceedings**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 Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, which governs the international service of process on a defendant who resides in Australia. The primary method for taking evidence in Australia for a foreign proceeding is through the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

Australian authorities will not accept any letters of request that require a person to state which documents relevant to the proceedings are or have been in their possession, or produce any documents, other than particular documents specified in the letter of request that the requested court believes to be in their possession. Given the strict statutory regime regarding pretrial discovery in Australia, any veiled request for pretrial discovery that circumvents that process is likely to be rejected.

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

Arbitration law in Australia differs based upon whether it is classified as domestic arbitration (both parties to the arbitration agreement have their places of business in Australia), or international arbitration (being anything else). Domestic arbitration in Australia is regulated under the uniform Commercial Arbitration Acts (the Arbitration Acts), which are largely based on the UNCITRAL Model Law. Section 2a of the Acts requires courts to have regard to the Model Law in the process of interpretation. There are, however, some important differences between the two. For example, section 34A, which allows for appeals against awards, has no parallel in the Model Law.

International arbitration in Australia is regulated under the International Arbitration Act 1974 (Cth). Under section 16 of that Act, the Model Law has the force of law in Australia.

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

Under the Arbitration Acts, an arbitration agreement must exist in writing. However, a broad understanding of 'writing' is taken to include: electronic communications; any record of the agreement irrespective of whether it was concluded orally; or the 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.

25 Choice of 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 parties fail to make an agreement, the number of arbitrators will be one (noting also the difference with the Model Law, which provides for three). In such a situation, the court makes the appointment at the request of a party, having due regard to the qualifications required of

the arbitrator and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to impartiality or independence, or if the arbitrator does not possess the qualifications agreed to by the parties. A justifiable doubt is one where there exists a real danger of bias.

Further, a party is restricted to challenging an arbitrator that they appointed only for reasons which it becomes aware of after the appointment was made, and must do so within 15 days. As is typical, the tribunal itself decides the challenge, however, if rejected, a party may request the court to also make a determination.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The parties are, as always, free to select whichever arbitrators they feel are best placed to resolve their dispute. The reality, however, is that the arbitrators of choice for major commercial arbitrations are often retired judges of superior courts.

Courts in Australia tend to adopt a pro-arbitration stance, and hence judges are often attuned to the differences between arbitration and litigation.

27 Arbitral procedure

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

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Of course, this is subject to the overriding duty imposed to treat the parties equally, and provide them with a reasonable opportunity to present their case.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court has a limited power of intervention. This may include a role in respect of appeals and deciding challenges to arbitrator appointments as well as the court having power to play an assistive role, such as in taking evidence or in enforcing interim measures granted by a tribunal. These powers cannot be overruled by the parties' agreement.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Yes, unless otherwise agreed between the parties. This power to grant interim measures allows the tribunal to make orders requiring a party to take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or to preserve evidence that may be relevant and material to the resolution of the dispute. With limitation, this may include the ability to order relief such as security of costs, discovery of documents, and inspection of property. As a precondition to granting this relief, however, the tribunal must be satisfied that:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered;
- that harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted, and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

An interim measure granted by a tribunal can be enforced, upon the application of a party, by the court.

30 Award

When and in what form must the award be delivered?

Domestic arbitration law imposes no time limits on the delivery of an award.

The parties can, however, agree to this, and many arbitral institutions also contain such limits.

31 Appeal

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

An appeal from an award can be made on a question of law only if the parties agree that an appeal can be brought, and the court grants leave. The court, however, must not grant leave unless the following four conditions are satisfied:

- the determination of the question will substantially affect the rights of a party;
- the question is one which the tribunal was asked to determine;
- the decision of the tribunal is either obviously wrong, or is of general public importance and the decision is at least open to serious doubt; and
- that despite the arbitration agreement of the parties, it is just and proper for the court to determine the question.

An appeal must be brought within three months.

After an appeal is heard by the court, a party can bring a further appeal as against that court's judgment. Importantly, however, this is no longer an appeal against the award itself, but rather an appeal against the lower court's judgment.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

With regards to domestic awards, an arbitral award is to be recognised as binding and, upon application to the court, can be enforced. The only exception to this is if the opposing party can convince the court that it should not recognise or enforce the award on the grounds found in section 36 (which mirror the grounds found in the Model Law and the New York Convention).

With regards to foreign awards, section 8 of the International Arbitration Act has the same effect as that described above for domestic awards. The courts do not have discretion to determine whether to recognise and enforce the award, but must do so unless one of the limited grounds provided are satisfied. This reflects the pro-arbitration stance of Australian arbitration law.

33 Costs

Can a successful party recover its costs?

The costs of an arbitration are at the discretion of the tribunal, which may make whatever orders it sees fit in this regard. In practice, many arbitral rules provide guidance on the considerations that the tribunal should have in mind when making such orders.

Alternative dispute resolution

34 Types of ADR

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

Alternative dispute resolution mechanisms, including arbitration and mediation, are increasingly popular in commercial matters in Australia. Indeed, some of the Australian courts are now directing parties to use specific alternative dispute resolution mechanisms to attempt to resolve or narrow issues in dispute. In addition, there are a number of tribunals in each jurisdiction that have been established to deal with disputes in a specific area and provide affordable alternative dispute resolution mechanisms.

35 Requirements for ADR

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 has been an increasing focus by the judiciary on the costs of litigation, which in turn has promoted a greater use of alternative dispute resolution in Australia. In the Federal Court of Australia, the parties to a dispute are required to file a 'genuine steps statement', which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

In the commercial list of the Supreme Court of New South Wales, it is common for the court to order that the parties mediate before the matter is set down for hearing.

Many contractual agreements now contain alternative dispute resolution clauses that require the parties to attempt to resolve the dispute in a specific way, prior to the commencement of proceedings.

In Australia, the court may order that the proceedings be stayed until such time as the process referred to in the dispute resolution clause is completed.

Miscellaneous

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

No.



CLAYTON UTZ

Colin Loveday
Alexandra Rose

cloveday@claytonutz.com
arose@claytonutz.com

Level 15
1 Bligh Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
www.claytonutz.com

Austria

Philipp Strasser and Dieter Heine

Vavrovsky Heine Marth Rechtsanwälte GmbH

Litigation

1 Court system

What is the structure of the civil court system?

The civil court system in Austria provides for proceedings in three instances. In general, first instance proceedings are conducted before district courts. District courts have jurisdiction for general civil law matters where the amount in dispute is below €15,000. Moreover, district courts handle disputes concerning family law, alimony, trespass, rental and lease matters, even if the amount in dispute exceeds €15,000.

Regional courts have jurisdiction in the first instance for all general civil law matters that do not fall within the responsibility of the district courts, in particular those with an amount in dispute exceeding €15,000. Moreover, regional courts, inter alia, have jurisdiction for matters such as labour law and public liability disputes, as well as certain commercial disputes.

Appeals from district courts are heard before regional courts. If a regional court was acting as first instance, appeals against its decision are heard by one of the higher regional courts. In cases that require a decision on legal issues of fundamental importance, a further appeal may be made to the Supreme Court as third and final instance.

The courts have specialised departments for commercial and labour law matters, both at the district and regional level. In Vienna, there are stand-alone specialised commercial courts at the district and regional level as well as a specialised labour and social law court. Currently, the Austrian judiciary comprises 116 district courts, 20 regional courts, four higher regional courts and the Supreme Court.

Proceedings are either decided by a single judge or a tribunal. All proceedings in district courts and most proceedings before regional courts are held before a single judge. In first instance, proceedings will only be decided by a senate of three judges upon the request of a party and in case the amount in dispute exceeds €100,000. Tribunals in commercial matters comprise two professional judges and one lay judge and tribunals in labour law matters comprise one professional and two lay judges.

2 Judges and juries

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

As in most civil law jurisdictions, Austrian judges take on an inquisitorial role in civil proceedings, thus summoning and examining witnesses, requesting documents and appointing experts. Hence, it is for the judge to ensure that the relevant facts are examined and established. Only after the judge has taken all testimony considered relevant for rendering a decision are the parties given the opportunity to put further questions to the witnesses.

There are no juries in civil proceedings. In labour law proceedings, the tribunal is composed of two lay judges and one professional judge; one lay judge being an employee's representative and one an employer's representative. Similarly, in commercial disputes, the tribunal is composed of one lay judge from a business profession and two professional judges.

Professional judges are Austrian civil servants, whose independence is guaranteed by the Constitution. In order to become a professional judge, law graduates have to gain practical experience as judge

candidates for approximately five years. Moves to promote diversity on the bench have been fairly successful and as of 2017, more than 50 per cent of professional judges are women (in comparison with 43 per cent in 2006). However, the percentage of women in leading positions in the Austrian judiciary is still a mere 35 per cent.

3 Limitation issues

What are the time limits for bringing civil claims?

Austrian law provides for a limitation period of 30 years except where special provisions provide otherwise. A shorter limitation period of three years applies to most civil law claims, such as claims for damages, claims for specific performance and claims for the delivery of goods.

In general, the limitation period will commence when the right could first have been exercised. For instance, claims for damages will become time-barred three years after the injured party becomes aware of the injuring party and the damage. Statutes of limitations cannot be waived in advance. But, statutes of limitations are not observed ex officio and thus need to be argued in court.

4 Pre-action behaviour

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

Austrian law does not stipulate any obligatory pre-action procedures. It is customary to request a debtor to fulfil its obligations before commencing legal proceedings, for example by having one's attorney send a letter to the debtor. However, such request is not a prerequisite for commencing proceedings.

If a party fears the frustration of its rights before proceedings will be concluded, it may request a court to issue a preliminary injunction for securing monetary or other claims as well as to secure a right or legal relationship.

There is no pre-action disclosure under Austrian law. In any event, a party intending to bring a claim should ascertain it has the evidence necessary to prove its claims, since requests for evidence production during the proceedings are rather limited (especially in comparison to document production possibilities in common law jurisdictions).

5 Starting proceedings

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 submission of a statement of claim to a court. The statement of claim needs to contain the following:

- the name and address of the court to which it is submitted;
- the names and addresses of the parties and their representatives;
- the matter and amount in dispute;
- the relief sought and the facts on which the relief sought is based; and
- the number of exhibits submitted with the statement of claim.

A statement of claim must be signed. It does not need to contain any legal reasoning. Similarly, there is no requirement to present evidence

at this stage. However, both might be helpful if the claim is of a complex nature. In any event, it should be argued why the respective court has jurisdiction to hear the case.

When filing a statement of claim a court fee has to be paid. The amount of the fee depends on the amount in dispute. If the formal and procedural requirements are fulfilled and the court fee has been paid, the court will transmit the statement of claim to the respondent. Otherwise, the court will reject the claim or order the party to correct its submission.

Austrian courts have sufficient capacity to deal with the caseload and decisions are usually made within a reasonable time.

6 Timetable

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

In proceedings before district courts, after forwarding the statement of claim to the respondent, the court will fix a date for a preparatory hearing. Although not required to submit a statement of defence, the respondent may submit such statement.

In proceedings before regional courts, the respondent will be ordered to file a statement of defence within four weeks. After receiving the written submission, the court will schedule a preparatory hearing. If a party fails to file a statement of defence where required to do so or fails to attend a scheduled hearing, the other party may request the court to issue a default judgment.

The court may render a judgment (and thereby close the proceedings) after the preparatory hearing. However, usually several evidentiary hearings are scheduled to take the evidence necessary for rendering a judgment. The taking of evidence may, inter alia, include witness and expert examination, object inspections and presentation of documents. The parties can introduce new facts and evidence until the oral proceedings in the first instance are formally closed.

After concluding the evidentiary hearing, the court evaluates the submitted evidence and closes the oral hearing, thereby also ending the parties' right to file new written submissions. Subsequently, the court will render its judgment.

7 Case management

Can the parties control the procedure and the timetable?

It is for the court to set out the procedure and the timetable of the proceedings. However, a party can apply for the extension of time limits or the postponement of fixed dates such as oral hearings. If the parties agree, proceedings can also be suspended for a minimum of three months.

8 Evidence – documents

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

In general, there is no duty to preserve documents and other evidence, although certain laws and regulations stipulate the preservation of documents. For example, entrepreneurs are obliged to preserve records for a minimum of seven years, including correspondence and accounting records. If a lawsuit is already pending, it is within the court's competence to preserve evidence. Thus, as a matter of precaution, a court may order that evidence shall be taken in case it would otherwise be lost.

There is also no general duty to share documents that are unhelpful to a party's own case. However, any documents shared with the court must also be presented to all other parties of the proceedings.

9 Evidence – privilege

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

It has to be borne in mind that there is no discovery under Austrian law. However, a party may request the court to order its opponent to present a specific document to the court. The opposing party may refuse the production of the document on a number of grounds, such as protecting business secrets or risking exposure to criminal prosecution.

Austrian attorneys are under an obligation of professional secrecy. Nevertheless, contrary to the common-law concept of privilege, correspondence between a lawyer and a client is not protected by attorney-client privilege. Similarly, internal communication with in-house-lawyers is not protected. This might be of particular relevance with regard to raids at the client's premises. However, in accordance with ECJ case law, privilege protecting the communication between attorney and client exists in the context of European competition law.

10 Evidence – pretrial

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

It is not permitted to submit written witness statements in court. Rather, witnesses shall provide oral testimony before the court. Although expert witnesses should generally also provide oral testimony, it is permitted and customary to submit written expert reports.

11 Evidence – trial

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

Documentary evidence is usually introduced to the proceedings as a copy, which is submitted both to the court and the opposing party. As mentioned in question 11, both witnesses and experts shall appear before the court and provide oral testimony. First, the judge will examine the witnesses and experts. Subsequently, the parties may put further questions to the witnesses. The court may also conduct inspections and hear oral testimony from the parties.

12 Interim remedies

What interim remedies are available?

Interim remedies may be granted by the courts to protect the enforceability of a claim or to protect a party from irreparable harm. The Austrian Enforcement Act distinguishes three types of interim measures: interim measures to secure a monetary claim, interim measures to secure a claim for specific performance and interim measures to secure a right or a legal relationship. To secure a monetary claim, the following means are available:

- order for the deposit of money or custody or administration of moveable assets;
- prohibition on selling or pledging moveable property;
- prohibition directed towards a third party;
- order putting immovable property under administration; and
- prohibition on transferring or charging immovable property.

With regard to interim measures securing claims for specific performance or rights, other means such as establishing a right of retention or ordering the debtor to refrain from any action adversely affecting the claim, right or object are available.

To grant interim remedies in support of foreign proceedings, the foreign judgment to be rendered needs to be enforceable under Austrian law. Similarly, interim remedies ordered by a foreign court or arbitral tribunal may be enforced if they comply with Austrian law.

13 Remedies

What substantive remedies are available?

Substantive remedies may take the form of judgments ordering performance, declaratory judgments and constitutive judgments. Judgments ordering (specific) performance are most common and include cease-and-desist orders. Declaratory judgments are considered subsidiary to judgments ordering performance since an application for a declaratory judgment is inadmissible if a claim for performance can also be filed. Constitutive judgments alter a legal relationship. Punitive damages are not available under Austrian law.

Interest in the amount of 4 per cent is payable on money judgments. In the event both parties are entrepreneurs, a substantially higher interest rate will apply. The rate depends on the base interest rate published by the Austrian National Bank and is set at 9.08 per cent at the time of writing.

14 Enforcement**What means of enforcement are available?**

The means of enforcement will depend on the title to be enforced and the type of assets the enforcement is directed at. Enforcements will be undertaken by a bailiff. Typical means for the enforcement of judgments are the seizure of moveable and immovable property, the attachment and transfer of receivables, as well as judicial auction. Executory titles directed at specific performance may be enforced by eviction, substitute performance or the issuance of penalties.

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

In principle, court hearings are held in public. However, in certain cases the public may be excluded from the hearing (eg, to safeguard public morals or official secrecy). Court documents are not available to the public.

16 Costs**Does the court have power to order costs?**

The court renders its decision on costs together with the decision on the merits. In general, Austrian law provides that the winning party has to reimburse the losing party for all costs. If neither party fully succeeds, only partial reimbursement will be ordered. Costs to be reimbursed include legal and court fees as well as certain expenses. Legal fees are calculated in accordance with the official lawyer's tariff, which might be lower than the fees individually agreed upon between attorney and client.

17 Funding arrangements**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 fee arrangements (*pacte de quota litis*) are prohibited under Austrian law. However, other arrangements such as lump-sum bonus agreements may be agreed upon between lawyers and their clients.

Third-party funding is common and has been explicitly approved by the Austrian Supreme Court in 2013. There are, however, no specific provisions under Austrian law dealing with third-party funding. Thus, no restrictions exist as to the arrangement between funder and litigant. Similarly, there are no disclosure obligations for litigants or funders.

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

Legal costs insurance is available and relatively common. Depending on the individual insurance policy, insurance may cover all of a party's costs and its potential liability for the opponent's costs. After-the-event litigation insurance is not a common occurrence in Austria.

Parties may also seek legal aid in the event they lack sufficient funds for bringing or defending a claim. However, especially with regard to funding a claim, Austrian courts tend to be restrictive and will only confirm legal aid if the claim has a sufficient chance of success.

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

Strictly speaking, Austrian law does not provide for class actions. There is, however, a form of group litigation referred to as the 'Austrian model of class action', which allows multiple claimants to assign their claims to an association. Typically, these will either be the Consumer Information Association or the Chamber of Employees. This type of class action has been successful in the past, in particular with regard to

cases against banks for charging excessive interest rates on loans and unsuitable investment advice.

Against the background of consumer-related scandals such as the VW emission fraud, the Austrian Ministry of Justice has recently set up a working group on class actions considering reforms to the current system of collective redress.

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

Reasons for appealing against a judgment of a court of first instance include nullity (serious procedural errors), procedural irregularities, the wrong establishment of facts or an incorrect legal assessment.

A party may file an appeal within four weeks after the original judgment has been served. The opposing party may file a reply to the appeal. Although the court of appeal may order an oral hearing, in practice oral hearings on appeals rarely occur. In deciding on the appeal, the court of appeal may either:

- dismiss the appeal;
- accept the appeal and amend the original decision;
- set aside the judgment and retry the case itself; or
- set aside the judgment and refer the case back to the court of first instance for a retrial.

A decision of the court of appeal may be appealed against before the Austrian Supreme Court. However, such appeal may only be filed in very limited circumstances. First, the Supreme Court only admits appeals as to the legal reasoning of a judgment. Moreover, an appeal to the Supreme Court either needs to concern a substantial question of law the Supreme Court has not yet decided upon or there must be a departure from the Supreme Court's existing case law by the court of appeal. Decisions of the Supreme Court are final and binding.

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

Foreign judgments may be enforced in accordance with bilateral and multilateral treaties. To be considered enforceable, foreign judgments first require a formal declaration of enforceability (*exequatur*). A declaration will be granted if the foreign judicial act is enforceable according to the laws of the foreign state, and reciprocity is guaranteed. If no reciprocal agreement exists, Austrian courts will not grant enforcement.

A judgment rendered in another member state of the EU will be enforced in Austria under the Brussels regime (EU Regulation No. 1215/2012) and does not require separate recognition. Judgments rendered in Switzerland, Norway and Iceland will be recognised without requiring any special procedure in accordance with the revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007.

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

In the European Union, procedures for obtaining evidence from foreign countries have been considerably facilitated by the introduction of the Evidence Regulation (EC Regulation No. 1206/2001). According to the Regulation, judicial assistance requests are transmitted directly between the courts. The regulation applies to both oral as well as documentary evidence. Outside of a European context, the Hague Convention on Civil Procedure of 1954 and other bilateral treaties might apply.

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

The Austrian arbitration law is set out in sections 577 to 618 of the Code of Civil Procedure. In 2006, the law underwent a major reform, which predominantly based the Austrian arbitration regime on the Model Law.

Although closely following the structure of the Model Law, a few important distinctions can be found. First and foremost, Austrian arbitration law does not distinguish between national and international arbitrations or between commercial and non-commercial arbitrations, but provides a uniform arbitration law for any type of arbitral proceeding. It also includes additional provisions regarding consumer and labour law-related matters as well as a separate provision on arbitrability. Similarly, there is a distinct provision on the allocation of costs which cannot be found in the original text of the Model Law. What is more, according to Austrian arbitration law procedural errors only lead to the setting-aside of the arbitral award if Austrian procedural public policy has been violated.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The formal requirements for validly concluding an arbitration agreement resemble those stipulated in the Model Law. In accordance with section 583 of the Code of Civil Procedure, an arbitration agreement must be in writing (ie, in a written document signed by both parties or in letters, faxes, emails or other forms of communication that prove the existence of the agreement).

Aside from the writing requirement, in order to be enforceable, an arbitration agreement must also fulfil certain substantive requirements, such as identifying the parties and clearly expressing their intention to specifically submit a dispute to arbitration.

25 Choice of 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 parties have not agreed on a specific number of arbitrators, Austrian arbitration law provides for a tribunal of three arbitrators as a default rule. In this case, each party shall appoint one arbitrator and the two party-appointed arbitrators shall jointly appoint the third arbitrator, who will act as chair of the arbitral tribunal. If a party fails to appoint an arbitrator or the parties fail to reach an agreement on a sole arbitrator, the appointment will be made by the courts.

In general, arbitrators can be challenged if there are justifiable doubts as to their impartiality or independence, or if they do not fulfil the requirements set out by the parties' agreement. Party-appointed arbitrators can only be challenged by their appointing party for reasons that become known to the appointing party after the appointment has been made.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Austrian arbitration law does not impose any default requirements as to the characteristics of an arbitrator. However, the parties are free to agree upon requirements the arbitrators have to fulfil (eg, certain professional qualifications or background).

27 Arbitral procedure

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

The parties can agree on the arbitral procedure and the arbitral tribunal must follow the rules agreed upon by the parties. Failing such agreement, the arbitral tribunal can proceed in any manner it considers appropriate. Being the seat of the Vienna International Arbitral Centre (VIAC), many cross-border arbitrations seated in Austria provide for institutional arbitration under the VIAC Rules.

However, there are a number of mandatory rules that always have to be complied with, such as the parties' right to be heard, the independence and impartiality of the arbitral tribunal or the requirement that the arbitral award has to be in writing.

Update and trends

Since 2014, proceedings to set aside arbitral awards fall within the exclusive jurisdiction of the Austrian Supreme Court as the first and final instance, thus providing a one-stop-shop principle for arbitral proceedings. In addition, the Supreme Court also exclusively decides on the existence or non-existence of an arbitral award and has jurisdiction over judicial measures accompanying arbitral proceedings, such as the appointment of substitute arbitrators. As can already be witnessed, these amendments further strengthened Austria's position as the arbitration hub in central and eastern Europe.

In the wake of the upcoming enactment of the recast of the European Regulation on insolvency proceedings (EU Regulation 2015/848) in July 2017, a number of accompanying laws are currently under consideration. These will, inter alia, include an expansion of the competencies of judicial officers with regard to insolvency proceedings.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Under Austrian arbitration law, the courts only have very limited powers to intervene during an arbitration and may only do so on a party's or the tribunal's request. In particular, a party may request a court:

- to appoint an arbitrator if the parties cannot agree or a party fails to do so;
- to grant an interim or protective measure;
- to decide the challenge of an arbitrator; or
- to intervene if an arbitrator's mandate has been terminated and the arbitrator does not resign or the other party does not agree to the termination.

Also, the arbitral tribunal itself can request judicial assistance from a court:

- to enforce an interim or protective measure; or
- to gather evidence for which the arbitral tribunal has no authority (eg, to apply coercive measures).

Of the above grounds, the following are mandatory: the competence of courts to issue interim measures upon a party's request, a party's right to challenge an arbitrator before a court, and judicial assistance by courts. All other powers can be overridden by agreement.

29 Interim relief

Do arbitrators have powers to grant interim relief?

As a general rule, arbitrators may order any interim relief they deem appropriate. Interim relief can be requested from both the courts and the arbitral tribunal. As a prerequisite, the relief needs to be granted in respect of the subject matter of the dispute and, without granting the relief, the enforcement of the claim would be frustrated or considerably impeded, or a risk of irreparable harm would arise.

30 Award

When and in what form must the award be delivered?

The award must be delivered in writing, signed by the arbitrators and state the date on which it was rendered. The award must state the reasons on which it is based, unless the parties have agreed otherwise. Austrian law does not provide for a time limit for delivering an award. However, the parties may agree on a time limit either by explicitly providing for a time limit in the arbitration agreement or by referring to institutional rules.

31 Appeal

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

The grounds for challenging an award are set out in section 611(2) of the Code of Civil Procedure. The grounds closely follow those provided by article V of the New York Convention and article 34 of the Model Law. The list is exhaustive and there is no right to a further appeal. Since

2013, the Austrian Supreme Court acts as the only instance in proceedings for challenging an award. The grounds are as follows:

- the invalidity of an arbitration agreement or a lack thereof;
- a party's incapacity to conclude an arbitration agreement;
- a violation of the right to be heard;
- the subject matter is beyond the scope of the arbitration agreement;
- a failure in the constitution or composition of the tribunal;
- the proceedings violate Austrian public policy;
- the requirements for an action for revision have been fulfilled (see Code of Civil Procedure, section 530);
- the matter in dispute is not arbitrable; and
- the award violates Austrian public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Domestic awards are enforced in the same way as other domestic titles in accordance with the Austrian Enforcement Act. Enforcement requests fall within the jurisdiction of the district court where the obliged is domiciled or the district court where the enforcement will be undertaken.

Foreign arbitral awards are enforced by Austrian courts pursuant to the New York Convention and other multilateral treaties. Foreign awards must first be declared enforceable (recognised) by the courts. A request for recognising the award can be combined with a request for enforcement and the courts will decide simultaneously on both requests. After being declared enforceable the foreign award is treated as if it were a domestic award.

33 Costs

Can a successful party recover its costs?

Pursuant to section 609 of the Code of Civil Procedure, the arbitral tribunal shall decide upon the obligation to reimburse the costs of the proceedings, provided the parties have not agreed otherwise. The arbitral tribunal shall take into account the circumstances of the case, in particular the outcome of the proceedings. The decision has to be made in the form of an arbitral award.

Austrian arbitration law does not define the types of costs a party can recover, but merely notes that the obligation to reimburse may include any and all reasonable costs appropriate for bringing the action or defence.

Alternative dispute resolution

34 Types of ADR

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

Although there is a refined legal framework for ADR procedures under Austrian law, resolving disputes by means of ADR has not yet gained significant approval by the Austrian business community. Hence, mediation, although popular, is mainly used in family and labour law disputes.

The Austrian Mediation Act has established a mediation council with the Austrian Ministry of Justice, which specifies vocational programmes for mediators and sets out the requirements for becoming a certified mediator.

In 2016, VIAC presented the new Vienna Mediation Rules, which provide a procedural framework for ADR by defining procedural standards not only for mediation proceedings but ADR proceedings in general. The rules also cater to parties wishing to combine ADR proceedings (eg, 'med-arb') or an early neutral evaluation before the commencement of arbitral proceedings.

Furthermore, the Austrian courts have launched pilot projects in which judges are supposed to propose the initiation of mediation proceedings prior to commencing litigation, if deemed appropriate.

35 Requirements for ADR

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 general requirement under Austrian law to consider ADR before commencing arbitration or litigation. Only with regard to certain tenancy disputes shall specific conciliation panels have exclusive jurisdiction.

Miscellaneous

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

In general, Austria is gaining importance as a hub for international arbitration. This is owed to its modern arbitration law, its geographic location and the work of VIAC. Similarly, Austrian state courts provide reliable and comparatively fast proceedings. The quality of decisions is usually high and specialised commercial panels and courts ensure that adjudicators understand complex commercial issues.



Vavrovsky Heine Marth

Philipp Strasser
Dieter Heine

philipp.strasser@vhm-law.at
dieter.heine@vhm-law.at

Fleischmarkt 1
1010 Vienna
Austria
Tel: +43 1 512 03 53
Fax: +43 1 512 03 53 40

Mozartplatz 4
5020 Salzburg
Austria
Tel: +43 662 84 95 16
Fax: +43 662 84 95 16 25

www.vhm-law.at

Belgium

Hakim Boularbah, Olivier van der Haegen and Charlotte Van Themsche

Liedekerke Wolters Waelbroeck Kirkpatrick

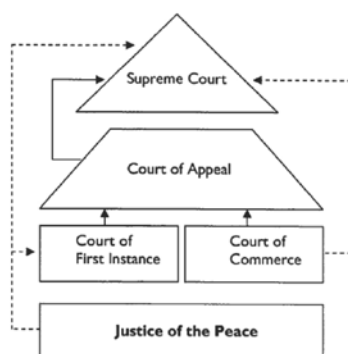
Litigation

1 Court system

What is the structure of the civil court system?

The Belgian civil court system is modelled after the French (Napoleonic) three-tier system, in which a judgment handed down by the lower court may be appealed to a higher court with respect both to questions of law and to questions of fact, and the higher court's decision is subject to limited review by the Supreme Court.

This diagram does not include the criminal, labour and administrative courts or the constitutional court.



Justices of the peace

There are 187 justices of the peace in Belgium.

As a rule, the justice of the peace has subject matter jurisdiction on all disputes where the amount of the claim is not in excess of €2,500, with the exception of a few disputes that are expressly reserved by law to other courts.

In addition, the justice of the peace has special subject matter jurisdiction, regardless of the amount of the claim, on disputes regarding certain matters, such as disputes with regard to leases, certain family disputes and certain consumer credits.

Courts of first instance

There are 13 courts of first instance in Belgium.

A court of first instance has general jurisdiction on all disputes where the value of the claim is in excess of €2,500. There are a few exceptions to the general subject matter jurisdiction of a court of first instance; some matters are expressly reserved by law to other courts.

In addition, a court of first instance has exclusive jurisdiction on a number of matters, including but not limited to:

- claims for an authorisation to enforce (domestic and foreign) arbitral awards, as well as foreign judgments (except in insolvency matters);
- claims regarding personal status (nationality, paternity and maternity suits, etc);
- claims regarding expropriations for public purposes; and
- claims regarding the application of tax laws.

Claims regarding attachments, garnishment orders, etc, are handled by a specific chamber within a court of first instance: the 'court of attachments'.

Finally, a court of first instance has appellate jurisdiction with respect to judgments handed down by the justices of the peace established in the court's district, provided the value of the claim is in excess of €1,860.

Since 1 January 2016 (entry into force of the main provisions of the law of 19 October 2015 reforming certain features of the Belgian civil procedure), cases before a court of first instance are handled by chambers composed of one judge. Chambers may exceptionally be composed of three judges if the complexity or interest of the case as well as specific circumstances so require. Some courts of first instance or commerce (for example, in Brussels or Antwerp) usually set up chambers that specialise in specific matters (construction, contracts, property, bankruptcy, etc).

Three-judge chambers remain the norm before the labour courts and courts of commerce in which two lay judges sit with a professional judge.

Courts of commerce

There are nine courts of commerce in Belgium.

Under the Belgian Judicial Code, as recently amended, a court of commerce has jurisdiction on all disputes between enterprises (irrespective of the value of the claim), being any person or legal entity pursuing an economic objective on a lasting basis, provided the dispute concerns an act that was carried out in the pursuit of this objective, but except when the dispute belongs to the exclusive jurisdiction of other courts.

In addition, a court of commerce has special or exclusive jurisdiction on a wide variety of disputes, including but not limited to disputes regarding corporations (including disputes between shareholders), claims involving insolvency proceedings, and claims in relation to inland and sea shipping.

A court of commerce also has exclusive jurisdiction on all disputes between enterprises regarding intellectual property - namely, patents, trademarks and designs, etc. There are a few exceptions to these rules.

Cases before a court of commerce are handled by chambers composed of three judges: one professional judge and two lay judges (usually entrepreneurs or bank employees that spend one or two days each month sitting as judges).

Courts of appeal

There are five courts of appeal in Belgium, one each in Brussels, Antwerp, Ghent, Liège and Mons.

All judgments handed down by a court of first instance or a court of commerce can be appealed before a court of appeal, provided the value of the claim is in excess of €2,500. However, there is no second appeal of a decision handed down by a court of first instance on an appeal from the justice of the peace.

A court of appeal also has jurisdiction to certify certain decisions with respect to the utilities market or decisions of bondholders or shareholders in public limited companies.

Since January 2017, chambers specialising in regulated markets (Markets Court) have been created at the court of appeal of Brussels. The Markets Court consists of judges having at least 15 years of

professional experience evidencing of a specific knowledge of economic and financial law or regulated markets. The jurisdiction of the Markets Court covers the whole country.

Supreme Court

The Supreme Court reviews judgments handed down by the lower courts, provided all appeals have been exhausted. Thus, it reviews judgments against which no appeal can be lodged (namely, when the value of the judgment is less than €1,860 before the justice of the peace, or €2,500 before a court of commerce or a court of first instance) and judgments handed down in appeal from the justice of the peace by a court of first instance, as well as judgments handed down by the courts of appeal.

In civil and commercial matters, appeals to the Supreme Court must be filed by one of the 20 lawyers admitted to practise at the Supreme Court.

The Court does not review the facts of the dispute, but only whether the lower court has properly interpreted the law (including treaties and binding supranational regulations and laws), and whether it has complied with formal and procedural rules. As Belgian law provides that judgments must be reasoned and must respond to the parties' arguments and exhibits, the Supreme Court's review will extend to ensuring that the lower court's findings of facts are consistent and not contradictory. In effect, this review entails a limited review of the facts by the Supreme Court.

The Supreme Court does not actually settle the dispute but merely confirms the judgment under review, or strikes it down and remands the dispute to another court at the same level of jurisdiction as the court whose judgment was cancelled. The Supreme Court's decisions do not have the authority of binding precedents, and the court to which the dispute is remanded does not have to comply with the Supreme Court's decision. However, if in the same case the Supreme Court is asked again to review a decision on the same plea on which it had already rendered a decision to quash, the second decision of the Court shall then be binding on the court to which the case will be remanded again. It happens very rarely, however, that the courts do not comply with the decision of the Supreme Court in the first place.

Constitutional Court

The Constitutional Court has a dual function: it rules on conflicts between the federal laws and the regional laws; and it rules on the compatibility of these laws with the main provisions of the constitution or of international instruments, including particularly the provisions that guarantee civil liberties and rights.

Two types of claims can be submitted to the Constitutional Court.

An annulment claim can be filed against the laws passed by the federal, regional or community legislatures, within six months from the date of publication of the law in the Official Gazette or of a decision of the Constitutional Court on a preliminary question stating a violation of the above-mentioned rules. The annulment claim can be filed by the Council of Ministers and the governments of the regions and communities, by the chairpersons of all legislative assemblies, or by any natural or legal person who can show that it has a justifiable interest in pursuing the annulment of the law, namely that it will be affected personally by the law in question.

Courts may also (*sua sponte* or upon the motion of one of the parties) refer a preliminary question to the Constitutional Court when they are in doubt as to the compatibility of a law with the above-mentioned rules.

Council of State – administrative section

Claims against the government and certain administrative bodies regarding the validity of certain decisions or actions taken by the administration (eg, a decision denying an export licence, or adjudicating a public procurement) are subject to the jurisdiction of the Council of State. The Council of State has the authority to suspend and eventually annul the disputed decisions and actions. These claims are brought forth before the Council of State, in accordance with the procedural rules set out in the Laws on the Council of State of 12 January 1973, recently amended by the Laws of 6 and 19 January 2014. The Council of State may award a compensation to indemnify the harm suffered because of the annulled decision or action. Compensation must also be sought from the civil courts. Once compensation has been claimed

before one instance, it is not possible to bring a claim for compensation before another one.

2 Judges and juries

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

The role of the judge is to adjudicate the dispute by applying the law to the claims, facts and evidence that are submitted by the parties.

A judge may not rule on matters not claimed by the parties (*judgment extra petita*), or award more than what was claimed by the parties (*judgment ultra petita*). He or she must decide on every claim brought forward by the parties.

The procedure is adversarial (except in certain circumstances – see questions 5 and 12). Each party must submit the evidence on which it bases its claim. Judges supervise the admissibility, relevance and weight of the evidence submitted by the parties.

A judge may, upon a party's request or *ex officio*, order an inquiry, a witness deposition or the submission of certain documents. He or she may also appoint experts or issue a request to another (foreign) court in respect of the same measures.

Pursuant to the maxim *da mihi factum, dabo tibi ius* ('give me the facts, and I [the judge] will give you the law'), the parties need only (in theory) to submit the facts and evidence of their claims to the judge, who must identify and apply the law to decide the case. This obligation has been reaffirmed several times by the Supreme Court, including with respect to foreign law. Although in theory the parties have no obligation to argue or prove the law on which they rely, practice shows that legal argument and discussing the law or the foreign law before the judge are an essential part of the lawyer's role.

Finally, a judge is the guardian of public policy. He or she must ensure that relevant provisions of public policy are not violated and may not entertain claims or remedies that would be against public policy.

There are no jury trials in civil proceedings in Belgium.

To be appointed as a judge, the candidate must be Belgian and hold a master's degree in law. The other requirements depend on the programme chosen by the candidate:

- Judicial training: a candidate who has held a position in the legal sector for at least one year during the past three years is entitled to take part in the qualification process for judicial training. After three years of judicial training, the candidate can be appointed as a judge.
- Examination of professional competence: more experienced lawyers can be appointed as a judge immediately (without judicial training) but have to pass written and oral exams.
- Oral examination: a candidate who has worked as an attorney for at least 20 years or for 15 years as an attorney and at least five years as an in-house lawyer is entitled to be appointed immediately on the basis of an oral examination (without having to pass a written exam).

Depending on the vacant positions, the Superior Council of Justice selects candidates who have fulfilled the conditions set out above. The selection is based on objective criteria related to the candidates' abilities and capacities.

3 Limitation issues

What are the time limits for bringing civil claims?

Under Belgian law, terms of limitation are a matter of substantive, not procedural, law. They will therefore be determined by reference to the substantive law applicable to the dispute, as shall be designated by the court's conflict of laws rules.

Under Belgian law, the main terms of limitation are as follows:

- a 'real action' (claim for the recovery or protection of real property) shall be time-barred after 30 years (10 years in some circumstances);
- claims in tort are time-barred five years after the day on which the plaintiff is aware of the injury and of the identity of the person liable for this injury, and in any event 20 years and one day after the date on which the fact, action or negligence that caused the prejudice occurred; and
- most other claims are time-barred after 10 years (eg, the term of limitation to enforce a judgment is 10 years).

There are many exceptions to these general terms of limitation in respect of property leases, compensation for the termination of commercial agency agreements, professional fees, etc.

Finally, the above terms of limitations can be renewed by serving a writ of summons, notice of a payment request or attachment, if the plaintiff acknowledges the debt, or if the creditor's lawyer, bailiff or representative sends a letter of formal notice to the debtor located in Belgium provided this letter meets certain legal requirements.

4 Pre-action behaviour

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

With a few exceptions (such as in disputes regarding residential lease and land lease agreements), Belgian law does not require any action to be taken before legal proceedings are initiated.

If the parties have agreed on mediation or on another form of pretrial ADR, the court shall stay the proceedings, at the defendant's request, until the ADR method has had a chance to succeed.

The defendant domiciled in Belgium may require the foreign plaintiff to post a guarantee, covering the costs of the proceedings and of service, before the court hears the claim (*cautio iudicatum solvi*). This does not apply if the claimant is domiciled in the European Union or in a state that has concluded a treaty with Belgium exempting claimants from this obligation.

5 Starting proceedings

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 process server will serve summons on the defendant, either by delivering a writ of service to the defendant's address or through other methods of service available under international conventions. After service has occurred, the claim will be recorded in the court's registry. In certain cases, the summons can be filed by the claimant with the court rather than served; the court will then send notice to the defendant by registered mail. The defendant is notified of the commencement of proceedings when he or she receives the notification of the court by registered mail. The defendant is deemed to have received this notification on the day following the one when the notification was brought to his or her domicile, residence or address for service.

The summons must comply with strict requirements regarding the identification of the parties to the dispute, the factual background of the dispute, the claim and the relief sought, the court seized, and the date, time and place of the introductory hearing. Parties are allowed to raise new arguments during the exchange of briefs. However, under Belgian law, a 'new claim' (ie, an application aiming at extending or modifying the scope of the initial application) must be based at least in part on statements or facts contained in the initial writ of summons.

There is a minimum waiting period of eight days between the date of service and the date of the introductory hearing in court. When the defendant is a foreign resident, the period of notice is extended by an additional 15 days for countries with which Belgium shares a border and for the United Kingdom, 30 days for other countries in the European Union and 80 days for the rest of the world. In urgent cases, an application may be lodged with the court for an *ex parte* order, shortening the waiting period.

A third way of introducing a claim is by an *ex parte* application filed with the court. In this case, the defendant is not notified or served, and is not made aware of the commencement of proceedings. A claim can only be lodged *ex parte* if the law expressly provides so (such as in proceedings for the enforcement of arbitral awards or foreign judgments or applications for authorisation to attach assets). A claim for temporary measures can also be initiated by an *ex parte* application when exceptional circumstances warrant this, such as extreme urgency, the need to take the defendant by surprise or the impossibility of identifying the adverse party (such as in cases of strikes).

Finally, the parties may also file a joint application to the court and request the court to settle their dispute.

Some of the Belgian courts, particularly the courts of appeal, have a backlog of cases, which can delay the adjudication of a dispute

for several years. Recent amendments to the Belgian Judicial Code, together with the appointment of more judges and court assistants, have led to improvements. The Belgian Judicial Code also allows for expedited procedures in a series of cases.

Moreover, initiatives are taken by some courts in order to manage their caseload in a timely manner. For instance, the Brussels court of commerce made a series of organisational changes effective from 1 September 2015:

- four chambers are reserved for matters to be dealt with by the presiding chairs of the court (urgent relief, etc). Eight chambers deal with the introduction of new cases and summary proceedings (see question 6). Eleven other chambers manage classical proceedings on merits. Other distinct chambers devote their time to specific matters (order for payment, etc);
- some hearings are expressly left open every six weeks in order to handle case-management issues; and
- a list of cases in which the parties are ready to plead is set up so as to allow for hearings to be scheduled at short notice.

6 Timetable

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

Generally speaking, Belgian civil proceedings comprise five phases:

- service or notice;
- introductory hearing;
- exchange of briefs;
- oral pleadings held before the court; and
- the judgment rendered by the court.

The claim is usually not heard at the introductory hearing, but postponed in order for the parties to exchange briefs.

Simple claims, uncontested claims, interim measures such as the appointment of experts (see question 12), language issues (see question 36), challenges to the court's jurisdiction and a few other matters may be heard at the introductory hearing.

Upon the introductory hearing, the court or the parties (see question 7) must set a procedural timetable that determines both the deadlines for filing the parties' briefs and the date of the oral hearing. Parties may, however, ask jointly for the postponing of the case for an indefinite period.

7 Case management

Can the parties control the procedure and the timetable?

The power of initiative rests mainly with the parties, particularly with the claimant. The courts will not take any initiative and will act only if a party has requested it to do so.

The parties may agree on the timetable for exchanging briefs and on postponing the oral hearing. The courts will determine *ex officio* the calendar when the parties do not reach an agreement on it.

If a new and relevant fact is discovered by a party after the deadlines for exchanging briefs, the judge may, at that party's request, grant new deadlines and, if necessary, a new date for the oral hearing.

When the parties do not agree on other procedural matters, the courts will step in, at the request of one of the parties, and issue procedural orders.

New provisions have been inserted in the Belgian Judicial Code to allow for the electronic management of cases. However, these provisions are not fully effective yet due to a lack of technical means. So far, it is possible to file written submissions by electronic means with the registries of the courts of appeal and the courts of commerce. The system is also currently being tested before some courts of first instance (Antwerp, Ghent, Liège and Namur).

8 Evidence - documents

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 impose a general duty to preserve documents and other evidence pending trial. However, such obligation may result from other laws. Thus, tax and accounting laws impose an obligation to keep records and accounts for a number of years.

Further, there is no general obligation to share evidence with the other parties. There is no discovery process under Belgian law. However, if there is reason to believe that a party or a third party holds a document that is likely to prove a fact that is relevant to the dispute, the court may order that party or third party to submit it.

If the party or third party in question refuses to produce the document without a valid reason (eg, the document is privileged), it can be ordered to pay a non-compliance penalty. In addition, the court may, depending on the circumstances at hand, infer from a party's refusal to submit certain documents that the disputed fact is proven or such other inference as the court shall deem reasonable.

9 Evidence – privilege

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

Communications between lawyers who are members of a bar and their clients, medical records and some other documents are considered privileged and will not be allowed as evidence by the courts. Disclosing such documents or information may even, depending on circumstances, constitute an offence criminally prosecuted.

Some communications between in-house lawyers and their clients will also be deemed privileged.

External lawyers

Documents exchanged between external lawyers and their clients are covered by professional secrecy as protected by the Belgian Criminal Code. Belgian courts have, until now, been very protective of professional secrecy and allowed few exceptions. For example, the Belgian Constitutional Court has partly cancelled a law regarding money laundering that imposed an obligation on lawyers to blow the whistle on their clients in certain transactions.

Communications between external lawyers are confidential, pursuant to rules of conduct adopted by the Bar Councils. As a rule, any written correspondence between opposing lawyers in their capacity as counsel to a party is confidential, with limited exceptions.

As far as cross-border communications with European external lawyers is concerned, the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe guarantees confidentiality only in the event that the lawyer who intends to send a confidential letter to a lawyer in another member state clearly expresses this intention before sending the letter in question and the recipient does not immediately protest such announcement.

With regard to cross-border communications with other external lawyers, extreme caution is recommended.

In-house lawyers

The Belgian Act of 1 March 2000 establishing the Institute of In-House Lawyers preserves the confidentiality of legal advice given by an in-house lawyer for the benefit of his or her employer and in his or her capacity as legal adviser.

The protection granted by this provision is narrower than that which applies to communications between a lawyer and his or her client.

The statute only covers legal advice, thereby excluding (draft) agreements, minutes of meetings, correspondence with other companies, communications that only contain information, etc. The confidentiality rule also does not cover communications with persons other than the employer or the company's external lawyers. Neither does it apply when the letter sent to the employer is also sent to other persons and third parties. Therefore, correspondence with the lawyer of the adversary party is not confidential. However, a convention was signed in 2006 between the Belgian Institute of In-House Lawyers and the Belgian French- and German-Speaking Bar Association, which considers as confidential communications and negotiations between an in-house lawyer and an external lawyer from the bar mentioned above.

Confidentiality is safeguarded in both civil and criminal procedures, as well as towards other authorities, such as the social or environmental inspection, and tax authorities. The protection also stands before Belgian competition authorities. However, the European Court of Justice decided, in the 1982 AM&S case, that the legal privilege of in-house lawyers does not stand towards European competition authorities. In 2010, in the Akzo case, the European Court of Justice confirmed this position and decided that the privileged character of

communications between a lawyer and his or her client did not extend to the communications between a firm and its in-house lawyers.

10 Evidence – pretrial

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

There is no pretrial discovery process in Belgium. Witness statements and expert reports will be exchanged during trial and submitted together with the parties' respective briefs (see question 6).

11 Evidence – trial

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

General

Belgian civil procedure is accusatorial in nature: since the courts have a rather passive role, it is up to each party to prove the facts on which it bases its claim or defence.

Witnesses

While parties rarely rely on witnesses, this is allowed under Belgian law. The parties may file witness statements (affidavits), and courts may order witness statements to be filed ex officio. Since August 2012, witness statements are subject to specific substantive and formal requirements.

The parties may request the court to order the deposition of a witness. The court may also order the deposition ex officio. This can take place either in court or at another location, depending on circumstances.

If a witness refuses to appear voluntarily, the court may summon the witness to appear, subject to a non-compliance penalty and damages.

A judge will be designated by the court to administer the oath to the witness and take the deposition. As a matter of principle, the judge alone may interrogate the witness. If the parties are present, they may not confront the witness directly and must submit their questions to the judge, who decides whether to ask the question to the witness. Courts are usually flexible and will allow direct follow-up or clarification questions.

Experts

Court-appointed experts

The court may, at a party's request or ex officio, order an expert investigation. It will then appoint an expert who will meet with the parties, carry out an expert investigation and submit a draft report on his or her findings to the parties. The parties will be allowed to comment on the draft report before the expert files the final report. The court is not bound by the expert's findings. The court may decide to hear the expert, order additional investigations, ask questions to the expert or appoint other experts.

Party-appointed experts

The parties may file their own expert reports and request the court to hear their expert. In this case, the procedure for witness depositions applies.

12 Interim remedies

What interim remedies are available?

A claim can be brought before the presiding chair of a court to obtain urgent relief in summary proceedings. Such relief is temporary and does not bind the court that will hear the full case on its merits.

The conditions to obtain such relief are strict:

- the plaintiff must show that urgent relief is required;
- the plaintiff must have a prima facie claim;
- the balance of interest must weigh in favour of granting the relief sought; and
- the relief sought must only be of a temporary nature.

Typical claims brought forth under these provisions include:

- claims for the appointment of experts;
- claims for a cease-and-desist order; and

- claims for the appointment of an interim manager or auditor to supervise the management of a company.

When there are compelling reasons to avoid an adversarial discussion – for instance, because of the extreme urgency of the situation at hand or because of the need to take the adverse party by surprise – these measures can even be obtained *ex parte*.

A similar fast-track procedure is available in certain matters, governed by specific laws, resulting in a decision on the full merits of the case, which will not be temporary but final (subject to appeal). This procedure, referred to as ‘procedure as in summary proceedings’, is available under a variety of laws, such as:

- before the presiding chair of a court of first instance regarding claims based on the Act of 2 August 2002 regarding misleading advertising by professionals;
- before the presiding chair of a court of commerce or a court of first instance regarding claims based on Book XVII, Title 1 of the Belgian Code on Economic Law (cease-and-desist orders in well-defined matters like unfair market practices or alleged infringements of intellectual property rights); and
- before the presiding chair of a court of commerce under the Company Code regarding claims for the exclusion of shareholders or the forced buyout of shares.

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.

Both moveable (including intangible assets) and immoveable property can be subject to an attachment order. Bank accounts are frequently garnished in Belgium. There are certain restrictions under which certain assets are immune from attachment, such as clothes, basic furniture and salary up to approximately €1,300. Besides, assets belonging to states, international organisations and central banks are immune from enforcement. There are five specific restrictions under Belgian law:

- Pursuant to the Act of 28 April 1999 implementing the EU Directive 98/26/EC of 19 May 1998 on settlement in payment and securities settlement system, the funds, securities or securities entitlement of foreign states or instrumentalities held in the Euroclear system (or in other similar international clearing systems) may not be attached.
- Article 1412-bis of the Belgian Judicial Code prevents attachments of the assets of the Belgian state and public entities. These assets are not immune if the concerned entity declares that they can be subject to attachment or if they are not necessary for the fulfilment of governmental purposes.
- Article 1412-ter of the Belgian Judicial Code prevents attachments of all cultural assets belonging to a foreign entity when such assets are present in the Belgian territory for the purpose of a public and temporary exhibition.
- Article 1412-quater of the Belgian Judicial Code provides that any assets that foreign central banks or monetary institutions own or manage in Belgium are immune from attachment. However, these assets are not immune if they are exclusively allocated to an economic or commercial private law activity. The creditor seeking to attach these assets must demonstrate that they are not immune by filing an *ex parte* application for authorisation before the court of attachments prior to any attachment.
- Since September 2015, article 1412-quinquies of the Belgian Judicial Code provides that assets belonging to sovereign states and international/supranational organisations are, by their very nature, immune from attachment (see question 32). By way of derogation from that principle, a creditor may seek the authorisation to attach assets of a sovereign state or organisation by filing an *ex parte* application with the court of attachments demonstrating that one of the following conditions is fulfilled:
 - the foreign state or organisation has explicitly and specifically consented to the attachment of the assets;
 - the foreign state or organisation has allocated or earmarked the assets for the satisfaction of the claim at hand; or
 - it is established that the assets are specifically in use or intended for use by the foreign state or organisation for other

than non-commercial governmental purposes and are located in the Belgian territory, with the proviso that only the assets related to the entity referred to in the enforceable title or authentic or private document underlying the attachment can be attached. It must be noted that this new legal provision has been partially annulled by the Belgian Constitutional Court.

13 Remedies

What substantive remedies are available?

The main remedies available under Belgian law are as follows:

- a Belgian court can order the specific performance of an obligation, or enjoin a party to refrain from a certain action or behaviour. Typically, these orders and injunctions will be subject to non-compliance penalties;
- the court may also allow the claimant to entrust the performance of the obligation in question to a third party, at the defendant’s expense;
- the court may authorise the claimant to proceed with certain measures, such as the publication of a statement in the press, or instruct the domain name administrator or the IP registrar to strike out or transfer the domain name (or IP right) to the claimant’s name, or other measures; and
- further, a Belgian court may also grant compensatory damages. Belgian law allows for the compensation of actual losses (both economic losses and moral distress) and consequential damages, provided causation can be established. However, a Belgian court cannot order the payment of punitive damages.

14 Enforcement

What means of enforcement are available?

Since 1 January 2016, unless provided otherwise by law or decided otherwise by judges, judgments from lower courts are immediately enforceable notwithstanding the initiation of an appeal. Likewise, judgments handed down by the presiding chair of a court are enforceable immediately.

Depending on the remedy awarded in the judgment, enforcement will usually be carried out by a process server, who will collect payment from the judgment debtor by attaching and selling the debtor’s property and assets, or by garnishment of the debtor’s receivables and bank accounts; and, in respect of orders for specific performance, serve the order and collect the non-compliance penalties.

The judgment creditor may also force the judgment debtor into bankruptcy.

15 Public access

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

In accordance with the Belgian constitution, court hearings, records and judgments are in principle public (the access to hearings and judgments can be restricted in special circumstances).

Publicity does not apply to inquiry measures, such as witness testimony or judicial expertise. Exceptionally, the law, or the court itself, may depart from the rule of publicity in the interest of public order, the rights of minors or the right to privacy. Even in those cases, the judgment itself remains public.

The availability of court documents has long been disputed: some argue that all court documents are available to any interested party and that the court registry must provide a copy upon simple request; others maintain that access to court documents can only be granted with the prior approval of the attorney general.

16 Costs

Does the court have power to order costs?

In comparison with most countries in Europe, the cost of civil litigation in Belgium is rather reasonable. Apart from a moderate ‘procedural indemnity’ (see below), and apart from when a court determines that a party’s conduct is extremely frivolous or vexatious, there is no fee shifting in Belgium.

The losing party will usually be ordered to pay the costs of the proceedings. These will include the following:

- costs of service, filing and registration with the court registry;
- costs of witness depositions and judicial expertise;
- if the payment of money is ordered, and provided the amount is in excess of €12,500, a registration tax due to the Tax Administration of 3 per cent of the total amount payable;
- pre-judgment attachment costs and enforcement costs, if any; and
- a 'procedural indemnity'.

The amount of the 'procedural indemnity' is set by law. This amount is adjusted from time to time for inflation. Since 1 June 2016, the amount of the procedural indemnity is calculated as follows: if the claim cannot be appraised in monetary terms, the basic amount of this indemnity is €1,440. In respect of claims that can be appraised in monetary terms, the basic indemnity will range from €180 to €18,000. In certain circumstances, the amounts set by the law may be increased (to a maximum of €36,000) or decreased by the court. These amounts must be paid by the losing party to each adverse (winning) party for each instance (lower court, higher court). However, if one party loses against several adverse (winning) parties, the procedural indemnity that the losing party will be ordered to pay cannot exceed twice the maximum amount that is claimed by the (winning) adverse party that may claim the highest indemnity. The procedural indemnity is not applicable to proceedings brought before the Supreme Court.

The costs of filing and registration with the court registry are fixed and depend on the nature of the writ that is filed with the court registry and on the amount of the claim. Moreover, the filing costs are collected 'per claimant'. This undoubtedly has an impact on the initiation of class actions in Belgium (see question 19).

17 Funding arrangements

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?

Belgian law and rules of ethics require lawyers to charge fees with moderation and fairness. In practice, bar regulators require the fees to be reasonable and transparent, and proportionate to the difficulty of the case and to the stakes of the dispute.

Strict 'no win, no pay' contingency fees are not allowed. However, a lawyer may charge a reasonable success fee to his or her client, if the outcome of the case warrants this.

Third-party funding is allowed. The third party and the claimant may agree on sharing the proceeds of the dispute. However, short of assigning the claim, this does not give the funding third party standing to take part in the proceedings. Extreme caution must be exercised when drafting the funding agreement, and even more so the assignment agreement, as Belgian law allows the debtor of disputed claims to redeem the debt by paying back to the assignee the price paid for the assignment, with interest and costs.

18 Insurance

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

Insurance for legal costs has long been available in Belgium, as part of or as an optional addition to automobile liability insurance. The government has adopted measures to encourage the development of legal costs insurance policies in other sectors.

19 Class action

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

There are various methods of multi-party litigation (that is, litigation involving multiple claimants or defendants or both) in Belgium. These include:

- Actions for collective redress (class actions): under the influence of the European Commission recommendation on common legal principles on collective redress dated 11 June 2013 and of legislative initiatives in some neighbouring European countries, a Belgian Act

regarding class action proceedings was passed on 28 March 2014. The Act was introduced in Book XVII, Title 2 of the Belgian Code of Economic Law and came into force on 1 September 2014. The need was clearly felt both to ensure access to court in those situations where the circumstances discourage an individual to act on his or her own, and to ease and enhance the efficient settlement of multiparty disputes.

The scope of this Act is very limited: only groups of consumers represented by non-profit organisations or public bodies are allowed to bring a class action suit and this suit must be addressed against an 'enterprise' (as defined in question 1) in case of an alleged violation of specifically enumerated Belgian and European rules (insurance; banking and finance; energy; passenger transport; etc). On 17 March 2016, the Belgian Constitutional Court found that the limitation of the scope of the Act of 28 March 2014 was legitimate. Besides, the court held that the limited bodies entitled to act as group representatives is reasonably justified given the objectives pursued by the Act, namely ensuring access to court of victims of collective damage while guaranteeing the smooth implementation of class actions in the Belgian judicial system. The Brussels Court of First Instance and the Brussels Court of Commerce have an exclusive jurisdiction to rule on class actions.

Since the entry into force of the Act in September 2014, five class actions have been introduced before Belgian courts. All these actions have been brought by Test-Achats/Test-Aankoop, the main Belgian consumer protection organisation. The first class action was initiated to obtain compensation from the National Railway Company of Belgium (NMBS/SNCB) for the interruption and the suspension of the train service during eight days of national strikes in 2014 and 2015. No decision was handed down in that case since the parties reached an amicable settlement before the hearings on the admissibility of the class action. The second class action has been brought against the commercial airline company Thomas Cook following the delay of a flight. On 4 April 2016, that action was found admissible by the Brussels Court of First Instance. The court decided to apply the opt-in system (ie, only the consumers that have suffered the collective harm and have expressly notified the court's registry of their intention to be part of the group within six weeks will belong to the group). The most recent class action was brought against eight websites involved in the resale of concert tickets at high prices. No decision on the admissibility has been handed so far.

In 2014, the Belgian government stated that class actions as provided in the Act of 28 March 2014 will be assessed two years after its enactment. At the end of 2016, the Belgian Federal Public Service Economy sent a questionnaire to stakeholders about the admissibility requirements, composition of the group, conduct of the proceedings, procedural costs and funding, etc. The Belgian government will assess class action proceedings on the basis of the results of the questionnaire. On that basis, it could decide to extend the action to small and medium enterprises (SMEs).

- Actions of collective interest: in certain cases, the law allows some form of representative action, where consumer or professional organisations may seek injunctive relief against practices that harm the interests of consumers or of the members of the organisation. Cases arise frequently in respect of advertising for consumer goods, consumer safety or securities offerings. These organisations cannot recover damages for their members. They may, however, seek damages for themselves, to the extent that the practice in question harms their own personal interests. Similar remedies exist in environmental law. In addition, workers' unions and qualified human rights organisations are allowed to seek injunctive relief against practices that violate certain labour rights or non-discrimination laws.
- Collective (related) actions: several individual legal actions arising from a similar event or the same contract can be joined and consolidated in the same proceedings by different claimants who are often represented by the same lawyer. This happens, for instance, in major securities fraud or negligence cases. The related actions are handled by the court jointly even if they remain, from a legal perspective, individual actions.

20 Appeal

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

Any judgment can be appealed, both on the findings of fact and on the findings of law. The court of appeals hears the dispute *de novo*.

The main exception is when the lower court adjudicates a claim that is for less than €1,860 (justice of the peace) or €2,500 (first instance and commerce).

Judgments handed down by lower courts are, in principle, immediately enforceable unless provided otherwise by law or decided otherwise by judges (see question 14). It means that an appeal does not suspend the enforcement of judgments rendered by lower courts.

There is a right of further appeal (or immediate appeal if the judgment does not meet the thresholds for a first appeal) to the Supreme Court (see question 1). Appeal to the Supreme Court is limited to questions of law and formal requirements.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Within the European Union

Judgments rendered in a member state of the European Union resulting from proceedings initiated as from 10 January 2015 will be recognised and enforced in Belgium in accordance with the provisions of Council Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis). The EU Regulation No. 44/2001 of 20 December 2000 (Brussels I) still rules the recognition and enforcement in Belgium of judgments resulting from proceedings initiated before 10 January 2015. The EU Regulation No. 1215/2012 provides that a judgment given in a member state that is enforceable in that member state shall be enforceable in other member states without any declaration of enforceability being required (assimilation). The grounds for denying enforcement under Regulation Brussels Ibis are the same as the grounds for denying recognition and enforcement under Regulation Brussels I, that is where there is a violation of due process and where (recognition or) enforcement would be manifestly contrary to public policy, when the foreign judgment is irreconcilable with a judgment given in a dispute between the same parties, and when the foreign judgment infringes rules on mandatory jurisdiction (insurance, consumer contracts and employment contracts) and exclusive jurisdiction. Furthermore, Regulation Brussels Ibis expressly introduced the possibility to file a claim to obtain a declaration of unenforceability of a foreign judgment. The Council Decision 2007/712/EC applies to the recognition and the enforcement of judgments rendered in member states of the European Free Trade Association. No security, bond or deposit may be required of a party that applies for enforcement of a judgment given on the ground that he or she is a foreign national or that he or she is not resident in Belgium.

Outside the European Union

The recognition and enforcement of foreign judgments rendered in countries with which Belgium has not concluded a treaty are governed by the Belgian Code of Private International Law.

A foreign judgment will be denied recognition and enforcement in the following circumstances:

- recognition and enforcement are manifestly contrary to public policy;
- the 'rights of defence' (due process) have not been respected;
- the foreign court was designated by the parties with the sole intention of escaping the application of the mandatory laws designated by the conflict of laws rules of the Code of International Private Law;
- the foreign decision is not final, and still open to an ordinary appeal;
- the decision is not compatible with an earlier judgment rendered in Belgium, or with a decision rendered earlier abroad that is capable of being recognised in Belgium;
- the claim has been initiated abroad, after a claim had been lodged before the Belgian courts between the same parties and with the same object;
- Belgian courts had exclusive jurisdiction to hear the claim; or

- the foreign court had jurisdiction solely because the defendant was present or had assets in the foreign jurisdiction, without any relation between that presence or assets and the claim.

Procedure

Under the EU Regulation Brussels Ibis, the creditor must not obtain judicial leave to enforce a foreign judgment in Belgium. He or she shall immediately enforce it in Belgium with the assistance of a bailiff, provided the creditor provides him or her with an authenticated copy of the judgment and a certificate issued by the member state of origin. The certificate must be served on the debtor before laying any measure of enforcement. The bailiff or the served debtor may ask for a translation of the judgment. The debtor may challenge the enforcement measures by filing an application to obtain a declaration of unenforceability before the competent court of first instance. An appeal can be lodged with the court of appeal against the decision rendered by the court of first instance.

If the EU Regulation Brussels I is still applicable or if the judgment is handed down in a country with which Belgium does not have a treaty, the procedure for obtaining leave to enforce the foreign judgment in Belgium is reasonably fast. The application is filed *ex parte* before the court of first instance of the district where the defendant is domiciled or has his or her residence, or the place where enforcement will probably be sought. According to Belgian law, even if a foreign judgment has not yet been declared enforceable in Belgium, it is sufficient to provisionally attach assets located in Belgium while the enforcement procedure is pending.

The applicant must elect domicile in the district where the application is filed together with the following documents:

- an authenticated copy of the judgment (for a judgment from countries with which Belgium does not have a treaty, the copy must be 'legalised' by Belgian diplomatic authorities);
- if the judgment was handed down by default, evidence that the claim was served or notified to the judgment defendant (only for a judgment from countries with which Belgium does not have a treaty);
- evidence that the judgment is enforceable in the country of origin, and that it has been served or notified to the judgment defendant (such evidence is provided for European judgments by the certificate that must be filed by application of articles 53 and 54 of Regulation 44/2001); and
- in addition, the courts may – and generally do – require a translation of the judgment if it is written in a language other than the court's language.

The court will review the application summarily and make a formal check of the documents accompanying the application.

The order handed down in *ex parte* proceedings can be challenged by the judgment debtor before the same court within a period of one month from the date of service of the enforcement order. Although this suspends the enforcement of the foreign judgment, the judgment defendant's assets may be attached or his or her accounts garnished, as a guarantee for the enforcement of the judgment.

If the court has denied the enforcement order sought by the judgment creditor or has rejected the judgment debtor's challenge of the enforcement order, the defeated party may file an appeal before the court of appeal. However, in the case of enforcement under Regulation Brussels I, the debtor may only lodge an appeal against the enforcement order before the Supreme Court.

22 Foreign proceedings

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

Regarding evidence to be taken either in Belgium in support of proceedings in another EU country, or in another country of the EU in support of litigation in Belgium, the rules are set by Council Regulation EC 1206/2001 of 28 May 2001 on cooperation between the member states in the taking of evidence in civil and commercial matters.

The Regulation seeks to streamline cooperation in the gathering of evidence abroad in the relations between the member states of the European Union. The aim of the Regulation is to simplify and speed up the transmission and execution of requests for obtaining evidence

through techniques such as the deposition of witnesses and the inspection of documents or objects. According to the Regulation, the requesting court must directly address its request to the courts in the country where the evidence must be obtained and that have jurisdiction over the witness to be heard or the person holding the requested document. The requested courts then have 90 days to process the request. Parties and representatives of the requesting court have the right to be present during the taking of evidence by the requested court if the law of the requesting court allows such presence. A requesting court may also be authorised to directly proceed to the taking of evidence in the other country if this can be done on a voluntary basis without the need for coercive measures.

In respect of evidence located in states that are not bound by Council Regulation EC 1206/2001, Belgium applies the Hague Convention of 1 March 1954 on civil procedure. Belgium has also concluded a number of bilateral treaties on civil procedure and judicial cooperation. Most of these treaties were concluded with European Union member states (inter alia, France and Germany) and have become moot as a result of the adoption of EC Regulation 1206/2001.

In respect of those states with which Belgium does not have a treaty, the Belgian Judicial Code operates as a fallback mechanism, and Belgium will enforce letters of request issued by foreign courts and transmitted by foreign governments, pursuant to the relevant provisions of the Belgian Judicial Code. The procedure, however, is very time-consuming, and therefore often inadequate for obtaining evidence in the context of proceedings pending abroad.

Foreign parties may also apply to the Belgian courts directly (rather than through a letter of request sent by the foreign court to the Belgian court), under the provisions of the Belgian Judicial Code, for obtaining evidence in Belgium.

Briefly, the following measures can be sought: deposing witnesses; obtaining the production of documents (see above); and obtaining the designation of a court-appointed expert.

In urgent cases, these measures can be obtained in summary proceedings before the chairperson of a court of commerce, a court of first instance or a labour court (see question 12).

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes, since the entry into force on 1 September 2013 of the new law on arbitration of 24 June 2013, which amended the sixth part of the Belgian Judicial Code. The 'new' Belgian regime is to a large extent inspired by the UNCITRAL Model Law. The Belgian regime, however, keeps certain specificities, for example, on the grounds for annulment (see question 31) and the absence of ex parte interim measures ordered by the arbitral tribunal. The 'new' rules apply to arbitral proceedings that commenced after their entry into force on 1 September 2013.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Pursuant to the new provisions on arbitration in the Belgian Judicial Code, an arbitration agreement is not necessarily a written document, and can even be oral as long as it can be proved by all means of law. Any document, including emails, letters, faxes and contracts, may contain an arbitration agreement, as long as it clearly expresses the parties' intention to submit their disputes to arbitration.

In the absence of such document, other elements, such as the acknowledgment of the arbitration agreement by a party or the voluntary appearance before the arbitral tribunal, may constitute evidence of the existence of the arbitration agreement.

Whether a party can invoke an arbitration clause inserted in its general terms and conditions depends on the general law of obligations applicable pursuant to Belgian conflict of law rules, in particular, the rules pertaining to the enforceability of such terms and conditions. Generally speaking, the formal requirements in civil matters are more severe than in commercial matters, where the mere reference to a document containing an arbitration clause may suffice if the defendant had or could have had knowledge thereof at the time of execution of the contract and accepted it, or raised no objection.

25 Choice of 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?

When the parties have not agreed on the number of arbitrators, the arbitral tribunal will comprise three arbitrators.

If the arbitration agreement is silent on the way the arbitral tribunal should be set up, the plaintiff must notify the defendant of its intention to resort to arbitration, state the name of the arbitrator of its choice and invite the defendant to appoint an arbitrator. If the defendant fails to appoint an arbitrator within one month as from the notification sent by the plaintiff, the latter can request the chairperson of a court of first instance to appoint the arbitrator. The same applies in the event the party-appointed arbitrators fail to reach agreement on who should chair the arbitral tribunal. This process can be time-consuming, especially if one of the parties refuses to participate in setting up the arbitral tribunal and undermines every effort to that end. It is therefore highly recommended that the parties either nominate the arbitrators in their arbitration agreement or, alternatively, leave the appointment of the arbitrators to the decision of a neutral appointing authority, such as an arbitration institution.

An arbitrator can be challenged on the following grounds: he or she lacks the legal capacity to act as an arbitrator; he or she does not meet the requirements that have been set in the arbitration agreement; or circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence.

A party cannot challenge the appointment of an arbitrator on the basis of grounds of which he or she was aware when the appointment was made, unless he or she objected to the appointment at that time.

The parties may also agree upon a procedure for challenging the appointment of arbitrators. Failing an agreement, the party that wishes to challenge the appointment of an arbitrator must first notify its objections to the concerned arbitrator, the other arbitrators (if any) and to the other party. The arbitrator then has 10 days to withdraw. If he or she does not do so, a motion can be filed before the chairperson of the competent court of first instance for an order dismissing the arbitrator.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Parties have a wide margin of discretion regarding the appointment of arbitrators. They can either address the issue of the appointment of arbitrator(s) in their arbitration agreement or when the dispute arises.

Belgian law does not require any specific qualifications in order to be appointed as an arbitrator. Parties are free to appoint the arbitrators of their choice (a lawyer or an expert in a specific area such as the building industry, for instance). The only requirement is that arbitrators must be independent and impartial at the time of their appointment and throughout the proceedings, and that the choice of arbitrator cannot be based on unfair discriminatory reasons.

Parties usually refer to the rules of an arbitral institution in their arbitration agreement. CEPANI (the Belgian Centre for Arbitration and Mediation) is the most important arbitration institution in Belgium. It publishes on its website a list of members who have experience in arbitration and can be appointed as arbitrators.

27 Arbitral procedure

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

The Belgian Judicial Code sets out the procedural rules that will apply to the arbitration, provided, however, that the parties or arbitrators have not agreed otherwise (in the case of ad hoc arbitration), or provided that the arbitration institution does not itself dispose of a set of procedural rules (in the case of institutional arbitration).

The Belgian Judicial Code sets down these rules in chronological order, corresponding with the different phases of the arbitral proceedings:

- the arbitration agreement (see question 24);
- the composition of the arbitral tribunal, as well as the replacement and challenge of its composing members (see question 25);

- the actual arbitral proceedings, including the power of the arbitral tribunal to order interim and conservatory measures (see question 29);
- the arbitral award (see question 30) and the end of the arbitral proceedings;
- the actions available against the arbitral award, including the correction, interpretation and completion of the award, as well as the appeal against and annulment of the award (see question 31); and
- the enforcement of the arbitral award (see question 32).

As indicated above, in principle these rules only apply by default and are thus not mandatory, with the exception of the provisions on the impartiality and independence of arbitrators, the adversarial nature of the procedure and the recourses against the award.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The intervention of the chairperson of a court of first instance may be sought in respect of the appointment of the arbitrators (see question 25).

A court of first instance can hear challenges of arbitrators (see question 25).

While arbitral tribunals may order interim and conservatory measures (see question 29), the parties may also apply to the courts to obtain urgent interim relief (see question 12). Interim and conservatory measures are ordered on an *ex parte* basis. The application must be filed with the court of first instance of the place where the party against whom enforcement is sought has its domicile or residence in Belgium, or, in the absence of such domicile or residence, the place where the applicant wishes to enforce the award. The decision of the court shall not be subject to an appeal of any sort.

When a witness refuses to be deposed before an arbitral tribunal, the deposition will be taken before a court of first instance.

All claims that documents are forged or that signatures are not authentic may only be heard by a court of first instance.

There is no supervision of the making or drafting of the arbitral award itself, but a court of first instance can assign a deadline to the arbitrator or arbitrators to deliver the award.

The recognition and enforcement of an award are also sought before a judicial court.

29 Interim relief

Do arbitrators have powers to grant interim relief?

In accordance with the Belgian Judicial Code, the arbitral tribunal may order any such interim or conservatory measures it deems fit, except issuing attachment orders, as this comes under the exclusive jurisdiction of state courts.

The arbitral tribunal's authority to grant interim measures does not restrict the parties from seeking interim relief from the courts, if urgency so requires (see questions 12 and 28).

Typical examples of interim relief granted by an arbitral tribunal are an order to submit documents or to depose witnesses, an order to provide security for costs, or the appointment of an expert to assist on technical issues or to assess damages. However, the arbitral tribunal has no authority to force reluctant witnesses to be deposed, or to decide claims that documents were forged or that signatures are not authentic. Another example of an interim measure is an order to hand over a disputed asset or document to a third party until the end of the arbitral proceedings, so as to safeguard it.

30 Award

When and in what form must the award be delivered?

In principle, the arbitral tribunal takes its decision by a simple majority, unless the parties have agreed otherwise. The parties may also agree that the chairperson's vote is decisive in the event that the arbitrators fail to reach a majority.

The arbitral award must be in writing and signed by the arbitrators. In the event that one or more of the arbitrators cannot or refuse to sign, this must be reported in the award itself.

The award sets out the decision of the arbitral tribunal and the reasons on which the award is based.

Furthermore, the award must state the names and domiciles of the arbitrators and of the parties, the subject matter of the dispute, the date of the award and the seat of the arbitration.

If the arbitration is not organised under the auspices of an institution, the chairperson of the arbitral tribunal notifies every party by sending a duly signed copy of the arbitral award.

31 Appeal

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

Appeal proceedings are extremely rare in Belgium, where most awards are considered final and binding.

Under Belgian law, it is impossible to file an appeal against an arbitral award before a court.

In the rare cases where the parties provide for an appeal against the award in their arbitration agreement, the appeal will be lodged before an arbitral tribunal composed of different arbitrators. Unless the parties have agreed otherwise, the procedure (including the composition of the new arbitral tribunal) is similar to the procedure applied before the first arbitral tribunal (see question 27).

Unless the arbitration agreement provides otherwise, the parties must file their appeal within one month of the date of service of the arbitral award (the new rules provide that the one-month period starts as from the date of notification of the award). Nonetheless, the original arbitral tribunal may decide that its award is provisionally enforceable notwithstanding appeal.

When the arbitration agreement does not provide for an appeal, a party wishing to challenge an arbitral award may file an application for setting aside or challenging its recognition and enforcement.

On 16 February 2017, the Belgian Constitutional Court found that third parties to arbitration proceedings should be entitled to file a third-party opposition against arbitral awards if these awards infringe their rights. The third-party opposition is a judicial remedy available to persons who were neither parties nor represented in the main proceedings but who suffer damage as a result of the decision handed down in those proceedings. So far, such a recourse was only possible against judicial court decisions and not against arbitral awards. In its decision, the Belgian Constitutional Court stated that court decisions and arbitral awards have the same effects towards third parties. However, the Belgian lawmaker will have to define the legal regime of this new type of third-party opposition, which cannot be brought before the arbitral tribunal (as there is no arbitration clause binding the third party) but will have to be introduced by the third party before a judicial court.

Filing a claim for setting aside (annulling) the award

When the arbitral award has been rendered in Belgium, a party may seek the annulment of all or part of the award on one or a combination of the following grounds (pursuant to the new rules on arbitration, these grounds for annulment have become stricter – under the former regime additional grounds were available, which are not listed below).

The court of first instance can set aside the award only if:

- (i) there was no valid arbitration agreement, including if one of the parties did not have the legal capacity to enter into the arbitration agreement;
- (ii) due process requirements were not respected (unless the breach has had no influence on the arbitral award);
- (iii) the award deals with a dispute not falling within the terms of the arbitration agreement (a partial annulment is possible);
- (iv) the award does not contain the reasoning of the arbitrators;
- (v) the arbitral tribunal was irregularly constituted or the procedure was not complied with (except if the irregularity has had no influence on the arbitral award);
- (vi) the arbitral tribunal has exceeded its jurisdiction or powers;
- (vii) the underlying dispute is not arbitrable;
- (viii) the award is contrary to public policy; and
- (ix) the award was obtained by fraud.

The grounds mentioned under (i), (ii), (iii) and (v) above can no longer be invoked to request the setting aside of the award if the party was aware of them during the arbitration proceedings, but failed to raise them at that point.

The grounds mentioned under (vii), (viii) and (ix) are the only ones that can be raised *ex officio* by the court.

The claim for setting aside the award must be filed no later than three months after the date of notice of the arbitral award (except with respect to positive arbitral awards on jurisdiction that can only be set aside together with the final award).

The new rules allow the court handling the annulment claim to adjourn the dispute and invite the arbitrators to take measures to remedy the irregularity that founds the annulment claim.

Pursuant to the new rules, the decision that allows or rejects the claim for annulment of the award cannot be appealed.

If all parties are non-Belgian, they can waive their right to apply for setting aside the award, before or after the dispute arose. This waiver must expressly refer to setting aside proceedings; a general waiver to invoke 'any legal recourse' will not be sufficient in that respect. Belgian parties cannot waive this right (a waiver would be deemed null and void).

A party may also seek to challenge the enforcement of the arbitral award (see question 32). Since January 2017, the party that lodges a recourse against the *exequatur* order of an arbitral award and wants to annul the same award has to introduce concomitantly and in the same procedure an annulment application, provided that the time limit to file an annulment application has not expired. With that reform, the legislator gave jurisdiction to the same court to hear enforcement proceedings of an arbitral award issued in Belgium and concurrent setting aside proceedings brought against the same award.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Pursuant to the new rules, an application for leave to enforce an arbitral award, whether foreign or domestic, must be submitted to the court of first instance of the place where the party against whom enforcement is sought has its domicile or residence in Belgium, or, in the absence of such domicile or residence, the place where the applicant wishes to enforce the award. This application is *ex parte*. The party against whom enforcement is sought has, subject to exception, no right to be heard at this stage of the procedure.

The party seeking to enforce the award must elect domicile in the court's district and file with its application the following documents: the authenticated original arbitral award or a certified copy thereof; the arbitration agreement or a certified copy thereof; and a certified translation of both the award and agreement into the language of the court proceedings.

As far as domestic awards are concerned, enforcement of the award will be denied if the court finds that either the award or its enforcement would be contrary to public policy, if the dispute was not arbitrable or, in respect of foreign awards that do not fall under the scope of the New York Convention of 10 June 1958, if one of the other grounds for refusal exists. To a large extent, the new rules on arbitration match the grounds for annulment and the grounds for non-recognition for both domestic and foreign awards.

As regards foreign awards, the application will be based, in most cases, on the 1958 New York Convention, or on one of the bilateral conventions mentioned below. If the state where the arbitral award was rendered is not a party to any treaty or convention, the court will apply the rules set out in the Belgian Judicial Code.

Belgium has adopted the 1958 New York Convention subject to reciprocity, and applies the convention both to commercial and civil disputes.

Belgium has also signed five bilateral conventions regarding the recognition and enforcement of foreign arbitral awards with Austria, France, Germany, the Netherlands and Switzerland. The bilateral conventions as well as the 1958 New York Convention all provide that the party seeking to enforce the award is allowed to choose the legal regime that seems the most favourable towards recognition and enforcement.

If enforcement is allowed, the party against whom enforcement is sought can challenge the enforcement order within one month as from the date of service of the order. Although this procedure does not by itself stay the enforcement of the award, the party against whom enforcement is sought may request a court of first instance (for domestic awards) or the judge of the attachments in a court of first instance

(for foreign awards) to order a temporary stay of the enforcement if he or she proves that there is a strong *prima facie* chance that the enforcement order will be reversed. The party against whom enforcement is sought may also escrow the amount that he or she has been ordered to pay, so as to avoid the actual remittance to the party seeking to enforce the award.

If enforcement is denied, the claimant may only lodge an appeal against this decision before the Belgian Supreme Court. A challenge before a court of appeal is not possible.

Under Belgian law, the term of limitation to enforce an award is 10 years as from the date of the notification of the award to the parties.

Since 13 September 2015, assets belonging to foreign states and international/supranational organisations are immune from attachment pursuant to article 1412-quinquies of the Belgian Judicial Code (see question 12). The Act of 23 August 2015 introducing Article 1412-quinquies in the Belgian Judicial Code was partially annulled by the Belgian Constitutional Court on 27 April 2017.

33 Costs

Can a successful party recover its costs?

Unless otherwise agreed, the fees and expenses of the arbitrators, the administrative fees of the institution (if any) and the parties' reasonable fees and costs (including legal costs and expert costs) shall be allocated between the parties by the arbitral tribunal in the final award.

Alternative dispute resolution

34 Types of ADR

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

To prevent or resolve a dispute, the parties may turn to several types of ADR, such as third-party decision, conciliation, mediation or arbitration, and several mixed types of ADR, such as the ombudsman organised within the auspices of certain autonomous public undertakings, such as the postal service and the railway service, and the mini-trial organised by CEPANI.

There are no legal formalities with regard to the first two types of ADR. Conciliation may be voluntary or mandatory (see question 35). A specific chapter of the Belgian Judicial Code is dedicated to mediation.

The type of ADR chosen will mostly depend on the nature of the dispute. While mediation is commonly used in family disputes, other ADR methods are often used in commercial disputes.

A Belgian Act regarding ADR in order to settle consumer disputes was passed on 4 April 2014 as a result of the enforcement of two European directives (2013/11/EU and 2009/22/EC). The Act was introduced in Book XVI of the Belgian Code of Economic Law and came into force on 1 June 2015 and has been amended by the Law of 26 October 2015.

35 Requirements for ADR

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?

Certain issues require a conciliation attempt before the introduction of court proceedings; for example, with regard to labour law, (land) lease and the protection of the environment.

When the parties have agreed to ADR, the courts will give effect to their agreement. At the request of either party (but not *ex officio*), the courts will compel the parties to exhaust the ADR method on which they had agreed before allowing the parties to proceed before the courts.

ADR clauses are in principle without prejudice to either party's right to seek interim measures (see question 12).

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

Although Belgium is a very small country, it has three official languages: Dutch, French and German. The use of language in court proceedings is regulated in the mandatory provisions of the Belgian Act of 15 June 1935, which deals with:

- the language of the introductory act to the proceedings;
- the request to obtain a change of language;
- the use of language during the proceedings;
- the exceptions following from the non-observance of these mandatory rules; and
- the use of documents drafted in a language other than the language of the proceedings.

Pursuant to a reform approved in 2012, the courts of first instance, the commerce, labour and police courts in Brussels were split into French-speaking courts and Dutch-speaking courts. The use of language in arbitration proceedings, on the other hand, is not regulated.

Moreover, since 1 April 2014, the number of districts has been reduced from 27 to 12 for the courts of first instance (with the splitting in two of the district of Brussels), and from 27 to nine for the courts of commerce (with the splitting in two of the district of Brussels).

Liedekerke
wolters
waelbroeck
kirkpatrick

Hakim Boularbah
Olivier van der Haegen
Charlotte Van Themsche

h.boularbah@liedekerke.com
o.vanderhaegen@liedekerke.com
c.vanthemsche@liedekerke.com

3 Boulevard de l'Empereur / Keizerslaan
1000 Brussels
Belgium

Tel: +32 2 551 1472
Fax: +32 2 551 1454
www.liedekerke.com

Brazil

Gilberto Giusti and Fernanda Marques Dal Mas
Pinheiro Neto Advogados

Litigation

1 Court system

What is the structure of the civil court system?

The civil court system is composed of common and specialised jurisdictions, each subordinated to specific higher courts, but all subject to the Superior Court of Justice in regard to federal law matters and the Federal Supreme Court in regard to constitutional matters. The federal Constitution also divides the judicial branch into federal – specialised or common – and state courts.

The lower jurisdiction is generally exercised by first instance judges, who are elected by competitive public examinations available to any interested individual with a bachelor's law degree. The competence to hear cases at first instance, however, may also lie with the courts of appeal depending on the magnitude of the claim, the persons involved and the subject matter. The right of appeal to the second instance (Court of Appeals) can be interpreted as a corollary provided for by the federal Constitution for both federal and state courts.

According to article 109 of the federal Constitution, the federal courts are competent to hear cases to which the Federal Union or any of its related entities are party thereto or are legally interested in as plaintiff, defendant, assistant or intervener (except for the cases of bankruptcy, labour-related accidents or those subject to the specialised jurisdiction), as well as cases involving foreign states or international organisations, disputes on indigenous peoples' rights, the enforcement of letter rogatory and foreign court and arbitral awards after recognition by the Superior Court of Justice, among others. The lower federal courts' decisions are subject to appeals before the federal regional courts, which are divided among five regions in the Brazilian territory.

The state courts have jurisdiction to hear the remaining cases, according to the jurisdictions set forth in the Constitutions of the respective states. The lower court decisions are subject to appeals before the state Court of Appeals – one per state and one for the Federal District.

The Superior Court of Justice is the court for non-constitutional federal matters. In addition to its original competences (such as the recognition of foreign court and arbitral decisions), it hears the appeals filed against the decisions rendered by the Federal Regional Courts and the state Courts of Appeals, which are admitted only in quite narrow and limited situations, in order to ascertain the proper and correct observance of the federal laws. The Superior Court of Justice is composed of 33 justices.

The Federal Supreme Court is the higher court in the structure of the judiciary system, and its main duty is to safeguard the federal Constitution. It hears limited cases where a violation to the terms of the Constitution is argued. The admission of appeals to the Federal Supreme Court is extremely narrow due to one of its requisites, that was brought by the Constitutional Amendment 45/2005: the overall repercussion of the constitutional issue in dispute, which is analysed under economic, political, social and legal perspectives, according to the explicit wording of article 102, III, section 3, of the federal Constitution. The Federal Supreme Court is composed of 11 justices.

2 Judges and juries

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

Under Brazilian civil procedure law, the judges have those powers pre-established in the Code of Civil Procedure (Law No. 13,105 of 16 March 2015, which came into effect on 18 March 2016), such as the possibility of early dismissal of cases based on procedural issues, summary judgments and rejection of evidence, all in favour of a more expeditious decision on the case.

In addition, all determinations of law and fact are made by judges, who exercise an active role in court proceedings. Judicial initiative in fact-finding is governed by article 370 of the Code of Civil Procedure, which confers upon the court the power to determine *ex officio* or at the request of a party the evidence necessary to conduct the proceedings, as well as to dismiss any request considered useless or with mere dilatory purposes.

The federal Constitution does not contemplate trial by jury in commercial and civil cases.

The selection process of judges is made by competitive public examinations available to any interested individual with a bachelor's law degree. In recent years, the National Council of Justice has implemented a number of affirmative actions to promote diversity on the bench, such as the creation of specific programmes to promote racial diversity and inclusion among judges.

3 Limitation issues

What are the time limits for bringing civil claims?

Under Brazilian law, the statute of limitations regime is governed by articles 205 and 206 of the Brazilian Civil Code. As a general rule, the statute of limitations period is 10 years (article 205), unless otherwise determined by specific provisions of the law. For instance, the statute of limitations is five years for the collection of certain and fixed amount debts under a public or private instrument (article 206, paragraph 5, I), or three years for reparation under the civil law (article 206, paragraph 3, V). Shorter periods apply in some other cases.

The parties cannot alter statute of limitation periods. As a general rule, however, a limitation period can be interrupted once by means of a motion to toll the statute of limitations. If and when applicable, this motion interrupts the limitation period, which then restarts from day one.

4 Pre-action behaviour

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

Except for any pre-litigation steps assumed by the parties under a certain contract (such as negotiation or mediation), there are no pre-action steps that should be taken by the parties before initiating a civil action.

5 Starting proceedings

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 by submission of a complaint by the plaintiff. The main elements of the complaint are, under article 319 of the Code of Civil Procedure, the facts, the claims and the law on which the claims are based. The Code of Civil Procedure also requires the complaint to contain: (i) the appropriate court at which the case will be tried; (ii) the names and information of the parties; (iii) the total amount under dispute; (iv) the evidence that the claimant intends to produce; and (v) whether the plaintiff would be prepared to participate in a conciliation or mediation hearing.

The plaintiff has the burden of structuring the pleading and presenting the relevant facts in the beginning, as this will define the limits within which the court may act. Such measures must be taken at the commencement of the proceedings as, according to article 329 of the Code of Civil Procedure, the pleadings can only be amended by the plaintiff without the defendant's consent before the defendant is duly summoned.

Once the claim is filed, the court may set a preliminary conciliation or mediation hearing, which should occur at least 20 days after proper service on the defendant, as per article 334 of the Code of Civil Procedure.

Summons in Brazilian court cases shall be made by the respective court by means of: a letter delivered by a court official; or a registered letter sent by the postal services; or by electronic means when applicable. A copy of the complaint shall be delivered to the defendant. When it is not possible to find or access the defendant, the service of process may be made by publication in a local paper.

If the individual or legal entity is outside Brazilian territory, the service should occur by means of a letter rogatory. Service of process of a Brazilian party in a legal action initiated at a foreign court must also be made in Brazil through a letter rogatory (it cannot be made by fax or letter sent by lawyers). The letter rogatory and the documents attached thereto would have to be translated into Portuguese by an official translator and sent to Brazil through both countries' embassies. The service must be supervised by a Brazilian court and carried out by a court official.

The courts' capacity to handle their caseload is an issue that has been on the agenda in Brazil for quite some time now. Over the past three decades, Brazil has suffered a significant crisis in the administration of justice, marked by widespread dissatisfaction with the operation of the courts. Court cases are numerous and complex and the procedural system permits a multiplicity of appeals, and prescribes several formalistic rules; all of which contributes to the long duration of the proceedings and consequently to the dissatisfaction with the operation of the courts.

In this context, since 2005, a competent commission started to discuss the draft of a new Civil Procedure Code, which finally entered into force in March 2016. The new Code aims to improve the civil procedure rules, speed up litigation and modernise some of the provisions relating to matters pertaining to international law. Even before that, however, there had already been several amendments to the previous Code aimed at allowing the courts a more active role in improving their operation and efficiency.

In particular, in 2004, Constitutional Amendment 45/2005 had already implemented a relevant reform of the judicial system, inserting article LXXVIII into the federal Constitution to provide the reasonableness of the duration of the process as a constitutional right.

6 Timetable

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

Once the defendant is duly served, he or she should answer the claim in a short period of time (usually within 15 business days). In cases where a preliminary conciliation or mediation hearing is set, the 15-day period starts from the date of the hearing (article 335, I, of the Code of Civil Procedure). The answer must contain all the defendant's arguments of defence and any preliminary objections (such as *lis pendens*, *res judicata*, the existence of an arbitration agreement, lack of jurisdiction, among others).

The Code of Civil Procedure also provides for the possibility of the defendant to file a separate motion to seek removal of the judge in case of actual or perceived bias. Proceedings in this case may be temporarily suspended until the motion is resolved. In his or her defence, the defendant may also file a counterclaim, if the counterclaim is either related to the principal action or based upon a defence to the complaint.

If the defendant fails to present his or her defence within the terms established by law, he or she will be prevented from filing a defence. The proceedings will continue and the final decision will be rendered on judgment by default (*revelia*), which means that all facts alleged by the plaintiff will be deemed as truthful and the defendant could be defeated in the action based on the claimant's allegations.

After the filing of the defence, the plaintiff usually has the opportunity to present his or her reply. Afterwards, the judge shall request the parties to specify the evidence they wish to produce before the court. At this point, the judge may analyse and decide – by means of an interlocutory decision – on the admissibility of the pleadings presented by the parties and whether they meet the procedural prerequisites and formalities necessary to proceed. If procedural irregularities are found and can be corrected, the judge shall order the parties to correct them, as established by article 352 of the Code of Civil Procedure.

If the judge finds the case is admissible to proceed, he or she shall decide on the evidence still to be produced or render an award on the merits – this last option occurs if the judge deems the evidence already presented to be sufficient for the ruling (for instance, where the plaintiff renounces his or her right of action, the defendant confesses the essential allegations of the complaint, or the parties reach an out-of-court settlement, or the judge dismisses the complaint because it is time-barred).

Once all evidence admitted by the court (which usually includes a hearing for collection of oral testimonies) is produced, the court shall render an award. The award is in writing and contains a description of the parties, a summary of the claim and of the answer, a brief description of the facts, the reasoning and the ruling.

7 Case management

Can the parties control the procedure and the timetable?

As a general rule, the parties do not control the procedure and the timetable. Nevertheless, the Code of Civil Procedure that came into effect on 18 March 2016 introduced a new provision (article 190) that allows the parties to agree on certain procedural issues. The practical application of this provision will have to be ascertained over the next few years, according to the case law to be created by the courts. In any case, the provision is a very relevant change in the civil procedural law and therefore merits being quoted:

Article 190 – If a case deals with rights that accept consensual dispute resolution, fully capable parties may lawfully establish changes in the proceeding to adapt it to the specificities of the case and to stipulate their procedural obligations, powers, prerogatives and duties, before or in the course of the proceeding. Sole Paragraph. Ex officio or upon request, the judge shall control the validity of the agreements set out in this article, refusing their application only in cases of nullity or abusive clause included in an adhesion contract or if one of the parties is deemed to be in a clear vulnerable situation.

8 Evidence – documents

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 to preserve documents and other evidence pending trial, as full discovery is not provided for in Brazilian civil proceedings. Instead, the general rule is that documents should be maintained until all possible related lawsuits are barred by law, as per the rules in the statutes of limitation prescribed in prevailing legislation. Article 1.194 of the Brazilian Civil Code requires business people and companies to safeguard accounting records, correspondence and documents relevant to their activities until the relevant statute of limitation has expired.

In addition, the Code of Civil Procedure also provides for a proceeding in which the party can request the court the disclosure of

documents in the possession of the opposing party, third parties or both. The requesting party should specify in detail the document and its relevance for the dispute, indicating the facts that relate to it and the circumstances and grounds on which the party bases itself to affirm that such document exists and is in the possession of the other party. Because of these rigid requirements, such procedure is hardly used.

Notwithstanding these rigid requirements, the judge shall accept the request to disclose evidence made by a party when the following conditions are met: (i) the counterparty has the legal obligation to disclose; (ii) the counterparty referred to such document in the proceedings as an evidence; and (iii) the document, by its content, is common to both parties.

Based on article 404 of the Code of Civil Procedure, the party or the third party may refuse to exhibit a document if one of the following circumstances is present:

- the document relates to his or her private life;
- the exhibition of the document would violate his or her duty of honour;
- the exhibition would originate dishonour to the party or to third party;
- the exhibition would cause the facts, which are confidential, to go public;
- there are any other justified reasons, pursuant to the court's opinion; or
- the exhibition of the document would violate the law.

If a party unjustifiably refuses to produce the document requested by the court or any other evidence, the court may deem as subjectively admitted the facts the other party intended to prove with the evidence not presented.

9 Evidence – privilege

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

Law No. 8,906/94 (the Brazilian Bar Association Statute) in its article 7, II and XIX, sets forth that the lawyer has the right (i) to have respected the inviolability of its office in the name of freedom of defence and professional secrecy, and (ii) to refuse to depose as witness in litigation on facts related to a person for whom he or she acted as counsel, or about facts protected by professional secrecy.

Article 36, paragraph 1, of the Brazilian Bar Association Code of Ethics sets forth that the legal communications between lawyer and client are presumed confidential and privileged. Law firms' information (including files, data, mail, communications and even telephone conversations) are inviolable and any communications between a lawyer and a client are presumed to be confidential and, therefore, cannot be disclosed to third parties. According to the prevalent case law on the matter, all information received from the client or gathered by the lawyer for him or her in connection with a specific cause or research is protected by the law.

A strictly legal advice from an in-house lawyer (whether local or foreign) is also deemed privileged, since article 18 of the Brazilian Bar Association Statute sets forth that the employment relationship does not adversely affect the technical independence that is inherent to all lawyers.

10 Evidence – pretrial

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

Under Brazilian law, parties are not required to exchange written evidence from witnesses prior to trial. Expert reports (legal, technical, etc), on the other hand, should be presented as documentary evidence prior to the trial phase (article 477, caput, of the Code of Civil Procedure), and the parties are given the opportunity to comment on the counterparty's expert opinions also prior to a possible trial (article 477, paragraph 3, of the Code of Civil Procedure).

11 Evidence – trial

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

As mentioned above, Brazilian civil procedure does not provide specifically for witness written statements. Instead, oral depositions are taken by the judge at a hearing set for this purpose. Deposition of a factual or expert witness is usually admissible by courts as an efficient means of evidence, but courts may reject it when (i) facts have already been proven by documents or confession, (ii) the fact can be proven only by documents, or (iii) the production of the evidence is not necessary.

As a rule, any person can be a factual witness, except for the legally impeded or suspected. A witness is not obliged to testify if one of two events occurs: (i) the facts under discussion could cause the witness damage and/or are related to his or her relatives; or (ii) if the witness must keep confidential information related to his or her profession. The parties are entitled to give testimonies, but, different from the witnesses, they are not under oath. The judge may request an interpreter to translate the testimonies and depositions given in a foreign language.

Expert evidence is admissible in Brazil, consisting in the examination, inspection or evaluation of the controversial point by an expert indicated by the court or by the parties. As a rule, this type of evidence is produced by means of a court-appointed expert who will give his or her opinion to the court, first through a written opinion (article 477, caput, of the Code of Civil Procedure) and then in a possible trial (article 477, paragraph 3, of the Code of Civil Procedure). The experts in Brazil are normally appointed by the judge and the parties may have their own experts to assist in the production of the evidence, which usually leads to three reports to be evaluated by the judge.

12 Interim remedies

What interim remedies are available?

Brazilian courts are empowered to issue any type of interim remedies, including interim freezing injunctions or search orders. The Code of Civil Procedure of March 2016 eliminated the previous distinction between precautionary measures and injunctive relief and simplified the mechanism of granting urgent remedies in order to guarantee the efficacy of the proceedings. The proper remedy may be requested either in advance of or incidentally to the main lawsuit, as set forth by article 294, sole paragraph of the Code of Civil Procedure.

The requesting party should basically demonstrate that he or she has a strong case (*fumus boni iuris*) and that full satisfaction of the right pursued (or to be pursued) in the main action may turn out to be ineffective if the interim remedy is not granted (*periculum in mora*).

All interim remedies are now intrinsically connected to the respective main lawsuit. In case of a preparatory remedy, once it is implemented, the plaintiff must submit the main claim within 30 days in the same proceeding (article 308 of the Code of Civil Procedure). It is, therefore, debatable as to whether Brazilian courts will grant interim remedies in support of foreign proceedings. Furthermore, it is worth noting that the Code of Civil Procedure now expressly provides that 'the Brazilian judicial authority is not competent to hear or rule or both on actions in which the defendant argues in its answer for the existence of a choice of exclusive foreign jurisdiction in the underlying international contract.' We should expect Brazilian courts to start ruling on this in the near future.

13 Remedies

What substantive remedies are available?

The Code of Civil Procedure provides for two main types of actions to be filed before the courts: cognitive and enforcement. Cognitive proceedings, which are the most common, are designed to resolve the merits of a certain dispute (ie, to decide which party should prevail). Cognitive proceedings can be subdivided in three main types of reliefs: declaratory, whereby the plaintiff seeks a declaration of a right per se; condemnatory, whereby the plaintiff seeks compensation; and constitutive, whereby the plaintiff seeks to create, modify or extinguish a status or legal relationship. Under Brazilian law, damages consist only of actual losses and loss of profits. No punitive damages are available. The closest to punitive damages allowed by Brazilian civil law are moral (pain and suffering) damages. As a rule, inflation adjustment and legal

interests (usually at the rate of 6 per cent to 12 per cent per annum) are applicable to condemnatory claims.

14 Enforcement

What means of enforcement are available?

Under Brazilian law, enforcement proceedings are available to ensure enforcement of certain judicial and extrajudicial titles, such as a final award (judicial and arbitral), or specific titles that are given an 'enforceable' status by the law. Such proceedings were created to enable the plaintiff to seize the assets of a debtor in default to satisfy its defaulted claim.

Enforcement proceedings can be processed as an independent lawsuit (in case of extrajudicial executive titles, such as promissory notes) or an ulterior phase of an ordinary action in which the potential creditor or the winning party enforces the debt title against the debtor or the award in his or her favour. The procedure is usually shorter than in an ordinary action.

In any case, an enforcement action is always based on an enforceable title. There are two kinds of enforceable titles under Brazilian law: judicial and extrajudicial. A judicial enforceable title usually derives from a final judicial award, but it can also be created by a settlement (provided it is recognised by a Brazilian court), a domestic arbitral award, or a foreign award rendered by a court or an arbitral tribunal (provided it is recognised by the Superior Court of Justice). An extrajudicial enforceable title can be, for instance, a private agreement signed by the debtor and by two witnesses, bills of exchange and promissory notes, debts secured by mortgage, obligations to pay certain sums or to deliver fungible goods, affirmative or negative covenants, among others.

If the debtor does not comply with the court order issued in the enforcement proceeding, the creditor is entitled to appoint the assets it wishes to be constrained for payment purposes. After the constriction and evaluation of the attachment, the debtor is again served to file, if desired, an opposition, which does not affect the enforcement proceedings, unless the judge determines otherwise (and provided that the debt is duly secured). The range of defences is limited. If the defendant is not able or willing to pay the debt, the attached property shall be evaluated and sold in a public auction and the values are reverted to pay the creditor. The Brazilian legal system does not provide for any criminal sanction for debtors.

15 Public access

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

Article 93, IX of the federal Constitution sets forth that all judgments by the judiciary branch must be public, except for those cases for which ordinary law otherwise provides. Article 189 of the Code of Civil Procedure establishes that all court and procedural acts are public, except for some specific cases that should be held under secrecy (for instance, where the public or social interest would so require, or when dealing with arbitration, including issues relating to enforcement of the arbitral letter, provided that the confidentiality stipulated in arbitration is evidenced at court). The same rule applies for hearings (article 368 of the Code of Civil Procedure).

16 Costs

Does the court have power to order costs?

The costs of litigation depend on two key factors: the amount of the claim and the complexity of the claim. Each court has a different method for calculating its costs, but they usually reflect a percentage of the amount under discussion. The party who initiates proceedings must bear the initial costs. In addition, the party who files an appeal must pay the appeal costs.

After the final decision, the defeated party usually reimburses the winning party for all court costs paid during proceedings, including, as a rule, 10 to 20 per cent of the amount under discussion as attorneys' fees for the winning party. The requesting party must pay an expert requested by the judge or by the parties. Considering that Brazil operates under the principle that the losing party pays all costs, the burden of these costs may be shared when each party is partially successful.

Brazilian law does not require any special qualification for a foreign resident to bring an action before the Brazilian courts. Any plaintiff, however, whether Brazilian or foreign, who resides abroad or leaves the country during the course of a court action, must post a bond sufficient to cover the costs and legal fees of the other party, unless he or she has real property in Brazil to guarantee payment. The amount of the bond varies from 10 per cent to 20 per cent of the amount of the claim under dispute and it is not required in the case of enforcement proceedings based on an extrajudicial enforceable title or the filing of counterclaims, or when a competent international treaty so dispenses, as per article 83 of the Code of Civil Procedure.

17 Funding arrangements

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 general, to file any legal action before the courts, it is mandatory that the parties be represented by a lawyer enrolled with the Brazilian Bar Association. The relationship between attorney and client is regulated by Federal Law No. 8.906/94 (Brazilian Bar Association Statute), the General Regulations of the Brazilian Bar Association Statute and by the Brazilian Bar Association Code of Ethics and Discipline. Fee arrangements may be freely agreed upon between client and attorney with some specific limitations (such as a maximum percentage of contingency) established by the Bar rules.

In order to guarantee access to the courts, Brazilian law authorises a party with no sufficient funds for payment of court costs to request the benefit of free legal service. If the benefit is granted, the beneficiary party is released from the obligation to pay judicial costs, charges, stamps, publication costs, witness fees, expert investigation fees and attorneys' fees. Alternatively, the Brazilian courts, in some circumstances, authorise the deferral of the obligation of payment of the court costs to the conclusion of the proceedings when the requesting party is able to demonstrate that it is actually facing momentary financial problems.

Urgent remedies, such as writ of mandamus and habeas corpus, are cost-free, and lawsuits in the benefit of the public interest (popular actions and public civil actions) have special rules concerning court fees. For such reasons, court actions supported by third-party funding have not yet been an issue in Brazil; with respect to arbitration, it appears to be a trend that may develop in the near future.

18 Insurance

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

As there is no provision in the Code of Civil Procedure in this regard, any insurance arrangement to cover all or part of a party's legal costs would lie in the private commercial sphere of the interested party.

19 Class action

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

The Brazilian legal system provides for efficient class action procedures for multiple claims. Public civil actions, for instance, are special proceedings established by Law No. 7.347/1985, which governs lawsuits involving liability for damages caused to the environment, consumers (represented by the general public), assets and rights of artistic, historical, touristic or scenic value, any and all general public interest, and violations of the economic order. The Consumer Protection Code, which applies to product liability cases, has expanded the scope of Law No. 7.347/1985, by creating a new category of collective rights or interests. The standing to sue is granted to the Public Prosecutor's Office, to the Public Defender's Office, to other public entities, to associations, but not to the individual.

Any citizen may file a constitutional class action (peoples' action). The object of a peoples' action is to annul an act detrimental to the public interest. The federal Constitution encouraged the traditional

doctrine of class action and included the environment as a public interest that may be safeguarded by such judicial means.

Furthermore, the collective writ of *mandamus* – another traditional judicial procedure enhanced by the federal Constitution – gives legal standing to associations, unions and political parties to defend ‘trans-individual’ interests, a concept being used by some legal writers mainly in connection with environmental protection.

The *res judicata* in homogeneous rights claims (ie, those with a common origin) in Brazil operates *secundum eventum litis*. In other words, if the action is ruled with grounds, the decision will benefit all members of the relevant class; and if dismissed, it does not prevent the victims from filing their individual claims.

According to Brazilian law, a sort of opt-in and opt-out system occurs when individual actions and a class action coexists. The effects of the *erga omnes res judicata* decision rendered in a class action will benefit the plaintiffs in individual actions only if they had applied for suspension of their individual actions, within 30 days as from cognisance of the filing of the class action.

In other words, if the individual plaintiff (i) opts in, by requesting the suspension of his or her individual action, the effects of the *erga omnes res judicata* decision rendered in the class action will benefit him or her, whereas if the class action is dismissed, the plaintiff may restart his or her individual lawsuit; or (ii) opts out, by not requesting the suspension of his or her individual action, the decision rendered in the class action shall not apply to him or her.

20 Appeal

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

The basic rules are that against certain interlocutory decisions rendered by the court during the first instance proceedings (ie, the ones that do not terminate the case), the parties may file interlocutory appeals, and against the first instance final decision the defeated party may file an appeal. The interlocutory appeal and the appeal are both directed to the Court of Appeals, aiming at having the first instance decision reformed. In general, an appeal does not suspend the enforceability of the decision, and it is adjudicated by a panel composed of an even number of judges that may revise the decision in respect to the law and the facts.

As a final recourse, it is also possible to appeal decisions of the courts of appeals to the Superior Court of Justice (special appeal, for matters concerning federal law discussions (ie, if a party claims violation of a treaty, a federal law or conflicting interpretation of federal law by other state courts)) and to the Federal Supreme Court (extraordinary appeal, for cases related to constitutional issues (ie, if a party claims a violation of the federal Constitution)). The requirements for filing those appeals are quite rigid and restricted, listed in the federal Constitution, the Code of Civil Procedure and the Rules of Procedure of the Higher Courts.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The Brazilian federal Constitution states that any foreign award – either issued by a judicial court or an arbitral tribunal – must be recognised by a specific superior court prior to its enforcement before Brazilian trial courts, irrespective of the existence of reciprocity or specific international treaty or convention between the country of origin of the award and Brazil. The current constitutional regulation, through article 105, I, ‘i’, indicates the Superior Court of Justice as the only competent court in Brazil to hear cases concerning the ‘recognition of foreign judgments and the granting of *exequatur* to letters rogatory’, a procedure regulated by the Superior Court of Justice’s Internal Rules (*Regimento Interno*, RISTJ), as amended by Special Rule No. 18 of 17 December 2014.

The RISTJ sets forth, in its articles 216-C and 216-D that the award recognition will be granted if:

- the award is rendered by a competent court;
- the parties are regularly served process in the original case;
- the award is final and unappealable, complying with the necessary formalities in the country where the award was rendered; and
- the award is legalised by the Brazilian consulate and translated by a sworn translator in Brazil.

In addition, the RISTJ also establishes that the recognition will be denied if the award awaiting *exequatur* violates Brazilian public policy, sovereignty and human dignity principles. In the case of a foreign arbitral award, it is also necessary to demonstrate the existence of a valid arbitration agreement and its sworn translation into Portuguese. As a rule, the Superior Court of Justice only analyses formal aspects of the foreign judgments or awards; the merits of the decision are, in principle, not subject to further examination.

22 Foreign proceedings

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

The request for production of oral or documentary evidence in Brazil for use in civil proceedings in other jurisdictions should be made by the relevant foreign court by means of a letter rogatory sent to Brazil through the competent diplomatic channels. The letter rogatory should be submitted to the Superior Court of Justice to obtain the necessary *exequatur*.

The letter rogatory shall (i) be accompanied and supported by the original version and a sworn translation into Portuguese of the letter rogatory with the relevant information deemed indispensable by the foreign courts; (ii) indicate full name and address of the person to be heard in Brazil or who possesses the documentary evidence; and (iii) contain the questions to be made or the documents to be produced.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Brazilian Arbitration Law (Law No. 9,307 of 1996, as amended by Law No. 13,129 of 2015) is based on several modern arbitration legislations and its main sources are the UNCITRAL Model on International Commercial Arbitration and the Spanish Arbitration Law of 1988. The texts of the New York Convention of 1958 and the Convention of Panama of 1975 were also important during the process that resulted in the enactment of the Brazilian Arbitration Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Under the Brazilian Arbitration Law, there are two types of arbitration agreements in Brazil: the arbitration clause and the submission agreement or commitment, both of which are equally valid and enforceable. Submission agreements are only required when the parties do not expressly choose arbitration in the contract, or when the arbitration clause is too open, vague, or fails to refer to applicable arbitral rules or to establish the procedure for the appointment of arbitrators (‘empty arbitration clauses’). The ‘full arbitration clauses’ do not require a submission agreement to set aside the jurisdiction of the courts.

In view of the contractual nature of the arbitration agreement, in general any individual with full legal capacity or any legal entity represented by individuals with due powers may enter into an arbitration agreement and will be bound thereto. Relatedly, arbitration agreements are also subject to the requirements for validity of any contract under the Brazilian Civil Code: capacity and power of the parties; valid consent; lawful and possible subject matter; and compliance with the legally prescribed form.

Specifically concerning the arbitration clause, the Law expressly requires it to be in writing and to be inserted in the contract itself (or in a separate document that refers to it). A special formality is required in adhesion contracts. In such cases, the arbitration clause will only be enforceable if the adhering party initiates arbitration proceedings or expressly agrees to it, as long as the clause is written in a separate document or in bold type, duly signed.

As to the arbitration agreement, the Law sets forth the following requirements:

- the name, profession, marital status and domicile of the parties;
- the name, profession and domicile of the arbitrator(s);
- the matter referred to arbitration; and
- the place where the arbitration award will be rendered.

The submission agreement may also state:

- the place(s) where arbitration will be conducted;
- an authorisation for the arbitrator(s) to decide in equity, if agreed by the parties;
- the deadline for the arbitration award to be rendered;
- the choice of laws or statutory rules applying to arbitration, if agreed by the parties;
- the liability for payment of arbitration fees and costs; and
- the fixing of the arbitrators' fees.

25 Choice of 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?

Party autonomy is fully endorsed by the Brazilian Arbitration Law with respect to the number of arbitrators, their qualification, as well as the method of their appointment. Parties may, therefore, freely choose anyone as arbitrator.

However, if both the arbitration agreement and the applicable arbitration rules are silent on the number of arbitrators and the method of their appointment, and the parties do not reach an agreement on this issue, any of the parties may resort to article 7 of the Brazilian Arbitration Law, which provides a specific mechanism for the mandatory compliance (or specific performance) of the arbitration agreement. This mechanism determines that the judiciary will define any issues that the parties have not properly established in the arbitration clause nor have agreed upon afterwards.

The right to challenge the appointment of an arbitrator is guaranteed to any of the parties provided that such challenge is justified (ie, where the appointed arbitrator falls into one of the cases of impediment or suspicion provided in the relevant law or rules, or both). Unjustified or frivolous challenges are not accepted.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Under Brazilian law, there are no legal requirements as to the arbitrator's profession (no specific legal or technical training is needed) or nationality (there is no restriction on a foreigner acting as an arbitrator in Brazil). As mentioned above, thus, the parties may freely choose anyone as arbitrator, provided that he or she is legally capacitated, impartial, independent and deserving of the trust of the parties. Given the relevant development of arbitration in Brazil over the past two decades, a reliable and competent pool of candidates (mainly lawyers) has been acting in various complex domestic and international disputes involving all kinds of substantive matters (such as corporate disputes, infrastructure, constructions, etc).

27 Arbitral procedure

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

The Brazilian Arbitration Law establishes that the arbitral proceedings shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialised entity. If there is no provision on the procedure, the arbitrators shall regulate it.

The only restrictions imposed by the legislature on the parties' freedom to regulate and organise the procedure are related to the mandatory compliance with the adversarial principles, equal treatment of the parties, impartiality and freedom of decision of the 'judge'. Another requirement imposed by the doctrine, but not yet thoroughly discussed in case law is the need for motivation of the award. It is also important to observe that there is no primary or secondary application of the Code of Civil Procedure in arbitrations seated in Brazil. The rules of said Code only apply if the parties expressly agree so. The parties also do not necessarily have to be represented by lawyers, although it is most common and most indicated.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The reliability of arbitration as effective means of settling conflicts has found growing support in the Brazilian judiciary. Court decisions are increasingly recognising the binding nature of the arbitration clause, leading the parties to arbitrate even when one of them tries to fall back on its commitment to submit to arbitration. Likewise, the judiciary has guaranteed enforcement of awards rendered in Brazil and abroad.

Prior to the institution of arbitration, any party may resort to a state court to seek an interim urgent remedy in preparation for the arbitration (ie, an emergency conservatory measure to assure the institution of an arbitral tribunal and to warrant the effectiveness of the award to be rendered in due course). After the arbitration is terminated, any party may resort to court within 90 days to file an action seeking annulment of the arbitration award.

The challenge of an arbitral award in court is an exceptional measure that can only be sought when there is a serious procedural error in the decision that makes it null and void, as provided by article 32 of the Brazilian Arbitration Law. Some scholars believe that the parties cannot agree to exclude any basis of challenge against an arbitral award, as this would be contrary to some mandatory constitutional and legal provisions. There is, however, no case law yet on this issue in Brazil.

During the arbitration, the only situation in which a court may intervene is upon request by the arbitral tribunal seeking coercive enforcement of an arbitral order.

29 Interim relief

Do arbitrators have powers to grant interim relief?

After the constitution of the arbitral tribunal, the arbitrators have exclusive jurisdiction to grant, revise and revoke interim measures and emergency relief. Conversely, in specific and extremely exceptional cases, the parties can recourse directly to the state courts, without affecting the jurisdiction of the arbitrators (in cases of non-compliance with the injunction granted by the tribunal, for instance). In any case, the courts only intervene to ensure that arbitration guidelines will be strictly followed, and they will not replace the arbitral tribunal with regard to the merits of the controversy.

30 Award

When and in what form must the award be delivered?

In Brazil, the arbitral award has the same binding effects as a court decision on the parties and their successors, and shall be regarded as an enforceable instrument if vested with a condemnatory force. When there is more than one arbitrator, the decisions shall be taken by majority vote. In case of a tie, the presiding arbitrator's vote shall prevail and the other arbitrators may write their dissenting votes separately. The arbitral award shall be reduced to writing in a proper document, and shall be composed of:

- a report, containing the parties' names and a summary of the litigation;
- the reasons for the decision, addressing the factual and legal aspects involved and expressly mentioning whether the arbitrators rendered an award in equity;
- the actual decision rendered by the tribunal, wherein the arbitrators shall resolve the question submitted to them and establish a deadline for compliance with the decision, as the case may be; and
- the date and place in which the award was rendered.

The arbitral award should be rendered within the time limit agreed on by the parties in the arbitration agreement or in the applicable arbitration rules, as the case may be.

31 Appeal

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

An arbitral award is final and not subject to any appeal to the court. The Brazilian Arbitration Law provides only that arbitral awards can be challenged and declared null by a judicial court by means of an independent lawsuit to be filed by the interested party within 90 days of the issuance of the arbitral award.

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

The same procedures for enforcement of foreign and domestic judicial awards are applicable to foreign and domestic arbitral awards (see questions 14 and 21).

33 Costs**Can a successful party recover its costs?**

The parties have total flexibility to regulate apportionment of costs and expenses in the arbitration, including in regard to what costs can (or cannot) be recovered by them at the end of the proceedings. It is common in Brazil for costs such as attorneys' fees, arbitrators' fees, administration fees, expert fees, be recovered in the end (third-party funding is still quite rare in Brazil, and it is not clear whether those costs would be recoverable). At the end of the proceedings, the tribunal has to set the amount due in the award and allocate it in accordance with the agreement of the parties. In the absence of an agreement, general practice is that the losing party bears the costs.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

Alternatives to court litigation have experienced dramatic developments in Brazil over the past 15 to 20 years. Despite the praiseworthy efforts being made in Brazil to speed up justice, by reducing the number of judicial proceedings and their duration, the Brazilian judiciary system is still far from meeting the conditions required by Brazil's economic development with regard to some specific disputes. The need for more efficient and appropriate means for resolving certain conflicts created a unique opportunity for the consolidation of arbitration and other extrajudicial institutes as reliable and efficient systems.

Mediation has been increasing notably and several studies and programs have been carried out in order to develop mediation as a well-established and effective method for dispute resolution in Brazil. In late 2015, Law No. 13,140 – which regulates in-court and out-of-court mediation proceedings – came into effect and shall foster the use of this method.

More gradually, conciliation and dispute boards are also becoming important tools for dispute resolution in Brazil. The use of dispute adjudication boards (DABs), dispute review boards (DRBs) and combined dispute boards is increasing in Brazil and has become a real choice for investors and stakeholders to resolve disputes. Brazilians tend to adopt a dispute board formed at the beginning of a construction contract with a higher preference for DABs over DRBs.

35 Requirements for ADR**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?**

As a general rule, if the parties agree to mandatory ADR methods prior to litigation or arbitration, the courts or an arbitral tribunal can compel them to participate in such a process. In this context, the recently enacted Brazilian Mediation Law establishes that 'if there is a mediation clause in a certain contract, the parties shall attend the first mediation meeting.' As mentioned above, the Code of Civil Procedure also provides for mandatory mediation or conciliation, but the parties can expressly state that they are not interested in such processes.

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

As a final remark, it should be emphasised that the dispute resolution system in Brazil has undergone dramatic changes over the past couple of years, in particular due to the new Code of Civil Procedure (Law No. 13,103/2015), the amendments to the Brazilian Arbitration Act (Law No. 9,307/1996), and the enactment of the Brazilian Mediation Law (Law No. 13,140 /2015). In this context, a significantly more efficient legal framework is being implemented, accompanied by an increasing body of case law, in line with modern laws that have been interpreted and applied in traditional jurisdictions around the world.

PINHEIRONETO

ADVOGADOS

Gilberto Giusti
Fernanda Marques Dal Mas

ggiusti@pn.com.br
fmarques@pn.com.br

Rua Hungria, 1100
01455-906 São Paulo
Brazil

Tel: +55 11 3247 8400
Fax: +55 11 3247 8600
www.pinheironeto.com.br

Canada – Ontario

Shaun Laubman and Ian Matthews

Lax O'Sullivan Lissus Gottlieb LLP

Litigation

1 Court system

What is the structure of the civil court system?

In Ontario, there are provincially created trial courts, where cases are heard by a single judge. Above them are the Superior Courts, which are constitutionally established courts of general jurisdiction. Superior Courts often function as trial courts and hear many matters at first instance, but also exercise some appellate jurisdiction over matters heard in the provincial courts. Cases in Superior Courts are heard by a single judge.

The Court of Appeal for Ontario is the highest appellate court in the province. The Court of Appeal typically sits panels of three judges.

There is also a Federal Court of Canada and a corresponding appellate court (the Federal Court of Appeal). The jurisdiction of both courts is narrow. Those courts mainly hear claims against Canada, applications for judicial review of decisions by federal administrative bodies and claims in federally regulated areas such as admiralty law or intellectual property law.

The Supreme Court of Canada is the final appellate court in the country. Made up of nine judges, its jurisdiction is all-encompassing. The Supreme Court of Canada hears select appeals from decisions of the provincial and territorial Courts of Appeal as well as from the Federal Court of Appeal.

For complex commercial matters in the Toronto region, Ontario's Superior Court of Justice has established a 'Commercial List' staffed by judges with particular experience in managing, hearing and resolving complex business disputes. Parties with cases on the Commercial List are able to access judges quickly for chambers appointments to deal with case management and scheduling issues. The Commercial List has traditionally been at the vanguard for efforts in Ontario to expedite and streamline the litigation process.

2 Judges and juries

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

Most civil trials in Ontario, aside from personal injury and defamation cases, proceed before a judge alone. The judge typically plays a passive role although they can, and do, ask questions of witnesses to assist with their deliberations.

Jury trials are available in most cases. In Ontario, jury trials are not permitted if the action seeks certain types of relief, such as an injunction or mandatory order, specific performance of a contract or equitable relief. Jury trials are also not available against the Crown or municipalities in Ontario. Ontario's Rules of Civil Procedure specify the timing for delivery of a jury notice and the process for opposing it.

For civil cases in Ontario, juries consist of six jurors. Unanimity in a verdict is not required; the agreement of five jurors on any of the questions submitted to them is sufficient.

The selection process for federally appointed judges has recently undergone reforms. Each province and territory has an independent Judicial Advisory Committee that vets judicial applicants and makes non-binding recommendations to the Minister of Justice. The Judicial Advisory Committees are instructed to take account of the government of Canada's emphasis on enhancing the diversity of Canada's judiciary.

3 Limitation issues

What are the time limits for bringing civil claims?

Statutes of limitation vary across the provinces and depend on the cause of action. In Ontario, there is a basic two-year limitation period for most causes of action, which begins to run from the day when the claim is discovered. A claim is discoverable on the day on which a person knew or reasonably ought to have known that the injury, loss or damage occurred. In Ontario there is an 'ultimate' limitation period of 15 years, which runs from the date on which the act or omission on which the claim is based occurred.

Parties can agree to extend a limitation period by entering into a 'tolling' agreement.

4 Pre-action behaviour

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

In Ontario, there are certain types of cases where steps must be taken before an action can be commenced. For example, certain proceedings against the Crown cannot be initiated unless 60 days' notice of a claim is given with sufficient particulars to identify the events out of which the claim arose. In addition, no action for libel in a newspaper or in a broadcast may be initiated unless a notice specifying the matter complained of is given within six weeks of the discovery of the alleged libel. Furthermore, a claim alleging misrepresentation related to a purchase of securities on the secondary market may not be commenced unless a court first grants 'leave', which requires the plaintiff to demonstrate that the action is brought in good faith and there is a reasonable possibility of success.

For most other civil matters, there are no formal pre-action steps that need to be taken before a proceeding is commenced.

5 Starting proceedings

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 Ontario, civil proceedings are usually commenced by having either a statement of claim or a notice of application issued by the court. A statement of claim must be served within six months of being issued.

Personal service, or an enumerated alternative to personal service (such as when a lawyer accepts service of the process), is required for a statement of claim or notice of application. If the defendant is an individual, a copy of the pleading must be served on them personally. In the case of a corporate defendant, the pleading must be served on an officer, director, agent or a person at any place of business for the company who appears to be in control or to manage the place of business. In appropriate circumstances, for example, where a party is evading service, a court may make an order dispensing with service altogether.

Ontario's Rules of Civil Procedure permit service outside the jurisdiction without leave of the court in certain circumstances, such as when a contract was made in Ontario. Where service outside of Ontario is not expressly authorised, a court may grant leave to serve a party outside of the jurisdiction. In the case of a state that is a party to the

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the document must be served through the central authority in the contracting state or in a manner that is permitted by the Convention.

In order to address systemic delays in the justice system, there has been increasing attention paid to the need for more judicial appointments. There are also initiatives directed at modernising the court system in Ontario, for example, by allowing videoconference attendance for certain court appearances.

6 Timetable

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

Once a statement of claim has been served, the defendant has a prescribed period of time in which to serve a statement of defence. Defendants within Ontario have 20 days. Defendants within other Canadian provinces have up to 40 days. International defendants have 60 days for their defence. A defendant is entitled to an additional 10 days to respond if they first deliver a notice of intent to defend form within the prescribed period. After the statement of defence has been served, the plaintiff has 10 days to serve any reply pleading. It is common for counsel to grant reasonable indulgences to these deadlines if one is requested and the circumstances warrant.

After pleadings close, the parties usually proceed to documentary and oral discovery. At any time after pleadings close, a party can set the matter down for trial. By setting a matter down for trial, a party is certifying that they are ready for the proceeding to be added to the trial list. Once a party sets a matter down for trial, or consents to a matter being set down for trial, they can no longer pursue discovery or motions without leave of the court.

The amount of time between when a matter is set down for trial and the scheduled trial date depends on many factors including the anticipated length of trial and the jurisdiction where the case is being heard.

A proceeding will be automatically dismissed for delay if it has not been set down for trial within five years after it was commenced unless the plaintiff can show cause why the action should not be dismissed for delay.

7 Case management

Can the parties control the procedure and the timetable?

Subject to the overall five-year timeline for setting a matter down for trial, parties can generally control and establish the procedure and timetable for a proceeding. If the parties are unable to agree on a procedure or a timetable for completing the steps to get to trial, a party may seek the court’s intervention to enforce the Rules of Civil Procedure or to case manage the proceeding.

8 Evidence – documents

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

In Ontario, the principle of proportionality applies to ensure that the scope of discovery is proportionate to the importance, amount at issue and complexity of the proceeding.

Discovery is generally administered by the litigants. The courts will intervene to resolve discovery disputes. In the case of documentary discovery, a party must voluntarily disclose every document in its power, possession or control that is relevant to a matter at issue in a lawsuit, whether the document is helpful to its case or not. Where privilege is not claimed over a document, the document must be produced to the other parties at their request.

Parties are required to preserve documents and other relevant evidence pending trial and there can be consequences for spoliation of evidence.

9 Evidence – privilege

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

There are three accepted classes of privilege in Canada: solicitor-client privilege, litigation privilege and settlement privilege. In addition to

these accepted categories, the court may recognise privilege on a case-by-case basis.

Solicitor-client privilege applies to communications between a lawyer and his or her client that involve the seeking or giving of legal advice and that the parties intend to be confidential.

There is no legal distinction between external and in-house counsel. In both cases, the court will consider whether the communication was for the purpose of giving or receiving legal advice; if it was, then it is likely to be privileged.

Privilege belongs to the client, not the lawyer, and cannot be waived without the client’s consent. In the case of solicitor-client privilege, privilege is waived where the client voluntarily discloses the communication to a third party.

Litigation privilege attaches to documents or communications that are created or that take place for the dominant purpose of reasonably contemplated litigation. Litigation privilege no longer applies after the litigation comes to an end. Finally, settlement privilege applies to communications for the purpose of bringing about a settlement of ongoing or contemplated litigation.

10 Evidence – pretrial

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

In Ontario, parties are entitled to conduct an oral examination for discovery of adverse parties or their representatives. The rules provide that each party is entitled to seven hours of examination time. This is subject to extension either by agreement between the parties or the permission of the court. Parties involved in complex matters will often require more than seven hours for examinations for discovery.

Experts must prepare written reports setting out their opinion on the issues they have been asked to address and the reasons for their opinion, including any assumptions and research that form the basis for the opinion. These written reports must be exchanged prior to trial.

11 Evidence – trial

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

In a civil matter, the plaintiff must prove its case on a ‘balance of probabilities’ to succeed. In other words, the plaintiff must establish that its version of events is more probable than not.

Trial evidence is generally presented through witnesses’ oral testimony. Witnesses present their evidence first through direct examination and then are subject to cross-examination by the opposing party. Documentary evidence is generally introduced through witnesses who can authenticate the evidence, unless both parties consent to the document being received into evidence.

Experts must be formally ‘qualified’ by the court before their opinion evidence will be received at trial. This qualification process typically involves the parties examining (and cross-examining) proposed experts on their stated area of expertise. If an expert is qualified by the court, the expert may give his or her opinion on matters within the scope of his or her expertise and within the confines of their written report filed prior to trial. In Ontario, experts have a duty, among other things, to provide opinion evidence that is fair, objective and non-partisan. This duty prevails over any obligation the expert owes to the retaining party.

12 Interim remedies

What interim remedies are available?

An interlocutory injunction may be granted to protect the rights of the moving party pending final resolution of a case. The general test for an interlocutory injunction requires the moving party to satisfy three requirements: (i) there is a serious issue to be tried; (ii) the moving party would suffer irreparable harm in the absence of an injunction; and (iii) the balance of convenience favours an injunction.

In urgent circumstances, Canadian courts may issue interim or even ex parte injunctions. A moving party may ask for an interim injunction to protect its position pending the hearing of a motion for an interlocutory injunction. In cases of extreme urgency, an injunction may be granted ex parte (ie, without notice to the defendant) where

there is such urgency that the delay necessary to provide the defendant notice might cause serious and irreparable injury to the plaintiff.

Anton Piller and *Mareva* orders are available in appropriate cases to preserve evidence or assets prior to trial. Courts may also order that personal or real property be preserved pending trial when it is the subject of the litigation.

13 Remedies

What substantive remedies are available?

Monetary awards can be awarded as compensatory damages. Damage awards generally attract both pre- and post-judgment interest.

In breach of contract cases, courts have the power to award specific performance in lieu of damages if an award of damages would be inadequate to compensate the plaintiff for its loss. For example, specific performance may be ordered for breach of a contract for the sale of a unique good or real property. For real property, specific performance is no longer granted as a matter of course by Canadian courts absent evidence that the real property is unique such that a substitute would not be readily available.

A court may issue a declaratory judgment confirming or denying the legal right of an applicant. The court has the power to issue such an order regardless of whether any consequential relief, such as damages or an injunction, is or could be claimed along with the request for a declaration.

Punitive damages are available in Canada, but they are considered an exceptional remedy. As such, punitive damages have been awarded only in very limited circumstances, and the amount of such awards has generally been modest.

14 Enforcement

What means of enforcement are available?

There are various tools available for enforcing monetary awards. For example, a writ of seizure and sale can be obtained and then enforced through the sheriff's office. A judgment can also be enforced by garnishing the judgment debtor's wages or bank accounts.

Where a party intentionally disobeys a court order, a motion can be brought to find them in contempt of court. Contempt must be established beyond a reasonable doubt as the available punishments can be serious, including imprisonment or payment of a fine.

15 Public access

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

Openness is a fundamental principle of the court system in Canada. Court filings are typically accessible to the public. In Ontario, court filings are not electronically available and must be obtained by manual search.

The Supreme Court of Canada offers a real-time webcast of its proceedings, and briefs of legal argument prepared by the parties are typically made available on the Supreme Court's website.

Parties may enter into confidentiality agreements to maintain confidentiality over documents and evidence; however, the court is not bound to follow the terms of a private confidentiality agreement. Generally, once evidence is filed in court, a party must satisfy a strict test to obtain a sealing order for evidence, including that such an order is necessary to prevent a serious risk to an important interest, which can include a commercial interest.

16 Costs

Does the court have power to order costs?

Generally speaking, the winning party is entitled to recover some but not all of its legal costs from the unsuccessful party, including attorneys' fees and disbursements. The court retains a broad discretion to award or deny costs as it sees fit. In a 2017 decision, the Court of Appeal for Ontario confirmed that courts possess inherent jurisdiction to order a non-party to litigation to pay costs. Such an outcome is a rarity, and is reserved for exceptional cases in order to prevent misconduct amounting to an abuse of a court's process by the non-party.

In Ontario, costs awards are typically made on a 'partial indemnity' basis, which represents approximately 50 to 60 per cent of actual costs.

In certain circumstances, such as where one party acted improperly or where a party made a written offer to settle that was not accepted and would have been more favourable than the result obtained at trial, the court may award costs on a 'substantial indemnity' basis. Substantial indemnity costs awards are higher than those on the partial indemnity scale, but still do not amount to a full recovery of legal fees.

A party can obtain an order requiring the other party to pay security for costs in limited circumstances. Circumstances can include where the plaintiff is ordinarily resident outside of Ontario or where the plaintiff is a corporation with insufficient assets in Ontario to pay the costs of the defendant.

17 Funding arrangements

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 fees are generally permitted across the country, subject to certain safeguards and limitations. In Ontario, these safeguards include a prohibition on contingency fee arrangements in criminal, quasi-criminal or family law matters and a requirement to ensure that all such agreements are documented in writing. Contingency fee arrangements are most often used by plaintiff's counsel in class action and personal injury cases.

Third-party funding of litigation, in which the funder takes a portion of any recovery, is not categorically illegal; however, third-party funding arrangements will be closely scrutinised in the context of class action lawsuits. While Ontario courts have demonstrated a willingness to allow funding agreements in some class actions, they have insisted that such agreements be judicially approved.

In the context of class actions, Ontario has a statutorily established fund, known as the Class Proceedings Fund, from which funding may be sought in exchange for a levy of 10 per cent of any awards or settlements in favour of the plaintiffs, plus a return of any disbursements funded. Funding is not automatic; plaintiffs must apply for support and a committee will make a determination based on factors including an assessment of the strength of the case and the scope of the public interests involved.

18 Insurance

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

Insurance can be obtained privately although it is not commonly used.

19 Class action

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

Class actions are now a major part of the legal landscape in Canada. All provinces, except Prince Edward Island, have formal class proceedings legislation.

All class proceedings legislation requires the proposed representative plaintiff to bring a motion for judicial certification of the proceeding as a class proceeding. In Ontario, the representative plaintiff must demonstrate that five criteria are met in order to achieve certification. First, the claim must disclose a cause of action, which is a low bar and does not involve a weighing of any evidence. Second, there must be an identifiable class. Third, there must be common issues. Fourth, a class action must be the preferable procedure for the resolution of the common issues. Finally, the representative plaintiff must be appropriate and able to adequately represent the interests of the class.

Most class proceedings settle if a class is certified. A recent decision of the Court of Appeal for Ontario noted that, although class actions have now been around for almost 25 years in Ontario, there have been fewer than 20 common issues trials – although it appeared to actively encourage more such trials. Settlement agreements in class proceedings require court approval. If there is no settlement, the class proceeding will eventually proceed to a common issues trial. A judgment on the common issues will bind the defendant and all class members.

Update and trends

In 2014, the Supreme Court of Canada released a decision known as *Sattva Capital* that clarified the standard of review (ie, the level of deference) that an appellate court should apply in reviewing decisions involving the interpretation of contracts. *Sattva Capital* held that, generally speaking, a ‘deferential’ standard of review should apply. In a 2016 decision known as *Ledcor*, however, the Supreme Court clarified that in the case of standard form contracts (sometimes referred to as contracts of adhesion), a less deferential ‘correctness’ standard of appellate review may be appropriate where the contractual provision being scrutinised is of precedential value and there is no meaningful ‘factual matrix’ that would be of assistance in interpreting the provision in issue.

20 Appeal

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

Generally, the losing party in Ontario has a right of appeal to the Court of Appeal for Ontario from a final determination made by a court of first instance, such as a trial court. In some circumstances, depending on the nature of the dispute or the particular governing statute in issue, the ability to appeal is circumscribed and it is necessary to first seek leave, or permission, to commence an appeal.

Appeals beyond the provincial courts of appeal are more limited. There are very few instances in which a litigant can appeal as of right to the Supreme Court of Canada. For most cases, leave to appeal must be granted by the Supreme Court of Canada before it will hear the appeal itself. The Supreme Court determines whether to grant leave based on whether the question is an issue of national importance or relates to law that is developing inconsistently in different jurisdictions across the country.

There is usually no right of appeal from interlocutory (non-final) decisions and the appellate court must first grant leave. Beginning in 2015, motions in Ontario for leave to appeal an interlocutory decision are determined solely by written material, without the attendance of parties or lawyers.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

A party seeking to enforce a foreign judgment in Canada will typically seek enforcement from a Superior Court in the province or territory in which the defendant has assets.

To be enforceable in Canada, a foreign judgment must have been issued by a court properly exercising jurisdiction and the foreign judgment must be final and conclusive. When determining whether there was a proper exercise of jurisdiction, the Canadian court will look at whether there was a ‘real and substantial connection’ between the foreign court and the defendant or the subject matter of the foreign proceeding. The Supreme Court of Canada has confirmed that there is no need for a ‘real and substantial’ connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings. A judgment is considered final and conclusive if it can no longer be rescinded by the issuing court. A pending appeal to another court or an unexpired time period in which to appeal will generally not affect the finality of a judgment.

Canadian courts will not enforce foreign judgments that are for penalties or taxes, or that are based on foreign public laws. Canadian courts will not, for example, enforce foreign civil or criminal contempt orders. In deciding whether or not to enforce non-monetary judgments, courts will consider additional factors, such as the territorial scope of the order, whether enforcement of the order would require the Canadian court to interpret foreign law, and whether enforcement would place a burden on Canadian judicial resources.

The most commonly recognised defences to enforcement of foreign judgments are fraud, denial of natural justice and public policy.

Claimants seeking to enforce foreign judgments in Canada need to be aware of limitation periods. The time limit to seek enforcement of foreign judgments in Canada is governed by provincial limitation statutes, which will typically begin to run on the day the claim was

discovered. For enforcement of foreign money judgments, this will usually be the date the claimant knew or ought to have known that the defendant had assets in a Canadian province or territory. Once a foreign judgment has been recognised by a Canadian court, it may be enforced in the same manner as a domestic judgment, such as through seizure and sale of property.

22 Foreign proceedings

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

Foreign litigants can use letters rogatory to obtain documentary evidence or oral testimony from witnesses in Ontario. Before a court in Ontario will enforce a request from a foreign court for assistance in obtaining evidence for the foreign proceeding, the applicant must satisfy the following criteria:

- the evidence sought is relevant;
- the evidence sought is necessary for trial and will be adduced at trial, if admissible;
- the evidence is not otherwise obtainable;
- the order sought is not contrary to public policy;
- the documents sought are identified with reasonable specificity; and
- the order sought is not unduly burdensome, bearing in mind what the relevant witnesses would be required to do, and produce, if the action was tried in Ontario.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

International arbitrations are governed by provincial (or, in a narrow range of cases, federal) statute, most of which have largely adopted the UNCITRAL Model Law on International Commercial Arbitration. In Ontario, international commercial arbitration law is based on the Model Law, as implemented through the province’s International Commercial Arbitration Act, 2017.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements do not need to be in writing under Ontario’s Arbitration Act, 1991. The International Commercial Arbitration Act, 2017 requires that an arbitration agreement be in writing. However, an arbitration agreement will be deemed to be in writing if its content is recorded in any form, regardless of how the arbitration agreement was concluded. An arbitration that would otherwise be governed by the International Commercial Arbitration Act, 2017 but for the fact that the arbitration agreement is not in writing will be governed by the Arbitration Act, 1991.

An arbitration agreement is any agreement whereby parties agree to submit a dispute or potential dispute between them to arbitration. It can be an independent agreement or a clause in a broader agreement.

25 Choice of 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 arbitration agreement does not specify the number of arbitrators then Ontario’s Arbitration Act, 1991 provides that there will be one arbitrator. It also permits a party to apply to the court to have an arbitrator appointed if the arbitration agreement does not provide for an appointment procedure or the parties have been unable to agree on an arbitrator.

If the dispute is an international commercial arbitration, the International Commercial Arbitration Act, 2017 applies. The Act provides for three arbitrators in the event the parties have not agreed to a different number.

The ability to challenge the appointment of an arbitrator is limited to challenges to the arbitrator's qualifications, independence or impartiality.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Ontario benefits from a deep pool of arbitrators with commercial litigation experience. Many of the established arbitrators are former judges from all levels of the judiciary and many are senior commercial litigators, with both domestic and international experience. The quality and depth of the arbitrator pool in Ontario is sufficient to meet the needs of complex arbitration.

27 Arbitral procedure

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

The parties are generally free to agree on procedural requirements for the arbitration or to have the procedure left for the arbitrator to determine. Both the Arbitration Act, 1991 and the International Commercial Arbitration Act, 2017 provide general guidance on procedure for arbitral tribunals to consider, but with limited exceptions, they are not requirements.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Courts may intervene during an arbitration, on a party's application, for the following reasons: to appoint an arbitrator; to remove an arbitrator; to appoint a substitute arbitrator; to award interim relief; to consolidate or stay an arbitration when there are two or more arbitration proceedings; to review certain decisions by arbitrators regarding their jurisdiction; to assist the parties or the arbitrators in the taking of evidence; to set aside or overturn an arbitral award on appeal; and to recognise and enforce an arbitral award.

Parties to an arbitration may also seek the court's direction on procedural matters and to extend time limits.

The court's powers can be overridden to some extent by agreement, but the parties likely cannot override all of the grounds on which the court may intervene.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Arbitrators are empowered to grant interim relief, including injunctive relief and disclosure orders, but that power is generally limited to relief directed at the parties to the arbitration and with respect to the subject matter of the dispute. Arbitrators cannot grant *Mareva* injunctions to

preserve assets held by third parties or compel disclosure by third parties without the court's assistance.

30 Award

When and in what form must the award be delivered?

The award must be in writing, must be signed by the arbitrator or arbitrators, and must state the reasons on which it is based, unless the parties have agreed otherwise. There are no default deadlines for delivering the award; however, the arbitration agreement may address the timing for delivery of an award. Typically, an arbitration award will be delivered quicker than a court judgment.

31 Appeal

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

For international commercial arbitrations, the only recourse against an arbitral award is an application to the court to set it aside. To succeed, an applicant in Ontario must prove that:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or if there was no choice of law in the parties' agreement, under the law of Ontario;
- 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 its case;
- 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;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of Ontario; or
- the award is contrary to public policy.

For domestic arbitrations in Ontario, the Arbitration Act, 1991 provides that a party may seek leave to appeal an arbitral award to the court on a question of law where the arbitration agreement is silent with respect to appeals on questions of law. The Arbitration Act, 1991 also permits the parties to contract in to a right to appeal without leave of the court on questions of law, fact or mixed fact and law, or to contract out of any appeal rights (including the right to seek leave to appeal).

In Ontario, appeals from applications to set aside an award, or from appeals to the court, go to the Court of Appeal for Ontario, and from there (with leave) to the Supreme Court of Canada.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Domestic and foreign arbitration awards must be recognised and enforced through an application to the courts. An arbitral award that

Lax
O'Sullivan
Lissus
Gottlieb

Shaun Laubman
Ian Matthews

slaubman@counsel-toronto.com
imatthews@counsel-toronto.com

Suite 2750
145 King Street West
Toronto
Ontario M5H 1J8
Canada

Tel: +1 416 598 1744
Fax: +1 416 598 3730
www.counsel-toronto.com

is recognised by the courts can be enforced in the same way as a judgment or order of the court.

33 Costs

Can a successful party recover its costs?

Generally, a successful party can recover at least a portion of its legal costs and the costs of the arbitration; however, the parties can agree on how costs are to be dealt with in the arbitration agreement. Unless the parties agree otherwise, the approach to awarding costs in arbitrations is generally consistent with the approach followed by the courts, as described above.

Alternative dispute resolution

34 Types of ADR

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

All forms of ADR – including mediation and arbitration – are widely employed in all provinces of Canada. ADR is generally viewed by litigants and the courts as a complement to Canada’s judicial system.

35 Requirements for ADR

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 some provinces, such as Ontario, mediation is a mandatory requirement for civil cases commenced in particular locations, such as Toronto. In these jurisdictions, parties must mediate their dispute before they can obtain a trial date. It is also common for judges to informally encourage the parties to mediate as the case progresses.

There is no requirement for parties to arbitrate unless they have entered into an arbitration agreement.

Miscellaneous

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

No.

Canada – Quebec

James A Woods, Christopher L Richter, Marie-Louise Delisle and Léanie Cardinal

Woods LLP

Litigation

1 Court system

What is the structure of the civil court system?

One judge of the Superior Court hears in first instance every suit that is not assigned exclusively by a specific provision of the law to another court such as the Court of Quebec or the Federal Court of Canada. Judges of the Superior Court are appointed by the federal government. The Superior Court has a Commercial Division in Montreal that hears matters relating to bankruptcy, insolvency, company law and securities law, among other things.

The Court of Quebec is a court of first instance for criminal, penal, civil and youth matters. Judges of the Court of Quebec are appointed by the provincial government, and sit alone when hearing matters in first instance. In civil matters, the Court of Quebec has jurisdiction to the exclusion of the Superior Court when the claim is for a sum or value of less than C\$85,000.

Specialised governmental agencies established under federal or provincial legislation (administrative tribunals) have special jurisdiction to implement legislative policy and to hear cases on specific subject matters.

The Quebec Court of Appeal is the highest court in Quebec and usually sits in panels of three judges. It has an appellate jurisdiction throughout Quebec, over all causes, matters or things appealed from the Superior Court or the Court of Quebec.

The Federal Court of Canada has concurrent original jurisdiction with the Quebec courts in certain areas, such as admiralty law, remedies under copyright, trademark and industrial design laws and claims against the federal government, and exclusive original jurisdiction in certain other areas (such as corrections to the Patent Registry and other such federal registries, judicial review of federal officials and administrative tribunals, and immigration appeals). An appeal from the Federal Court exists as of right on most matters to the Federal Court of Appeal.

A judgment of the Quebec Court of Appeal or the Federal Court of Appeal in a civil matter may be reviewed by the Supreme Court of Canada only with leave to appeal given in cases involving a question of public importance or raising an important issue. The Supreme Court has a chief justice and eight other judges, all appointed by the federal government.

2 Judges and juries

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

Judges generally have a passive role, especially in the context of the hearing on the merits (trial). Judges must rely on the proof established by the parties at trial to make a decision. However, there are some exceptions to the passivity of the judge, which may be exercised in exceptional circumstances: a judge can order the proof of specific facts, summon witnesses, appoint an expert, order the production of certain documents or order attendance at the scene in order to make observations.

Judges also have the power to oversee the judicial process, particularly through the exercise of pretrial case management powers, an area in which judges tend to be much more active.

Judges of the Supreme Court of Canada, the Court of Appeal and the Superior Court of Quebec are appointed by the federal government

from persons who are or have been judges of a superior court or a barrister or advocate of at least 10 years' standing.

Judges of the Court of Quebec are appointed from among advocates having at least 10 years' practice. Where there are vacancies, an application and review process is held allowing interested persons to submit their candidature.

There currently are reforms to the federal judicial appointment process that will strengthen the selection process and the role of Judicial Advisory Committees, as well as promote the identification of a diverse pool of jurists in order to make the judiciary more representative of Canada's diverse population.

There is no jury in civil proceedings.

3 Limitation issues

What are the time limits for bringing civil claims?

The limitation periods for a civil action in Quebec include:

- one year – action for defamation, running from the day on which the defamed person learned of the defamation; application by a surviving spouse to fix a compensatory allowance, running from the death of his or her spouse; an action to retain or obtain possession of real estate, running from the disturbance or dispossession;
- three years – action to enforce a personal right or moveable real right for which the prescriptive period is not otherwise established; and
- 10 years – action to enforce immovable real rights; execution of a judgment; otherwise determined by law.

The parties may suspend these periods by agreement for a duration of no more than six months, and may renounce the benefit of any time already passed.

4 Pre-action behaviour

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

Before filing a civil action, the plaintiff or the plaintiff's attorney should place the debtor in default by writing a formal demand requiring the debtor to execute his or her obligation within a certain time period. If, after being put in default, the debtor still does not perform such obligation, the plaintiff may file an action. In some cases, the debtor can be in default by the sole operation of the law, which means that the plaintiff can take action without a formal demand.

There is a limited procedure available for conservation of proof before proceedings are commenced, and the court can authorise seizure before judgment of property or evidence in certain circumstances. Similarly, though disclosure obligations usually arise from the commencement of an action, a *Norwich* order, which is an extraordinary remedy compelling the pre-action discovery of a third party, may be requested in order to obtain such information before commencing an action.

Pre-court protocols have recently been introduced and are subject to the appreciation of the court. Parties must consider private prevention and resolution processes (eg, arbitration, mediation or negotiation) before referring their dispute to the courts.

5 Starting proceedings

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 filing an originating application. This application sets out the facts on which the action is based and the conclusions sought. It is served on each defendant by a bailiff. The defendant has 15 days from service to answer the application and indicate whether he or she intends to oppose it or pursue alternative dispute resolution processes.

The courts are experiencing capacity issues affecting their ability to list disputes in a timely manner and leading to problems in regard to access to justice. The new rules of civil procedures are aimed at improving access to justice and encourage private prevention and resolution processes before parties refer their disputes to the court and during the litigation process. Moreover, the Quebec government is currently considering increasing the budget allocated to Quebec's judicial system in order to increase judicial resources and decrease waiting times to obtain dates for interlocutory motions and trials.

6 Timetable

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

Within 45 days from the service of the originating application, the parties are required to cooperate to either arrive at a settlement or establish a case protocol where they set out in detail their agreements and undertakings regarding the orderly progress of the proceeding. They must agree on specific pretrial steps and the time required to complete them, all within the six-month peremptory time limit for setting the case down for trial and judgment. However, the parties can file a motion to extend this six-month deadline.

Some originating applications, such as applications for homologation or for judicial review, must be presented before the court at a specified date. However, it is possible for the parties to agree on a different presentation date and, in urgent situations, for the court to decide on a different date.

Grounds of defence are typically disclosed in a succinct text included in the case protocol. Leave may be obtained to file a more detailed written defence where the case presents a high level of complexity or where special circumstances warrant.

7 Case management

Can the parties control the procedure and the timetable?

Parties generally have control of their case with regard to the choice of procedure and the time limits prescribed, subject notably to the principles of proportionality and cooperation. The case protocol covers, inter alia, preliminary exceptions and safeguard measures, procedure and time limits for the communication of exhibits, the number, timing and length of examinations on discovery, expert appraisals, any planned or foreseeable incidental proceedings, the oral or written form of the defence and the time limit for its filing. However, the court may intervene to facilitate the progress of the proceedings and to ensure proper management of the case, particularly if the parties are unable to agree upon the case protocol or seek an extension of the six-month limit to set the case down for trial and judgment.

The number and length of examinations on discovery are typically limited. Where expert evidence is necessary, the parties must jointly seek the opinion of a single expert on a given matter, or submit their reasons for not doing so to the assessment of the court.

8 Evidence – documents

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

All exhibits to which a party intends to refer at the hearing must be communicated to all parties. Exhibits supporting a written proceeding must be disclosed in a notice attached to the proceeding. The procedure and the time limits for communicating exhibits are determined by the parties in the case protocol. Documents that a party does not

intend to use at trial need not be disclosed to the adverse party unless requested during discovery.

There are rules against spoliation of evidence pending trial, and parties are duty-bound to cooperate and make sure that relevant evidence is preserved.

9 Evidence – privilege

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

A party cannot obtain the communication of documents that are privileged, unless the privilege is waived. For example, confidential communications between a lawyer and his or her client for the purpose of obtaining legal advice are generally privileged, including such communication with an in-house lawyer. Other communications may be privileged, such as those concerning negotiations of out-of-court settlements and information prepared or collected principally in contemplation of anticipated or ongoing litigation. Confidential documents may also be afforded certain protections, but such substantial and legitimate interests are analysed on a case-by-case basis.

10 Evidence – pretrial

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

The parties and their attorneys have the right to conduct oral or written examinations on discovery of the adverse parties, their representatives or any other person. The consent of the other parties or a judge's authorisation may be necessary in some cases. Before or during the examination, the attorneys may ask for the communication of relevant documents relating to the issues. Any expert's report must be communicated to the other party before the matter is set down for trial. Experts generally are not discoverable prior to trial.

11 Evidence – trial

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

Ordinary witnesses provide oral testimony at trial. However, a written statement may be accepted as testimony by the courts subject to certain conditions, especially when the testimony is of secondary interest or uncontested. Other parties may demand that the party having communicated the statement summon the witness to the hearing.

An expert report is expected to be self-standing and constitute the essence of the testimony in chief of the expert witness. Except with leave of the court, the communication and filing of the expert's report are necessary before an expert witness will be permitted to testify. Parties adverse in interest have a right to cross-examine the expert witness, and the party summoning him or her may request that some oral testimony be given in chief or counter-proof as a matter of clarification.

All exhibits previously communicated to the adverse parties must be produced in evidence by a witness according to the rules of evidence, or admitted by the adverse party.

12 Interim remedies

What interim remedies are available?

The Code of Civil Procedure authorises the plaintiff to seize before judgment the property of the defendant with leave of the court. This measure will be permitted by the court if there is reason to fear that without this remedy the recovery of the debt may be put in jeopardy. A plaintiff may also seize before judgment, without leave, property over which he or she has specific rights set out by law. Seized property is put in the hands of a guardian chosen by the officer charged with the seizure.

In addition, courts may grant interlocutory injunctions. An interlocutory injunction will be granted if the applicant appears to be entitled to it, and it is considered to be necessary in order to avoid serious or irreparable injury to him or her, or to avoid a factual or legal situation of such a nature as to render the final judgment ineffectual. The court will also consider the balance of convenience and the urgency of the situation. Both *Anton Piller* and *Mareva* injunctions are also available in Quebec.

These remedies may be available in support of foreign proceedings.

13 Remedies

What substantive remedies are available?

Courts have the power to order specific performance and to award monetary damages such as compensatory and punitive damages, when available, and to make appropriate orders to deal with cases for which no specific remedy is provided by law. Specific performance is a primary remedy under the Civil Code of Quebec, and the court may issue mandatory orders, injunctions or reprimands, suppress writings or declare them libellous, etc.

In general, a money judgment bears interest from the date of default. The interest may be charged at the rate stipulated in the contract or, if no rate is stipulated, at the legal rate together with an additional indemnity.

14 Enforcement

What means of enforcement are available?

Once the decision is enforceable, the judgment creditor has to follow the procedure for compulsory execution. A judgment must be executed by a bailiff pursuant to a notice of execution, who will seize the debtor's property in the name of the judgment creditor. The procedure will vary depending on the type of property being seized (such as real or personal property, wages, securities). In the case of a real action, procedures exist to allow the judgment creditor to take possession of the property of which he or she has been declared owner, and to be registered as owner.

A party who disobeys any process or order of the court may be guilty of contempt of court. This person is liable to a maximum fine of C\$10,000 per day, or C\$100,000 per day for legal persons or partnerships, or to imprisonment for a maximum period of one year, in addition to damages in certain circumstances.

15 Public access

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

Court hearings are public and the documents filed with the courts are accessible to the public. However, exceptionally, courts have the discretion to order in camera proceedings or the sealing of documents when required to protect morality, public order, or substantial and legitimate interests such as trade secrets. Furthermore, in family matters including protection of minors, court hearings are held in camera unless the court orders otherwise in the interests of justice.

16 Costs

Does the court have power to order costs?

The losing party may be ordered to pay legal costs. However, the court has discretion to reduce or refuse such an award of costs, or even order the winning party to pay them in whole or in part.

Recoverable legal costs may include the disbursements that were paid to file certain written pleadings with the clerk of the court, to indemnify witnesses and expert witnesses for their time and for the preparation of their reports, and to pay the expenses for stenography or the recording of the hearing. In general, the recoverable costs do not include extrajudicial expenses or fees such as attorneys' fees.

Claimants from outside Quebec are commonly required to provide security for the defendant's judicial costs.

17 Funding arrangements

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?

Subject to certain exceptions, there is no prohibition regarding private agreements for the payment of expenses incurred during a lawsuit, and both contingency and conditional fee arrangements are common. At present, quota litis agreements appear to be valid in Quebec, except in

a few circumstances (for instance, in alimony claims in family matters) where they have been declared against public order.

Where litigious rights are sold, the person from whom they are claimed is fully discharged by paying to the buyer the sale price, costs and interest.

18 Insurance

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

Insurance for legal expenses is available as a private insurance policy but is not widely used.

19 Class action

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

The institution of a class action requires the authorisation of the court, which will be granted when the court is satisfied that:

- the recourses of the members raise identical, similar or related questions of law or fact;
- the facts alleged seem to justify the conclusions sought;
- the composition of the group makes it difficult or impracticable to proceed by joining individual lawsuits or obtaining mandates from each claimant; and
- the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

These criteria are interpreted liberally in favour of the authorisation of the proposed class action.

With the authorisation of the court, the representative of the group conducts the class action in accordance with the ordinary rules of procedure. Class actions are widely used in cases involving consumer protection, including product liability and securities law.

20 Appeal

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

A final judgment from the Superior Court or the Court of Quebec may be appealable to the Quebec Court of Appeal.

Leave to appeal will be required, notably, where:

- the value of the object of the dispute is less than C\$60,000;
- the judgment or order rendered concerns a non-contentious matter;
- the judgment rendered denies an application for forced or voluntary intervention of a third person;
- the judgment rendered rules on legal costs awarded to punish a substantial breach;
- the judgment or order rendered rules on a motion to quash a seizure before judgment;
- the judgment or order is rendered on an issue of execution;
- the judgment or order rendered concerns judicial review; or
- the judgment dismisses an action because of its abusive nature.

A judge of the Quebec Court of Appeal will grant leave to appeal if the matter at issue is a question of principle, a new issue or a question of law that gives rise to conflicting judicial precedents.

Furthermore, an interlocutory order may be appealed with leave when it decides in part the merits of the case, orders the doing of anything that cannot be remedied by the final judgment or when it unnecessarily delays the trial of the suit. However, an appeal from an interlocutory judgment dismissing an objection to evidence based on disclosure of privileged information is appealable as of right.

The appeal must generally be brought within 30 days of the date of the judgment at first instance.

A judgment of the Quebec Court of Appeal in a civil matter may be reviewed by the Supreme Court of Canada only with leave to appeal given in cases involving a question of public importance or raising an important issue.

Update and trends

The latest dispute resolution reform took effect with the entry into force of the new Code of Civil Procedure on 1 January 2016. Since then, the Quebec courts have applied and interpreted new procedural provisions. The judges now have greater powers to manage cases, in particular to ensure that the parties comply with the principles of proportionality and cooperation which are at the heart of the new Code of Civil Procedure. For example, judges may reduce the number of examinations and expert opinions required, and take abuses of procedure or undue delays caused by a party into account when apportioning costs between the parties.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

For the recognition of foreign judgments, the court verifies whether the decision meets the requirements prescribed in the Civil Code of Quebec without entering into any examination of the merits of the decision. According to the Civil Code of Quebec, a foreign judgment will be recognised, except in the following circumstances:

- the tribunal of the country where the decision was rendered had no jurisdiction under the provisions of the Civil Code of Quebec;
- the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
- the decision was rendered in contravention of the fundamental principles of procedure;
- a dispute between the same parties, based on the same facts and having the same object, has given rise to a decision rendered in Quebec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Quebec authority that was first seized of the dispute, or has been decided in a third country and the decision meets the necessary conditions for recognition in Quebec;
- the outcome of the foreign decision is manifestly inconsistent with public order as understood in international relations; or
- the decision enforces obligations arising from the taxation laws of a foreign country.

Furthermore, a foreign judgment may not be recognised if the decision was rendered by default, unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defendant in accordance with the law of the place where the decision was rendered.

22 Foreign proceedings

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

Foreign litigants may be allowed to obtain evidence from Quebec witnesses, under certain conditions, when it is shown that a court of a foreign country before which a case is pending desires to have such evidence. This is shown by the presentation of letters rogatory from the foreign court. There are restrictions concerning obtaining business records and removing them from Quebec.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Arbitration in Quebec is governed by the Civil Code of Quebec and the Code of Civil Procedure, which are based on the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The Civil Code of Quebec specifies that an arbitration agreement must be in writing to be enforceable. This requirement is satisfied if, in an exchange of communications or during judicial proceedings, the

parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

25 Choice of 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 an arbitration agreement is silent concerning the nomination of the arbitrator, there will be one or three arbitrators: the parties will jointly agree on an arbitrator, or each party will appoint an arbitrator who will then together appoint the third. The court will appoint an arbitrator when one of the parties fails to nominate an arbitrator within 30 days after having been notified to do so or when the arbitrators fail to concur on the choice of the third arbitrator within 30 days after their appointment.

A procedure is specified to challenge the appointment of an arbitrator if a cause of recusation exists, such as if the arbitrator does not have the qualifications agreed to by the parties.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Arbitrators must be impartial and unbiased. The parties usually choose the arbitrator (or arbitrators) in light of the specific areas of law or fact involved, the location of the parties, and the experience of the arbitrator. Arbitrators are often lawyers, but no specific accreditation or training is required. Many former judges and senior members of the Bar offer their services as arbitrators.

Arbitral institutions that are active in Quebec include the Canadian Commercial Arbitration Centre, the Institut de Médiation et d'Arbitrage du Québec, the ADR Chambers, and the Association of Maritime Arbitrators of Canada. These organisations have directories of members who may serve as arbitrators. Many law firms also have partners or counsel who act as arbitrators.

27 Arbitral procedure

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

The procedure to be followed is determined in the arbitration agreement or by the arbitrators, failing which the Code of Civil Procedure provides for the basic procedure. These rules concern the nomination of arbitrators, the statement of the parties' claims, the communication of exhibits, the notice of the date of the hearing, the summoning of witnesses, the consequences of the default of a party and the form of the award.

28 Court intervention

On what grounds can the court intervene during an arbitration?

If requested by one of the parties, a court may intervene during arbitration proceedings to grant provisional measures, to assist in the appointment or recusation of the arbitrators, to decide on the competence of the arbitrators after the arbitrators have determined the issue, to homologate an arbitration award or to annul it. The power of the court with respect to homologation or annulment of the arbitration award may not be overridden by an arbitration agreement. The arbitrator, or a party with leave of the arbitrator, may request the assistance of the court to obtain evidence.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Subject to the terms of the arbitration agreement, the arbitrators have all the necessary powers for the exercise of their jurisdiction, including the power to render safeguard, interlocutory and accessory decisions. This would include the power to make orders to preserve assets or documents, subject to the jurisdiction of the Superior Court to issue

injunctions, authorise seizures before judgment and appoint judicial sequestrators.

30 Award

When and in what form must the award be delivered?

The arbitration award must be written and signed by the arbitrators. The reasons upon which the award is based must be stated unless there are specific stipulations to the contrary in the arbitration agreement.

31 Appeal

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

There is neither appeal nor judicial review against an arbitration award. The only recourse possible is annulment. For an annulment, it is necessary to file a motion to the court within three months following the reception of the arbitration award or to oppose the motion for homologation of the arbitration award. The grounds for annulment are similar to the grounds for refusing homologation, which are described below.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

A foreign or domestic arbitration award cannot be executed unless it is homologated by a court. For the homologation of the award, courts do not inquire into the merits of the dispute. Courts must homologate an award unless:

- one of the parties was not qualified to enter into the arbitration agreement;
- the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Quebec;
- the party against which the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreements;
- the mode of appointment of the arbitrators or the applicable arbitration procedure was not observed; or
- in the case of a foreign award, it has not yet become binding on the parties or has been set aside or suspended by a competent authority of the place or pursuant to the laws of the place in which the arbitration award was made.

The court can also refuse homologation of its own motion if it finds that ‘the matter in dispute cannot be settled by arbitration in Quebec or that the award is contrary to public order’.

The homologated arbitration award is executed as a judgment of the court.

33 Costs

Can a successful party recover its costs?

In general, subject to the terms of the arbitration agreement, arbitrators have discretion to award costs. Arbitrators are not required to divide the costs equally among the parties.

Recoverable costs are usually established in the arbitration agreement.

Alternative dispute resolution

34 Types of ADR

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

In Quebec, arbitration and mediation are common. At any stage of the proceeding, the Code of Civil Procedure provides that the parties may request the designation of a judge to preside over a settlement conference. This settlement conference will facilitate dialogue and help them identify their interests, negotiate and explore solutions. If the parties reach a settlement, it will be homologated by the judge. Private mediation and arbitration services are widely available.

35 Requirements for ADR

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?

Participation in an ADR process is always voluntary, but parties must consider private prevention and resolution processes before referring their dispute to the courts. In family matters, attendance at an information session about mediation is mandatory.

In addition, the court may recommend participation in mediation in any matter. They may do so at the time of the presentation of the action or application after examining the questions at issue.

Miscellaneous

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

Unlike other Canadian provinces, relations between private parties are generally governed by the Civil Code of Quebec according to rules originally inspired from the French civil law tradition. The judicial and procedural law of Quebec is derived from a mix of French, English and other legal traditions. Quebec has a notarial profession based upon the civil law tradition.



James A Woods
Christopher L Richter
Marie-Louise Delisle
Léanie Cardinal

jwoods@woods.qc.ca
crichter@woods.qc.ca
mldelisle@woods.qc.ca
lcardinal@woods.qc.ca

2000 McGill College Avenue, Suite 1700
Montreal
Quebec H3A 3H3
Canada

Tel: +1 514 982 4545
Fax: +1 514 284 2046
www.litigationboutique.com

Cayman Islands

Guy Manning, Mark Goodman and Kirsten Houghton

Campbells

Litigation

1 Court system

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 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 (approximately US\$24,500) 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, 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 Privy Council in London.

2 Judges and juries

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

Proceedings in the Grand Court 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. Section 21 of the Judicature Law provides that a party may apply to the Court 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 Law 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.

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), and 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.

3 Limitation issues

What are the time limits for bringing civil claims?

The Limitation Law 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.

4 Pre-action behaviour

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.

5 Starting proceedings

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 cases are commenced by the issue of a writ by the plaintiff. Certain kinds of cases are 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). Originating process must generally be served personally by delivery to the hands of the individual. 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 in order to ensure that sufficient judges are available. The most pressing issue concerning the capacity of the courts is lack of

sufficient and adequate courtrooms. It is acknowledged by government that additional modern court facilities are required, and a consultation process has recently been undertaken to assess the requirements for judicial accommodation; however, no firm proposals for the provision of new space have yet been formulated. Regrettably, it seems unlikely that new facilities will be available for some time.

6 Timetable

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 indorsed on the writ, or presented as a separate document (known as a 'pleading'). If the statement of claim is not indorsed 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 indorsement). Once the writ is served, the defendants have 14 days (or longer if the writ is served abroad) to file an acknowledgment 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 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 multiparty 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.

7 Case management

Can the parties control the procedure and the timetable?

To a large extent, they can. 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.

8 Evidence – documents

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

Cayman Islands litigation is based on the pre-1999 English procedures, and preservation and discovery of relevant documents forms an important part of the 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.

9 Evidence – privilege

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 professional 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), incriminating documents, documents which would be injurious to the public interest, and 'without prejudice' communications. 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) Law, 2016, may not be disclosed without the permission of the party to whom the confidence attaches, unless the Court orders otherwise.

10 Evidence – pretrial

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, for the composition of a joint statement of experts of like discipline, to set out areas on which they are agreed, 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.

11 Evidence – trial

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 by video link or Skype. 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). Then the witness will be cross-examined by opposing counsel, and his or her party's counsel may ask questions in re-examination, in order to seek to clarify or correct matters that have arisen in cross-examination.

12 Interim remedies

What interim remedies are available?

A broad range of interim remedies is available, including freezing injunctions, *Anton Piller* (search) orders, and orders for interim payments. As a result of a series of cases in the Grand Court, in 2015 the Grand Court Law and Rules were amended to provide that the Court may now grant interim relief in the absence of substantive proceedings in the Islands 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 in order to protect assets or prevent mismanagement pending the hearing of the winding-up petition.

13 Remedies

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 Law.

Corporate insolvency procedures may lead to winding-up orders, or a range of alternative orders pursuant to section 95(3) of the Companies Law, 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.

14 Enforcement

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 debts owed 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. Winding-up or bankruptcy proceedings can also be started using a judgment debt (and on other grounds).

15 Public access

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 are held in open court and are accessible by the public. 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. A recent practice direction permits the clerk of the court to determine such 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.

16 Costs

Does the court have power to order costs?

The Court has power to order costs, and has a 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. It also has power to order a defendant to provide security for the costs of a counterclaim.

The current costs regime was introduced in 2002, and has been amended (in matters of small detail only) from time to time, most recently in March 2016.

17 Funding arrangements

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 common law rules of champerty and maintenance are still in effect in the Cayman Islands. This means that, unless special precautions are taken, funding arrangements, which are quite common, can have adverse consequences for the funder and the party, such as the making of costs orders directly against the funder rather than the party, and enhanced requirements for security for costs.

There is currently no legislation concerning funding arrangements, which is a matter of concern due to the limited resources applied to government-sponsored legal aid and because it causes additional complications in insolvency matters.

Following the English model, parties have attempted to introduce types of funding arrangements privately, often in the form of 'conditional fee agreements' (if the claimant does not win the case, the attorneys take no payment, but if they do, the attorney takes his or her fees with a percentage uplift to compensate for the risk). Any such arrangement must be approved in advance by the Court. In ordinary civil claims, the matter was brought to a head by the decision of the Court of Appeal in 2012 in *Barrett v AG of the Cayman Islands* [2012] 1 CILR 127, where the Court held that a winning plaintiff could not recover the uplift from a paying defendant, or possibly even the amount of his or her basic fees. The Court of Appeal indicated that legislative reform was required to clarify the position. This has not yet occurred but, in December 2015, the Law Reform Commission published a discussion document and a draft Private Funding of Legal Services Bill. The Bill provides not only for contingency and conditional fee agreements but also for litigation funding agreements under which third parties can fund litigation in return for a share of the proceeds.

In an insolvency context, it is already permissible for a liquidator to apply to the court to sanction a conditional fee agreement for the payment of litigation attorneys' fees. In the recent decision of Hon Justice Andrew Jones QC in *In the matter of ICP Strategic Credit Income Fund Limited* [2014] 1 CILR 314 the question of litigation funding in a corporate insolvency context was considered in some detail. The judge held that there was nothing to prevent the liquidators from assigning the 'fruits of the action' to a third party. The liquidators were not entitled under the Companies Law to assign a cause of action that was personal to the company or to assign the proceeds of an action which had been vested in them in their role as liquidators (eg, a statutory preference claim). Such a claim did not form part of the company's property, which was limited to the property owned by the company at the time that it entered liquidation, and any assignment of the liquidator's fiduciary power would necessarily be contrary to public policy. Further, any funding agreement that gave the third party the ability to control the litigation, including by indirectly exerting undue influence or control, would be void on the grounds of maintenance and champerty. Such an agreement risked the integrity of the litigation process and, accordingly, corrupted public justice. The party who provided the funding must not, therefore, be entitled to terminate the contract, cease paying the legal fees or cease providing legal services. Further, it must not be able to insist upon the continuation of the legal claim if the liquidators no longer wish to pursue it, or demand payment for services already rendered should the liquidator decide to discontinue the action.

Aside from the above, all manner of different funding arrangements are now being utilised. Common arrangements in the insolvency context (with the approval of the Court) include those where the funder will advance funding at very attractive (to the funder) rates of interest and will also obtain a percentage of any damages or judgment sum recovered.

Pure contingency fee arrangements by which attorneys obtain a percentage of the recoveries in litigation remain illegal and contrary to public policy in Cayman Islands, although the Court will authorise liquidators to enter into such arrangements with foreign attorneys for the purpose of foreign proceedings, provided that they are permissible in the applicable foreign jurisdiction.

A draft bill concerning the private funding of litigation has been circulated for consultation. If enacted, it would (among other things) repeal the common law offences of maintenance and champerty and permit the use of contingency and conditional fee agreements in most types of case. However, (as yet unspecified) limits on the percentages recoverable in contingency fee agreements and the uplifts on fees recoverable in conditional fee agreements would be imposed, as would limits on the amounts payable to third-party funding providers, subject always to the Court's discretion to permit agreements falling outside the statutory limits in appropriate cases.

18 Insurance

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

Legal expenses insurance is uncommon, whether before or after the event, but is permissible.

19 Class action

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

The Cayman Islands does 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.

We are aware of one action currently in progress in which the plaintiffs organised themselves as if they were 'true' class action plaintiffs in the United States, and they are suing the defendants using the representative action procedures in Cayman. A recent security for costs application made by the defendants was successful, partly because the judge accepted that if the defendants were successful, and obtained a costs order against the plaintiffs, it would be extremely difficult to enforce against the very large group of individuals in many jurisdictions.

20 Appeal

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 (for example, 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 an application must be made by 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, often represented by a single judge of the Grand Court sitting as a justice of appeal for that purpose. 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 now be obtained to appeal from the Court of Appeal to the Privy Council, although in the case of appeals from final orders, this is largely a formality. The Privy Council has recently issued a series of amended Practice Directions governing its procedures and these are available on its website.

21 Foreign judgments

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. The Law Reform Commission has suggested various amendments to the largely redundant Foreign Judgment Reciprocal Enforcement Law (which only applies to certain courts of Australia) to make reciprocal recognition of foreign judgments more easily available, but 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.

22 Foreign proceedings

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 Law 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.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Law, 2012 is based on the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Generally speaking, an enforceable agreement must be in writing 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 which are in writing and which incorporate an arbitration clause, that arbitration clause is deemed to be an agreement in writing.

25 Choice of 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 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 Law 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 Law provides for the 'appointing authority' (currently the Grand Court) to appoint the arbitrators on application and with regard to a number of factors such as 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 Law 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.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

As described above, the parties are free to choose their arbitrators, and in default, the Grand 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' informal chapter of the Chartered Institute of Arbitrators. The pool of arbitrators available is therefore wide, and would meet the needs of complex arbitration.

27 Arbitral procedure

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

The Arbitration Law 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 Law contains a series of default procedures and powers that the tribunal must adopt.

28 Court intervention

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 powers to stay legal proceedings brought in contravention of an arbitration agreement; to order that interpleader proceedings be determined in accordance with any relevant arbitration agreement; to extend time for commencing arbitration proceedings if limits imposed by the contract would cause undue hardship; to review a tribunal's positive finding as to its own jurisdiction; to enforce a tribunal's orders and directions, including security for costs and interim relief; to 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; to order security for the amount in dispute; to grant interim relief, including for prevention of dissipation of assets (or grant any other interim injunction or interim measure); to enforce interim measures granted by the tribunal; to extend time for making an award; to enforce consent awards; to assess (tax) the costs of the arbitrator in certain circumstances; to make awards of costs in the event arbitration proceedings are aborted and to make provision for the costs of the arbitration so that an award may be released; to order property recovered as a result of the arbitration to stand as security for legal fees; to determine any substantial question of law in the course of the proceedings; to enforce the award as if it were a judgment of the Court; and to 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.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Unless the parties agree otherwise, the tribunal has power, by section 44 of the Arbitration Law, to grant interim relief to maintain or restore the original position of the other 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.

30 Award

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.

31 Appeal

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

A party may, with the permission of the Court, appeal to the Court on a question of law arising out of an award. The parties may contract out of the right to appeal if they wish. The Arbitration Law sets out a number of factors to be considered by the Court when granting permission to appeal and the 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 the further leave of the Court. A further appeal to the Court of Appeal is possible with the 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.

32 Enforcement

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 Law, 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.

33 Costs

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 in the discretion of the arbitral tribunal. The tribunal would usually follow the same principles as to the award of costs as applied by a Grand Court 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 parties' 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 an arbitration; however, it is possible that the Grand Court would follow the recent 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 Grand Court to be sympathetic to parties seeking to claim these costs, the Arbitration Law 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**34 Types of ADR**

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

ADR is a relatively new concept in the Cayman Islands, and is taking some time to reach critical mass. There is a Cayman Islands-specific association of mediators and arbitrators, which is willing to act as an appointing body (www.ciama.ky), but the number of appointments has so far been quite small. A mediation scheme for family cases is currently being developed by the Judicial Administration. A small number of commercial mediations take place, but they are by their nature confidential, and it is difficult to obtain firm information on numbers.

35 Requirements for ADR

**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.

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

It is noteworthy that, unlike some other Caribbean jurisdictions, the Cayman Islands has not adopted a form of the 1999 English Civil Procedure Rules, and still relies upon the 1999 Rules of the Supreme Court of England and Wales, modified accordingly, for the basis of its Grand Court Rules.

Campbells

**Guy Manning
Mark Goodman
Kirsten Houghton**

**gmanning@campbellslegal.com
mgoodman@campbellslegal.com
khoughton@campbellslegal.com**

Floor 4, Willow House
Cricket Square
George Town, Grand Cayman, KY1-9010
Cayman Islands

Tel: +1 345 949 2648
Fax: +1 345 949 8613
www.campbellslegal.com

Cyprus

Andreas Erotocritou and Antreas Koualis

A G Erotocritou LLC

Litigation

1 Court system

What is the structure of the civil court system?

The court system in Cyprus 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. The specialised courts are, namely, the Labour Court, the Family Court, the Rent Control Court and the Military Court. The newly formed Administrative Court acts as the Administrative and Tax Court. First instance civil proceedings are heard by a single judge.

The Supreme Court acts as the final appellate court, with jurisdiction to hear and decided on appeals from subordinate courts. It also has jurisdiction to act as the Supreme Constitutional Court and as the Admiralty Court. The Supreme Court comprises 13 members, one of whom acts as its president. Appeals, unless otherwise decided, are heard by a panel composed of three judges.

2 Judges and juries

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 an umpire between the parties. All civil cases are tried by a single judge sitting without a jury. There are no jury trials in Cyprus.

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 and discipline of judges. Supreme Court judges are appointed by the President of the Republic, from within the ranks of the judiciary and upon recommendation from the Supreme Court.

There are no formal procedures or initiatives to promote diversity on the bench in Cyprus. The current ratio of men to women judges is 60:40.

3 Limitation issues

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 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 day of completion of the basis of the claim. Article 4 states that, unless otherwise provided in the law or any other law, no proceedings may be issued after 10 years have elapsed from that date. Nevertheless, the time limit may deviate depending on the nature of the claim.

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 or breach of statutory duty, where there is a three-year limitation period from the date when the injured person knew 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 of the accrual of the cause of action; and
- bills of exchange, etc: there is a six-year limitation period from the date of the accrual of the cause of action.

The above limitation periods may be extended by the court by two years where the court considers this to be just and reasonable.

Parties cannot agree to suspend the time limits. Nevertheless, the time limits will be suspended if the parties fall within one of the categories provided by article 12 (eg, between cohabiting partners, between spouses during marriage, between parents and children if the children are minors).

The transitional provisions of law provide that all limitation periods will start counting from 1 January 2016.

4 Pre-action behaviour

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

Despite there not being any general pre-action protocols or procedural formalities that must be followed prior to the initiation of the proceedings in Cyprus, parties must bear in mind that in certain specialist proceedings (eg, winding-up proceedings, tenant evictions, etc), there are specific procedures that must be followed.

Courts in Cyprus may grant pre-action discovery orders, such as *Norwich Pharmacal* orders, to assist a party in bringing an action.

5 Starting proceedings

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 states 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 thus include merely the relief sought, or specially endorsed providing the particulars of both the relief sought and the basis upon which that relief is being sought.

The specially endorsed writ of summons has the claimant's first pleadings included in it, and the generally endorsed writ has only a concise statement of the nature of the claim made and the relief sought.

Notification of commencement or service of claim

Notification of proceedings is done by personal service of the writ of summons. A copy of the writ is given to the person being served, via 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.

If personal service is not feasible, an application can be made to the court for an order for substituted or other service (such as service through public advertisement, placing a notice on the board of the court or another method). The deemed date of service is the date on which the private bailiff served the writ of summons on the defendant.

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. It should be noted that 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.

With regard to the caseload of Cyprus judges, a recent amendment of the Rules of Procedure created a 'small track' 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.

6 Timetable

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

As mentioned above, 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.

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 the relief or remedy which is 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 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 the filing of an appearance. In both instances, the defendant may file a reply to the defendant's defence within seven days of delivery of the defence, or a reply to the defendant's counterclaim within 14 days from the delivery of the defendant's defence and counterclaim.

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 complete, 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, including applications for the discovery and inspection of documents prior to trial. If such applications are opposed to by the other party, a hearing will be conducted in order for the court to determine whether to issue the requested orders or allow the applications.

7 Case management

Can the parties control the procedure and the timetable?

The procedure and the timetable of the claim is dictated by the court and is not under the control of the parties. Nevertheless, the timetable of a claim can be influenced by the number of interlocutory applications that may be made in the context of the proceedings by either party.

8 Evidence – documents

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. Such an 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 he or she failed to discover to be inspected, unless the court is satisfied that he or she has a different reason for not disclosing the said document.

9 Evidence – privilege

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.

10 Evidence – pretrial

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

Usually, parties do not exchange evidence prior to trial except for situations whereby it is their intention to adopt written statements in the course of the direct examination of witnesses and the court has ordered that such statements are exchanged between the parties prior to the hearing. With regard to experts, the reports of such witnesses are usually exchanged prior to the trial since their cross-examination is based on the content of their reports.

At the discovery stage, the parties may be obliged to list and verify by affidavit any documents or pieces of evidence relevant to the dispute.

11 Evidence – trial

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. Such evidence must be the best possible evidence at hand, must be admissible (ie, it must not contravene any of the provisions of the Constitution of Cyprus and Cyprus laws) and must be relevant to the facts at 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.

In order 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 in order for the proceedings to be disposed of and that the person in question has the necessary knowledge and skills. The expert may bring to court an expert report, which he or she then adopts under oath.

12 Interim remedies

What interim remedies are available?

Parties to proceedings may file any interim applications for any order or relief.

Inter alia, the following interim relief is available:

- freezing injunctions (with either local or worldwide application);
- prohibitory and mandatory injunctions;
- appointment of an interim receiver or liquidator;
- search orders; and
- for the discovery and inspection of documents.

Interim remedies in support of foreign proceedings are available, when such power is provided by a statute, a regulation 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 the Judgment Regulations, and in aid of international arbitration proceedings.

13 Remedies

What substantive remedies are available?

The following substantive remedies are available:

- general or special damages as compensation for any losses or injuries caused;

- the ordering of restitution of any gains or benefits acquired by the defendant;
- injunctive relief, ordered at the discretion of the court when damages become inadequate due to the irreparability of the injuries or damages caused; and
- specific performance orders.

Punitive damages may also be awarded at the discretion of the court. Interest is payable on money judgments.

14 Enforcement

What means of enforcement are available?

A domestic judgment may be enforced in one or more of the following manners:

- by a writ of moveables, namely the seizure and sale of moveable property;
- by sale of real or immovable property;
- by registering the court's judgment on the real or immovable property in the District Land Office;
- by a writ of attachment, namely the seizure of moveables 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; or
- by an application for an order for repayment of the debt in question via monthly instalments.

With regard to judgments that do not make an award of damages but rather order any one or more of the parties to act or refrain from acting in a particular manner, the party for the benefit of whom the order was issued may apply to the court for a writ of attachment the effect of which is to commit the disobeying party to incarceration. The court may order that a person committed for disobedience shall be detained until he or she has obeyed such order in all things that are to be immediately performed and give security as the court thinks fit to obey the other parts of the order, if any, in the future. Where the respondent against whom the writ of attachment is issued is not, and cannot be, found, the court may make an order that a writ of sequestration be issued against his or her immovable property. Two or more people shall be empowered by the court under a writ of sequestration to enter all the immovable property of the contemnor, collect and take all rents, profits, goods, chattels and moveable property they find therein, and detain and keep them under sequestration until the contemnor appears before the court and purges his or her contempt or the court makes an order to the contrary.

Additionally, a court may remove a defendant's right to be heard in the proceedings, if he or she is found to be in contempt of a court order.

15 Public access

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 held in public. Nevertheless, court documents are only available to the parties to the proceedings.

16 Costs

Does the court have power to order costs?

The court has a wide discretion to make different awards as to 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. There are court fixed-fee scale rules that are based on the value of the claim. They set out in detail the minimum and maximum charges for each particular step and describe the service provided throughout the proceedings. However, the costs recovered on the basis of the court rules only cover a very small portion of the actual costs, including legal fees, paid by the client for the purposes of the proceedings. This applies 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 which is not merely in the nature of a set-off) at any stage of the action where:

- the respondent is ordinarily (even temporarily) 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 claimant is suing through a nominal plaintiff; 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 was updated in 2008. There have been no amendments since with regard to the rules on court costs.

17 Funding arrangements

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 the litigation proceedings is usually arranged by the parties. A lawyer may negotiate the legal fees of the litigation proceedings and can reach any special arrangement or retainer freely with his or her client, which can be filed with the court and which supersedes the court's fixed rates. Where fees for contentious matters are not fixed by agreement, they are governed by the rules of the court.

The Cypriot courts have not yet examined 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 due to the application of the aforementioned principle of champerty that, 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, it must be noted that the matter is not regulated and there is no case law or other precedent on the above.

18 Insurance

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.

19 Class action

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

There is no system to accommodate class actions in Cyprus.

With regard to joint actions, however, where two or more actions are pending before the same court initiated by the same or different claimants against the same or different defendants, and the claims of such actions involve a common question of law or fact of such importance as to render it desirable that the actions be consolidated, the court may so order after an application from either party to the actions.

Additionally, a person may be joined in an ongoing action, as a plaintiff, in which any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative where if such person brought separate action any common question of law or fact would arise.

20 Appeal

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

An appeal of any interim decision shall be brought within a strict time limit of 14 days from the date of the judgment or decision. Any other appeal against a judgment on the merits of the case must be brought within 42 days from the time when the judgment or order is issued. The court may, upon application, extend the time for filing the appeal.

Appeals are brought by written notice to the registrar of the court appealed from, in which notice is specified which part of the judgment or order is appealed together with 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 a 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.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment issued by a European court can be recognised and enforced in accordance with the provisions of the European Judgment Regulations. As the Judgment Regulations do not require any special procedure for the recognition of foreign judgments, a mere application in accordance with the relevant local procedure suffices.

A non-European judgment or order may be recognised and enforced by virtue of the bilateral or multilateral agreements that Cyprus has ratified. Alternatively, a separate action may be initiated regarding the same cause of action brought in the foreign jurisdiction.

22 Foreign proceedings

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

Such procedures are not regulated domestically but may be provided for through bilateral or multilateral treaties with other states or through EU Regulations. According to EU Regulation 1206/2001, obtaining evidence from other member states may be done either through the direct taking of evidence by the court requesting it or through the direct transmission of such requests between the courts. According to article 2 of EU Regulation 1206/2001, 'each Member State shall draw up a list of the courts competent for the performance of taking of evidence according to the Regulation.' The list shall also indicate the territorial and, where appropriate, the special jurisdiction of those courts and any request shall be done by the use of the relevant forms annexed to the Regulation.

Arbitration

23 UNCITRAL Model Law

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 the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 21 June 1985 in Law No. 101/87. The legal framework governing international arbitration proceedings is therefore almost identical to the UNCITRAL Model Law.

Furthermore, the Law also adopts the Model Law's guiding footnote with respect to the meaning of the term 'commercial' in its article 2(4) and 2(5).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

In international arbitrations in Cyprus, Law No. 101/87 applies only to arbitration agreements that are in writing (article 7(2)). Article 7(3) of Law No. 101/87 defines an 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.

Accordingly, pursuant to article 7(3), oral arbitration agreements may fall outside the scope of Law No. 101/87. In domestic arbitrations, article 2(1) of Chapter 4 requires that arbitration agreements are in 'writing,' but does not define the term.

25 Choice of 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?

In international arbitrations, if the arbitration agreement does not appoint an arbitrator or specify the composition of the arbitral tribunal then the default appointment procedure provided for under article 11(3) will apply. According to article 11(3):

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 thirty 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 thirty 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 will be carried out by a single arbitrator if the arbitration agreement is silent on the matter. Furthermore, with regard to domestic arbitrations, 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;
- the arbitration agreement provides for the appointment of a single arbitrator;
- the single arbitrator appointed by the parties refuses to act or is incapable of acting or passes away;
- the parties or the two arbitrations fail to appoint the umpire; and
- the appointed umpire refuses to act or is incapable of acting or passes away.

Challenging the appointment of an arbitrator

In international arbitrations, articles 12 to 15 of Law No. 101/87 regulate the challenge and replacement of arbitrators. An arbitrator may be challenged only 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 qualifications agreed to by the parties (article 12(3)). In domestic arbitrations, the challenge and replacement procedure is regulated by articles 13 and 14 of Chapter 4.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

There are no formal provisions in the domestic arbitration laws limiting the parties' options to select anyone as arbitrator. The options available depend principally on the arbitration agreement agreed on by the parties themselves.

Update and trends

The Supreme Court recently expressed its agreement with the idea of setting up a specialised commercial court that would have jurisdiction over claims arising from contracts or disputes between companies, the purchase or sale of goods, the exploitation of oil or gas, the purchase or exchange of shares, intellectual property and insurance affairs. The Ministry of Justice is now preparing a bill for this and the court is expected to be established by 2018.

27 Arbitral procedure

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

Law No. 101/87 incorporates all of the mandatory provisions of the UNCITRAL Model law, for example: article 18 requiring that the parties are treated with equality and that each party is given an opportunity to present its case; article 24(1) providing a party with the right to request a hearing; and article 26 providing a party with a right to appoint and question an expert. Chapter 4 does not contain any mandatory provisions, but provides Cypriot courts with an extensive supervisory jurisdiction over domestic arbitrations.

28 Court intervention

On what grounds can the court intervene during an arbitration?

In international 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 (ie, assisting in the constitution of the tribunal, deciding on the jurisdiction of the tribunal, assisting in the taking of evidence and deciding on the validity of the arbitral award).

In domestic arbitrations, courts may intervene, after the application of one of the parties, for the purpose of issuing:

- 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 a property which is the subject matter of an arbitration; and
- orders of appearance before the tribunal or the presentation of documentary evidence (article 26, Chapter 4).

29 Interim relief

Do arbitrators have powers to grant interim relief?

Pursuant to article 17 of Law No. 101/87, an international arbitral tribunal may, upon the application of a party to an arbitration agreement, issue any type of interim measures which aim at securing the subject matter of the dispute.

A tribunal in domestic arbitration, operating under article 4 does not have the power to issue interim measures.

30 Award

When and in what form must the award be delivered?

There is no specific time limit for rendering an award under either Chapter 4 or Law No. 101/87. Nonetheless, it may be the case that there are contractual limits within which such awards have to be rendered.

Form of an award

Pursuant to article 31 of Law No. 87/101, an international 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 requirements of domestic arbitral awards.

31 Appeal

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

Grounds of appeal

In domestic arbitrations, an award can be appealed to a court and be set aside usually on the following grounds:

- misconduct of arbitrator;
- misconduct of the arbitral proceedings;
- improper procurement of award; and
- if the award is ambiguous or without reasons (article 20, Chapter 4).

In international arbitrations, the issue of setting aside an international award is governed by article 34 of Law No. 101/34. The setting aside grounds mirror those of the UNCITRAL Model Law and are:

- incapacity of the parties;
- invalidity of the arbitration agreements;
- lack of proper notice of denial of a party's right to present its case (due process);
- lack of jurisdiction of the tribunal;
- non-arbitrability under the laws of Cyprus; or
- if the award is contrary to the public policy of Cyprus.

Levels of appeal

An award is only subject to appeal to the courts pursuant to article 20 of Chapter 4 or article 34 of Law No. 101/87. There is generally no right of appeal to the court's decision on the setting aside of an award.

32 Enforcement

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 made 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 first submit an application containing the original or a certified copy of the arbitral award and the arbitration agreement. This application must also be supported by affidavit incorporating the documents state in article IV of the New York Convention and certain necessary translations.

Cypriot courts generally follow a pro-arbitration approach in the enforcement of foreign awards. Nonetheless, an award will usually not be enforced if it has been set aside by the courts at the place of arbitration for grounds that are identical or similar to those of article 24 of Law No. 101/87.

In domestic arbitrations, an award may, with leave of the Cypriot courts, be enforced in the same manner as a judgment or order to the same effect and in such case judgment may be entered in terms of the award (article 21, Chapter 4).

33 Costs

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. Nevertheless, subject to the arbitration agreement between the parties, the costs that are generally recoverable 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

34 Types of ADR

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

The methods of ADR 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.

35 Requirements for ADR

**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 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 present themselves before it and to inform them as to the possibility of resolving their dispute by means of mediation.

The courts will generally not force any party, directly or indirectly, to participate in the alternative dispute resolution processes.

Miscellaneous

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

As of 1 January 2015, Orders 30 and 25 of the Civil Procedure Rules were repealed and their effect is in relation to all actions filed after that date.

By virtue of the new rules introduced by Order 30 of the CPR, within 30 days from the date the pleadings are 'closed', the claimant would have to issue a notice for directions that will be served on all other

parties and be set before a judge after 60 days. Within 30 days from service of the notice for directions, the parties shall file an Appendix indicating the directions sought from the court. At the appearance before the judge the directions on the matters noted by the parties in their Appendices may be issued and the case will be set for directions regarding the evidence to be filed with the court. With respect to claims the value of which does not exceed €3,000, the judge will issue directions for filing written evidence and the case will be set for hearing on the basis of the written evidence with written or oral submissions. In those cases, it will only be in rare occasions that the judge will allow oral evidence to be adduced in addition. With respect to all other claims, the parties shall file with the court a list of their proposed witnesses at trial together with a summary of the evidence to be given by each and the judge will issue further directions for the preparation of the case prior to trial. The judge will make an order for written evidence to be filed upon the agreement of the parties and the hearing will take place on the basis of that evidence though the judge will allow the parties to examine, cross-examine and re-examine witnesses. The new provisions further provide for strict deadlines regarding the duration of examination, cross-examination and re-examination of witnesses. The new regime seeks to put strict deadlines with which parties and their lawyers shall adhere to for the purpose of preventing the case management stage becoming protracted and limiting the total time frame of proceedings.

With regard to the amendments introduced by 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 merely where a bona fide error was made or where the court is satisfied that particular facts were not in existence when the document was first filed.

EROTOCRITOU

ADVOCATES - LEGAL CONSULTANTS

Andreas Erotocritou
Antreas Koualis

andreas.erotocritou@erotocritou.com
antreas.koualis@erotocritou.com

1 Arch. Kyprianou & Ayiou Andreou Corner
Loucaides Building, 6th floor
3036 Limassol
Cyprus

Tel: +357 25 370101
Fax: +357 25 370102
www.erotocritou.com

Denmark

Morten Schwartz Nielsen and Mikkel Orthmann Grønbech

Lund Elmer Sandager

Litigation

1 Court system

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 matters 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 members, whose expertise is deemed to be of importance to the case. Certain requirements have to be fulfilled.

The High Courts and district courts

As a main rule, cases commence in the district courts, which are situated in each 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.

The general rule is that a case is allowed to be tried in two instances. It is possible for the High Courts to reject an appeal, however, if there is no prospect of the court reaching a different conclusion than the district court and the appeal does not concern fundamental legal questions, or where no other reasons exists in general in favour of hearing the case before the High Court.

Appeals allowed by the Danish Appeals Permission Board cannot be rejected by the High Courts. If the case concerns a matter of general public importance, it may be appealed twice, if permitted by the Danish Appeals Permission Board, so that it will be reviewed by the Supreme Court after having been reviewed by the district court and the High Court.

The district courts will be presided over by at least one judge and the High Courts by at least three judges.

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, 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.

2 Judges and juries

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 on the basis of 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 not presented by the parties. Besides delivering judgment, judges also head the trial and oversee the process. During witness testimony, judges are allowed to question the witnesses.

Judges are obliged to guide a party who is not legally represented where 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 short period of time after the initiation of the case, and no later than at the pretrial hearing.

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.

3 Limitation issues

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, as long as the claim itself has not ceased to exist (eg, due to the lapse of a time-limitation period).

The limitation period for monetary claims is determined in the Danish Limitation Act (chapters 3-4), and is, as a general 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.

Parties are free to agree to suspend the limitation period if the agreement is regarding an identified claim. 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 have to 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.

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.

4 Pre-action behaviour

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 taken into account 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 a pretrial expert opinion to be made 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.

5 Starting proceedings

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 plaintiff must at the same time pay 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 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 plaintiff of this.

For small claims of a principal amount not exceeding 50,000 kroner the process is significantly simplified. Under the small claim procedure, a case is filed by filling out a writ of summons downloaded directly from the court's website which, in addition to information about the parties, contains a short review of the specific and legal circumstances. 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 of time. 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.

6 Timetable

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. 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 in the service document from the court.

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 exchange of documents, the parties may file 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 shall contain a short summary of the proceedings and the arguments on which the court based its ruling. Typically, the arguments are quite short.

7 Case management

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 a number of guidelines to be followed in the event that the parties cannot agree. These also act as default procedures in the event that the parties do not decide on the procedure. If the parties, for example, agree to stay the proceedings due to 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 a number of 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(s).

8 Evidence – documents

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 book-keeping 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.

9 Evidence – privilege

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 information on:

- 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;
- persons connected to a party; and
- 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.

10 Evidence – pretrial

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.

11 Evidence – trial

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 has to allow 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.

12 Interim remedies

What interim remedies are available?

As interim remedies, the parties are able to file for injunctions ordering parties to cease or commence certain actions. Further, the parties may also file for search orders.

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.

13 Remedies

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 with regard to 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.

14 Enforcement

What means of enforcement are available?

If court decisions are disobeyed regarding payment and actions, the party making the claim may have it enforced through 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.

15 Public access

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 after the judgment is 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.

16 Costs**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 pre-trial 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.

In general, the amount of costs awarded in civil disputes does not cover the actual costs incurred by the parties. 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.

17 Funding arrangements**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 general 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.

As long as 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.

Agreements regarding third-party funding are possible. However, they are not used in practice.

Factoring is more commonly used, where the claim is sold to a professional party.

18 Insurance**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.

19 Class action**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.

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 out-up principle known in the US. 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.

20 Appeal**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 in order 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.

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

A foreign ruling will be recognised and enforced in Denmark if there exists either a convention or national Danish rules granting 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 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.

22 Foreign proceedings

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

23 UNCITRAL Model Law

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 regards to the 2006 amendments of the UNCITRAL Model Law.

24 Arbitration agreements

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 in order to be enforced under several other jurisdictions.

25 Choice of 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?

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 after having received a request from the opposing party. The two party-appointed arbitrators thereafter appoint the chair within 30 days after 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.

26 Arbitrator options

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.

27 Arbitral procedure

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).

28 Court intervention

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.

29 Interim relief

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. In order 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.

30 Award

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 regards 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).

31 Appeal

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 (for example, 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.

32 Enforcement

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.

33 Costs

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

34 Types of ADR

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 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.

35 Requirements for ADR

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 in a position to compel the parties to participate in ADR proceedings, but they may suggest it.

Miscellaneous

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

No.

LUND ELMER
SANDAGER

Morten Schwartz Nielsen
David Frølich

msn@lundelmersandager.dk
dfr@lundelmersandager.dk

Kalvebod Brygge 39-41
1560 Copenhagen V
Denmark

Tel: +45 33 300 200
Fax: +45 33 300 299
www.lundelmersandager.dk

Dominican Republic

Enmanuel Montás and Yanna Montás

MS Consultores

Litigation

1 Court system

What is the structure of the civil court system?

The Dominican civil court system comprises:

- peace courts, entitled to hear small claims cases as well as special minor cases established by law. This is a single-judge court;
- circuit courts, entitled to hear all civil and commercial claims (excepting those that are the competence of the peace courts). They also serve as courts of appeal for judgments issued by peace courts, and are single-judge courts; specialist commercial or financial courts do not exist in the Dominican judicial system.
- courts of appeal, entitled to hear appeals filed against judgments issued by circuit courts as well as appeals of decisions arising from special administrative procedures (arbitration, and trademark and patent law are good examples). All cases before courts of appeals are heard by no less than three and no more than five justices;
- the Supreme Court of Justice, entitled to hear appeals filed against the decisions of the courts of appeal as well as appeals of some special procedures (eg, decisions arising from dispute resolution processes within the telecommunications industry and appeals filed against decisions issued by circuit courts arising from incidental claims in the context of foreclosures); and
- the Constitutional Court, entitled to decide on constitutional matters (eg, review of *amparo* claims and adherence of statutes, treaties and resolutions to the Constitution). This Court may also decide other cases (civil, criminal) as long as a violation of a constitutional right is invoked and provided that legal requirements are met.

2 Judges and juries

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

In civil proceedings, the judge usually has a passive role where he or she must decide the case based on the evidence that the parties must submit. Civil judges are not entitled to complement arguments that should have been made by the parties unless an issue regarding public policy arises (forum non conveniens, violation of due process or constitutional rights, among others).

Despite their usual passiveness, civil judges have the authority to ask any question they deem necessary, which they do particularly when witnesses and experts depose before the court.

Juries do not exist under Dominican law.

It has been a policy of the judicial branch to promote diversity, particularly promoting female judges at key jurisdictions, since at least 2007. For instance, the vast majority of circuit judges in the greater Santo Domingo region, which is the political and financial core of the country, are women in their thirties.

3 Limitation issues

What are the time limits for bringing civil claims?

The limit depends on the nature of the issue to be discussed. For example, tort actions arising from unintentional harm must ordinarily be filed within six months from the time the harm was caused; this procedure usually refers to non-contractual cases. Tort actions arising from

harm caused intentionally must ordinarily be filed within one year and are also related to non-contractual scenarios. Finally, claims arising from contractual breaches must ordinarily be filed within two years of the time the breach is known.

Given the passive role of civil courts, defendants must raise limitation arguments and therefore the judge cannot automatically declare it. Dominican procedural rules do not contemplate scenarios where the parties could agree to suspend time limits, because under those scenarios the interested party may just refrain from bringing such an argument.

4 Pre-action behaviour

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

Ordinary processes do not require the parties to take pre-action steps before filing a claim. However, some particular fields (eg, Law 173 on Protection of Importer Agents of Goods and Products) provide for a mandatory mediation attempt. The idea in those particular scenarios is to provide for a forum where the parties could solve their disputes in a non-adversarial way, but this is not binding. In fact, some courts have considered that those mediation attempts are unconstitutional, since they hinder access to justice. This is an erroneous notion, but it is something to consider in some jurisdictions. Some other fields of law provide for the possibility of mediation, although is not mandatory (eg, Law 358-05 on Protection of Consumers).

The typical civil claim is filed without any mediation attempt, but in most sophisticated cases it is common for the parties to pursue negotiated solutions before bringing legal actions.

5 Starting proceedings

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 when the plaintiff serves the claim to the defendant through a duly appointed bailiff. It is of the uttermost importance to provide an accurate description of the relevant facts and the alleged law infringements at this early stage of the judicial process. Therefore, the claim must address all factual and legal arguments in order to allow the defendant to properly know in advance the basis of the claim and therefore prepare a sound defence. The parties to the proceedings are notified of their commencement once the claim is served, but they usually have access to the claim documents after the first hearing is held. In any case, the parties are given reasonable time to familiarise themselves with the claim documents and to provide evidence to support their cases.

The caseload of civil and commercial courts is nearly unbearable. While it is true that the judicial branch has been successful at reducing the amount of cases pending to be decided we have observed a decline in the quality of judgments. We are aware of attempts to modify, significantly, the civil and commercial procedures in order to make them more expedited but these attempts are too incipient at the time of writing. However it is clear that those efforts must be combined with a greater alternative dispute resolution culture.

6 Timetable

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

Ordinarily, the claim is served to the defendant. Then the served claim must be filed before the president of the competent circuit court (usually the one where the defendant has an established domicile).

Within 10 calendar days the defendant, through its appointed legal counsel, informs the plaintiff that counsel is going to assume the defendant's legal representation. From this point on, all relevant documentation must be exchanged with the appointed legal counsel.

The president of the circuit court, through an automatic system, randomly appoints the particular circuit court before which the case is going to be heard.

The plaintiff obtains from the circuit court the date when the first hearing is going to be held; the plaintiff then informs the defendant of the hearing date.

Hearings are held and the parties usually submit all the relevant evidence, as well as their conclusions after witnesses and experts are heard (if necessary). The typical procedure takes between two and three hearings, but more hearings may be necessary depending on the complexity of the case.

The judgment is issued and once served, the parties have a one-month period to appeal.

Once the appeal process is completed and the judgment is served, the parties have a 30 days to file an additional appeal before the Supreme Court of Justice. It is important to mention that some conditions must be met in order to have access to the Supreme Court of Justice in civil cases; the amount of the judgment must, for instance, exceed 200 minimum wages.

The whole process can take around five years.

7 Case management

Can the parties control the procedure and the timetable?

It is not possible to control the procedure and timetable of the case under Dominican law. The Dominican Republic's rules of civil procedure are not flexible, and the parties must comply with them entirely.

8 Evidence – documents

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

As a general rule, there is no legal duty to preserve documents pending trial, but if such documents are intentionally disposed of by any of the parties they could be held accountable for such actions.

In addition, the parties are not obliged to exchange documents, but the court may order the parties to provide documents or evidence under their custody pursuant to Law 834. It is important to mention that the discovery process does not exist in the Dominican Republic as it usually does in common law jurisdictions.

9 Evidence – privilege

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

Despite the lack of a legal rule regarding this matter, the general understanding is that confidential documents do not need to be produced no matter who the author of the document is (either internal or external counsel), unless the court orders otherwise; and advice from an in-house lawyer is privileged information.

There is an exception with regard to money laundering regulations, where privileged information must be disclosed at the request of the relevant authorities.

10 Evidence – pretrial

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

Although they could, this is not common practice. It is possible to obtain such evidence, but after it is exchanged during the trial phase.

The parties shall always have enough time to study and properly use all documents pertaining to the case and regularly they ask, and courts grants, extensions of time to deposit documents.

11 Evidence – trial

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

Civil procedures are document-orientated, and such documents should be presented in original form. Copies are not disregarded per se, but should be complemented by other evidence. Electronic documents are allowed pursuant to Law 126-02 on electronic commerce.

Despite the fact that documents are at the core of civil proceedings, oral evidence is allowed and often encouraged by courts. In that regard, witnesses and experts must testify before the court. Typically, experts submit a written report, which is available to the parties.

12 Interim remedies

What interim remedies are available?

The nature of the provisional remedies depends on the nature of the claim; for example, in civil and commercial proceedings the *referimiento* is the usual process for obtaining expedited temporary solutions as long as certain conditions are met (urgency, provisional remedy and existence of a nuisance). Interim and conservatory measures are also available within administrative and intellectual property proceedings.

Search orders are not available in Dominican civil proceedings. However, freezing injunctions are available, and if certain conditions are met, authorisation from the court is not needed.

The remedies referred to above are available in support of foreign proceedings if the legal requirements are met.

13 Remedies

What substantive remedies are available?

First of all, Dominican courts are more prone to award monetary damages rather than forcing anyone to do or refrain from doing something. This does not mean that specific performance is not available, but rather that other remedies, particularly compensatory damages, are applied more widely. Under Dominican law, the classification of remedies is very straightforward and plaintiffs are mostly entitled to compensatory damages. However, the seriousness of any given situation allows the court to go beyond a simple compensation and provide the plaintiff a more significant amount, particularly when the defendant had the intention to cause damage and in cases of contractual breach.

Courts are also entitled to award moral damages (which purport to compensate for suffering and grief and are therefore very subjective), and under certain circumstances they grant '*astreintes*', which refers to a sum of money that must be paid by the defendant (usually on a daily, weekly or monthly basis) in order to make them comply with a given obligation. It must be noted that for the past few years *astreintes* have not been granted in favour of the plaintiff but rather granted in favour of non-profit organisations; this is highly distortive, but some courts are following this pattern originally created by the Constitutional Court.

Punitive damages do not exist as a legal figure, but as mentioned above, additional compensation beyond compensatory damages is usually granted when the conduct of the agent is egregious.

With the enactment of the Monetary and Financial Statute in 2002, legal interest ceased to exist under Dominican law. Despite the difference between the concept of a legal interest (imposed by law) and a judicial interest (imposed by the court to mitigate a damage), the Supreme Court of Justice has been somewhat reluctant to apply any interest on monetary judgments unless the parties have previously agreed it.

14 Enforcement

What means of enforcement are available?

Dominican law does not provide much guidance in the event that a court order is disobeyed. However, courts have applied the traditional concept and elements of 'rebellion' in those cases where a court order cannot be enforced owing to the actions of any person. The typical scenario might lead to imprisonment from six days to six months.

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

As a rule of thumb, court hearings must be held in public and all documents are available to the public. There are, of course, exceptions where the matter at issue is strictly private (eg, divorce) and society therefore has no particular interest. In addition, in antitrust and competition matters, and pursuant to the recent implementation of Law 42-08 (in January 2017), some information could be treated as confidential under the administrative proceedings heard before the corresponding authorities.

16 Costs**Does the court have power to order costs?**

Courts have power to order costs. The typical scenario is to place the entire burden of costs on the party that has lost the legal process. Sometimes courts order the costs to be assessed between the parties (50/50, 80/20 and so on) according to what they deem fair under the particular circumstances of the case.

It is important to note that the legal fees to be paid by one of the parties, as ordered by court, are not based on the invoices actually paid by the party who won the case, but rather on the mechanism stipulated under Law 302. This mechanism is obsolete, and full recovery of fees (not necessarily costs) is frequently not possible.

Excepting specific proceedings where claimants could be asked to provide security for the defendant's costs, the ordinary rule is that no security is needed.

17 Funding arrangements**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 agreements are available and foreseen by Law 302. Pursuant to such statute, and in the case of conditional fee arrangements, lawyers are entitled to no more than 30 per cent of the value recovered and to an amount no less than the minimum established by Law 302 pursuant to an obsolete activity-based mechanism of fees.

Third-party funding is not forbidden under Dominican law, although it has been subject to important criticisms in the past few years, particularly in labour cases. It is important to mention that cases under public scrutiny have not been funded by professional investors but rather by the lawyers leading the cases at issue, a situation that has raised important ethical concerns.

Since third-party funding is not prohibited, a party to litigation may share its risk with a third party in consideration for a given amount (or any valuable consideration) or to gain some protection in the case of an adverse judgment. The kind of agreement mentioned above is not enforceable against the counterparty in the litigation unless the credit is assigned once a non-revocable judgment is issued.

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

Some liability insurance policies, particularly those related to traffic accidents, will cover a policyholder's attorneys' fees and costs. Although less common, commercial theft insurance policies are used by high-profile entities and serve the same purpose.

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

Class actions are particularly addressed within the context of environmental and consumer rights claims. Although not forbidden, class actions are not foreseen in Dominican civil and commercial proceedings and therefore could be implemented, but every claimant would

have to address its particular situation, must individualise its damage and justify its interest in the case; because of this, in the case of a very large claim (except environmental and consumer rights claims), it would be very difficult to handle such a level of personalisation.

Neither the statute for the protection of consumers' rights (Law 358-05) and its regulation nor the statute for the protection of environment and natural resources (Law 64-00) makes reference to conditions that shall be met in order to bring a class action, but the typical one is brought by non-profit organisations, since it is easier for them to gather and use relevant information.

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

As a rule of thumb, the right to appeal is available in almost every circumstance, excepting extraordinary procedures (the *amparo* process, which is only subject to constitutional review, and incidental claims within certain foreclosure proceedings being the most remarkable exceptions). When the right to appeal is not available, the parties are entitled to file their claims directly before the Supreme Court of Justice pursuant to a long-held precedent of this Court.

The main idea is to provide the litigating parties with the opportunity to submit their disputes to a higher-level court in order to provide a better degree of certainty. This is why the Dominican Constitution clearly establishes that all judgments are subject to further scrutiny by a superior court.

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

To enforce a foreign judgment it is necessary to obtain an exequatur pursuant to the recently enacted Law 544-14. The exequatur is an order issued by a competent court authorising the execution of a foreign judgment in the Dominican Republic. It should be borne in mind that according to the Supreme Court of Justice the exequatur is only necessary when it is connected to judgments ordering at least one of the parties involved to do (or to abstain from doing) something.

The exequatur process is held before the competent circuit court (usually the one where the defendant resides). The circuit court is allowed to verify that due process of law was followed; that Dominican public policies are not violated with the foreign decision and that such decision is binding and irrevocable. Considering the foregoing, Dominican courts are not allowed to modify the decision issued by a foreign court.

If reciprocal agreements with different countries exist, the procedure to be followed will be the one described in such treaties.

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

The Dominican Republic is a signatory of the Inter-American Convention on the Taking of Evidence Abroad, a mechanism purporting to create a legal framework for collecting evidence in a foreign jurisdiction. The procedure begins with a request made through judicial channels, diplomatic or consular agents, or governmental agencies of the state of origin or the state of destination, as the case may be. In the absence of public policy issues and if formalities are met, the destination state must comply with the request made to obtain evidence.

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

Yes. Dominican Arbitration Law 489-08 is based on the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An enforceable arbitration agreement must be in writing. It does not need to be a formal contract since it could be implied from emails and letters exchanged by the parties as well as any other mean clearly stating a willingness to use arbitration.

25 Choice of 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 parties do not provide the number of arbitrators that would be appointed in the case that a dispute arise, only one arbitrator will be appointed. In any case, there are always an odd number of arbitrators. Typically, the parties appoint one arbitrator to decide the case, or each one appoints one arbitrator and then those two arbitrators appoint the third one, who shall preside over the arbitration panel. The Board of the Centre of Alternative Dispute Resolution may also appoint the third arbitrator.

The parties have the right to challenge the appointment of an arbitrator, but they must show evidence of any arbitrator's bias or partiality.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Typically the parties are free to propose arbitrators; it is customary for the parties to propose a list of three arbitrators in order of preference from a list provided by the corresponding jurisdictional chamber of commerce. If any of the arbitrators is proposed by both parties, that arbitrator will most likely become part of the process. If this is not the case, the arbitrators at the top of the list of each party are usually appointed, and then those arbitrators will choose a third arbitrator who will chair the panel.

The pool of candidates is in the form of a list previously scrutinised and accepted by the corresponding chamber of commerce (there is one chamber of commerce at each province); in the case of major financial and commercial centres the pool of candidates is sufficient to meet the needs of complex arbitrations but that is not the case for the remaining jurisdictions. That is why most arbitration proceedings are held in Santo Domingo and, to a lesser extent, in Santiago.

27 Arbitral procedure

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

No, it does not. As a private process, parties have significant freedom to establish the language to be used, the place of arbitration and the number of arbitrators (as mentioned above, there must be an odd number of arbitrators). In addition, the parties are entitled to establish the procedure to be followed, including whether to present oral arguments and discuss evidence. The parties to an arbitration process may also decide to waive the use of hearings.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Courts can intervene on two grounds:

- if the arbitration panel or any of the parties (with the previous written consent of the arbitration panel) request the assistance of the corresponding court to obtain or submit evidence (including testimony from witnesses); and
- if the annulment of the award is requested by any of the parties (see question 31).

In any case, and pursuant to Law 489-08, the parties can override the court's powers regarding this matter.

Update and trends

There are various discussions and proposals to make civil and commercial processes more expedited but there are no foreseeable changes, at least not in the immediate future. At least there is demand for a more sophisticated and efficient judicial system and changes will occur, but this is going to take some time.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Unless the parties agree otherwise, the arbitration panel is entitled to grant interim relief only if such measures are requested by one of the parties and are deemed necessary by the arbitrators.

30 Award

When and in what form must the award be delivered?

Once the document exchange between the parties has been completed and they have rendered their conclusions, the arbitration panel may deliver its award. The award must be delivered in writing and must be signed by the arbitrators; dissenting opinions are allowed.

The award must be fully explained by the arbitrators unless the parties agree otherwise, and should address the allocation of legal fees and costs (including arbitrators' fees and institutional expenses, if applicable).

31 Appeal

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

Law 489-08 does not provide for appeal of the award, but rather for its nullity before the corresponding court of appeal if any of the conditions established by law are met (unless the parties agree to waive any recourse against the award). At least one of the following conditions must occur:

- the arbitration agreement is void or no arbitration agreement exists;
- the conditions for due process have not been met, particularly if the parties did not have the opportunity to be assisted by legal counsel;
- the award refers to a controversy not foreseen in the arbitration agreement or the award refers to situations exceeding the terms of the arbitration agreement;
- the composition of the arbitration panel or the arbitration procedure does not correspond to the arbitration agreement (unless such agreement is void);
- the arbitrators have decided issues beyond the nature of arbitration (eg, foreclosure proceedings and criminal matters); and
- the award is against public policy.

The Law does not address a situation where further appeal is possible. However, the Supreme Court of Justice has held that it will always have jurisdiction to review the judgments issued by lower courts of the judicial system (in this case, the court of appeals).

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign awards must obtain an exequatur (see question 21). Domestic awards, in order to be enforceable, must be authorised by the competent court pursuant to Law 489-08. Since the political landscape of the Dominican Republic is very stable enforcement procedures have not been affected.

33 Costs

Can a successful party recover its costs?

Yes, provided that the opposing party is solvent enough to pay. It is important to mention that when the award is made, no amount is owed to the arbitrators, and therefore any claim to recover costs might refer to the legal fees of the attorneys involved. All reasonable costs incurred arising from litigation might be recovered but again, solvency is often an issue.

Alternative dispute resolution**34 Types of ADR**

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

ADR is becoming increasingly popular in the Dominican Republic, particularly arbitration processes although the path to go in significant in order to make it more massive. Mediation and conciliation are mostly used when particular statutes provide for the compulsory use of these mechanisms, for example, Law 173 mentioned above.

In addition, and in the context of criminal proceedings, some of the most important district attorney offices in the country have established internal units with the main purpose of encouraging conciliation between litigating parties. Although the parties must be willing to conciliate, they are not obliged to, and therefore the odds of reaching a reasonable settlement depend on the skills of both the adjunct district attorney handling the case and the parties involved. Empirical evidence has shown a significant success rate at many of the units using this system, specially regarding minor misdemeanours.

35 Requirements for ADR

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?

Aside from the fact that the parties must agree to consider ADR as a way to solve their differences, there are no additional requirements. Of course, if the parties are already litigating or have initiated an arbitration process, the court or the arbitration panel should be informed of the situation.

Apart from the notable exception of criminal proceedings (and where public interest is not seriously compromised), the court might order the parties to undertake a conciliation process, although this is rather uncommon. Other proceedings (civil, criminal, administrative) make no reference to the power of the court to compel the parties to participate in an ADR process, but there have been some isolated cases where courts convince the litigating parties to attempt non-adversarial procedures.

Miscellaneous

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

No.



—CONSULTORES—

Enmanuel Montás
Yanna Montás

e.montas@msc.com.do
ymontas@msc.com.do

Torre Forum, Local 4A
Avenida 27 de Febrero No. 495
El Millón
Santo Domingo 10139
Dominican Republic

Tel: +1 809 541 1013
Fax: +1 809 549 5277
www.msc.com.do

Egypt

Zaki Hashem & Partners

Litigation

1 Court system

What is the structure of the civil court system?

Egypt adopts a dual system of civil judiciary, comprising civil courts and administrative courts. In principle, Egyptian courts adopt a two-instance litigation route for settling civil, labour, tax, commercial and administrative disputes. In addition to subject matter jurisdiction, the amount and the location of the dispute determine the court of jurisdiction competent to decide on a certain claim.

Partial Courts in Egypt act as courts of first instance in disputes with a value of 40,000 Egyptian pounds or less, whereas Primary Courts have jurisdiction, as courts of first instance, in disputes exceeding said amount and courts of second instance over any appeals against judgments rendered by Partial Courts where the dispute is of a value exceeding 5,000 Egyptian pounds. Judgments rendered by partial courts in disputes of a value of 5,000 Egyptian pounds or less cannot be appealed. There remains, however, the Court of Cassation, which is the highest court in the hierarchy of civil and commercial litigation. It is not a trial court; it reviews only questions on law. It only concerns itself with the proper application of the law or lack thereof and its judgment is exclusive to this regard. It does, however, assess the facts of a case and render a judgment in it if it rejects the Court of Appeal's judgment twice.

However, the law has designated jurisdiction over specific matters to specific courts regardless of the value of the dispute. Partial Courts have jurisdiction over cases where the dispute concerns right of usufruct of a water source and other related disputes, boundary mapping disputes in relation to buildings, land and other harmful institutions where neither ownership nor title is disputed, division of co-owned properties, wage disputes, signature verification disputes, and surrender of an immovable. In addition, Primary Courts have jurisdiction over bankruptcy disputes.

Further, the Economic Court is a specialised court established within every Court of Appeal to hold exclusive jurisdiction over all disputes to which economic laws apply, such as the laws regulating matters of companies, capital markets, intellectual property, commercial agency, bankruptcy and antitrust. Moreover, Administrative Courts of the State Council have jurisdiction to decide on disputes that result from the exercise of public power by a public entity, such as those involving administrative contracts, government tenders and public officials' decisions. Furthermore, the Supreme Constitutional Court is the only court competent to review challenges to the constitutionality of laws and regulations.

The general rule is that court panels are composed of several members. The panel for the Court of Cassation is composed of five judges, whereas the Primary Court, the Economic Court and the Court of Appeal review lawsuits with a panel of three judges. However, a panel composed of one judge decides in matters reviewed by the municipal courts, the Court of Urgent Matters and the Court of Enforcement.

2 Judges and juries

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

Egyptian courts adopt the adversarial system in civil matters. The judge has a passive role. A judge may neither direct the parties to the

weaknesses of their claims or defences nor can he or she request that they substantiate their pleas.

There are no moves to promote ethnic diversity on the bench. There are, however, moves to promote gender diversity, as the number of females in the judiciary has increased. For example, only recently have female judges been appointed to the Economic Courts.

3 Limitation issues

What are the time limits for bringing civil claims?

The nature and subject matter of a civil claim determine the legal time limits for filing it. They run as of the date whereby an obligation in contract or in tort becomes due, unless otherwise stated by law.

Tortious liability expires after three years from the date of discovering the damage and the wrongdoer, and in any event after 15 years from the date of occurrence of the damage. Similarly, a contractual obligation prescribes after 15 years from the execution of a contract. Generally, commercial debt claims between merchants prescribe after seven years unless otherwise stated in the law. Parties are not free to contractually determine time limits for bringing a claim.

4 Pre-action behaviour

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

A general prerequisite before recourse to litigation does not exist in Egyptian law. However, the law in specific cases requires the satisfaction of prerequisite procedures before filing the lawsuit. For example, a plaintiff pursuing an administrative lawsuit against a public entity must submit a petition to a designated Committee of Reconciliation, which issues a non-binding recommendation. Similarly, a party to a dispute that falls under the jurisdiction of the Economic Court must submit its claim to the Preparation Committee, which is a mandatory procedural prerequisite to filing a claim. Such committee verifies the completeness of the claim documents and mediates between the parties to reach an amicable conclusion to their dispute.

There is no pretrial discovery in Egyptian law.

5 Starting proceedings

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 lawsuit is considered commenced from the date at which a plaintiff's claim is filed at the court clerk's office. The service of process by the Office of Court Bailiffs is the only standard method of service. The process must be served within 30 days from filing the lawsuit documents. The service of process is complete and effective only when the process is served on the defendant in person or, in the event of defendant's absence, on the defendant's agent, a residing servant, relative, spouse or in-law at the defendant's place of residence. However, a defendant may contractually determine a place at which to be served, such as an attorney's office.

If the defendant is a company, it must be served at its headquarters. Process can be served on agents or at the branch office of a foreign company.

If the place of the defendant's residence is based abroad, a copy of the process is to be served on the public prosecution to notify the defendant through diplomatic means; the same applies if the residence of the defendant is unknown.

Courts generally do not have the capacity to handle their caseload, which does lead to courts taking long periods of time to settle disputes. There have been no proposals to remedy the situation.

6 Timetable

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

Upon registration of the claim at the court clerk's office, a date for the hearing is set within four to eight weeks. The average civil lawsuit at courts of first instance lasts from two to three years. In the event of a referral of technical questions to a court-appointed expert, the dispute time is ordinarily prolonged by an additional year. The parties can submit pleadings and supporting documents at all hearings until the judge declares the closing of submissions for judgment and sets a date for the pronouncement of the court's judgment. If a challenge by either party is successfully admitted by the Court of Appeal, a review will approximately require an additional year. The Court of Appeal's judgment on the subject matter is final and acquires *res judicata* as soon as it is issued. However, such judgment could be challenged in the Court of Cassation, which could take an additional 20 years.

7 Case management

Can the parties control the procedure and the timetable?

The parties to a dispute are not entitled to control the procedures and timetable of their lawsuit. However, parties may request the judge to shorten time periods of appearance before the court in events of emergency (eg, preliminary courts and courts of appeal judges may, upon the request of plaintiff, shorten the time period of appearance to three days from the date of process service, and to 24 hours in municipal courts) or request extensions when warranted.

8 Evidence – documents

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 are not obligated to preserve any documents pending trial, except if the court orders the production thereof in the incidents below.

Parties to a dispute are not compelled to share case-relevant documents. The general rule is that parties are not obligated to present evidence to their detriment, applying the maxim of *nemo tenetur edere contra se*.

However, a party may request the court to compel the production of documents, only in the following events:

- the law explicitly permits a party's request for the production of such document by the adversary party;
- the document sought is a conjoint one between parties to the dispute. In other words, a document drafted in both parties' interests, or it incorporates their reciprocated rights and obligations; and
- the party requested to produce the document relied on it at any phase of the lawsuit.

A party failing to produce the document when requested by the court must declare under oath that it is not in his or her possession, is not aware of its location, does not intentionally conceal it and did not fail to observe due diligence in locating it. If the requested party fails to produce the document and refuses to take the oath, the requesting party's remedy is the court's admission of the copy of the document presented by the requesting party, or the court's admission of its statement as to the content of the document attested to.

9 Evidence – privilege

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

The Law on Evidence provides an exclusive list of privileged communications, which cannot be disclosed to third parties, even after termination of the relationship, unless the privilege is waived by the beneficiary, or otherwise stated by law or ordered by the court.

Moreover, privileged information is obtained by the following:

- state employees or individuals entrusted with a public service. Any information acquired while performing their public duties is privileged and cannot be disclosed, even after termination of the employment, unless the privilege is waived by the state entity upon court order;
- attorneys, medical doctors, agents and any other recipients of private information acquired by professional means is privileged, unless such information leads to committing a misdemeanour or felony; and
- marital privilege; no spouse may disclose information acquired in a spousal relationship, unless either files a lawsuit, or one of them is prosecuted for committing a misdemeanour or felony against the other.

Further, according to Egyptian law, attorney-client communication is privileged information that must not be disclosed.

10 Evidence – pretrial

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

Parties do not exchange written expert opinions prior to trial. Nevertheless, parties are free to submit with the initiatory pleading a written statement of a party-assigned 'advisory expert', as opposed to experts appointed by the court to clarify a technical element of the case, if any.

As to witnesses, parties must submit a request to the court to admit their testimonies with regard to specific claims to be corroborated.

11 Evidence – trial

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

A witness must deliver an oral testimony under oath in court, or in front of a designated judge, even if his or her affidavit has been submitted to the court in written form. Experts deliver their opinions in a report submitted to the court clerk's office at the time determined by the court. The court is entitled to admit or reject written reports. The court may summon the expert to clarify, explain or elaborate on his or her report.

12 Interim remedies

What interim remedies are available?

The Code of Civil and Commercial Procedures, along with different texts of law, regulate requests for interim relief, before the subject matter claim is raised, during the pendency of litigation, or even after a judgment is rendered before its enforcement. Such remedies require presenting to the court a justification for urgency that an imminent and substantial risk of harm may occur, a delay of preventing that (until the judgment is rendered) can irremediably affect the underlying rights, and, in most cases, that proof the requesting party will prevail on his or her claim.

Interim remedies are of temporary nature; they remain valid until the underlying substantive claim is decided upon, or a judgment is executed. As such, interim remedies shall not alter the right attached to the object of requested relief. Any party affected by the interim measure is at liberty to challenge it.

Interim relief can usually be obtained through summary proceedings and, exceptionally, *ex parte*. It can be of a restraining nature to maintain a status quo, or include active instructions to a party, for example, protective seizure of assets in possession of a party or a third party (eg, a bank); appointment of a legal guardian; order of provisional payment; order to pursue the execution of a contract or to restrain a party from a certain action. However, search orders, in their common law meaning, cannot be ordered.

For remedies available in support of foreign proceedings, see question 22.

13 Remedies

What substantive remedies are available?

The law permits the recovery of material, as well as moral damages. Courts can order diverse remedies that can only be of a compensatory

nature; no punitive damages are permitted. Relief could be an order to perform an obligation or to refrain from certain actions (ie, specific performance). However, it can only be ordered when the interference of the debtor is not required. Money damages may be allocated for economic loss suffered and for consequential damages (actual losses and missed gains). Legal interest is payable for delay in payment of money judgments, by 4 per cent per annum for civil matters, and 5 per cent for commercial matters. The law sets a ceiling, for any agreed upon interest rate for a delay in contractual performance, at 7 per cent.

14 Enforcement

What means of enforcement are available?

A judgment is final and enforceable, absent an appeal, and if the court has not ordered an interim or temporary execution. The prevailing party can seek the enforcement of a judgment, if not voluntarily executed, by requesting the assistance of the court's department of execution, headed by the designated Court of Appeal judge present in every Primary Court. Further, only the execution administration can organise the sale of an asset to recover the amount of a debt.

In civil and commercial matters, failure to abide by court orders of specific performance is sanctioned by deterrence fines. The judge ordinarily orders specific performance within a set period of time; upon the failure of the judgment debtor to comply he or she must pay a deterrence fine for each day, week or month, as determined by the court. The court may turn the fine of deterrence into a monetary compensation to the benefit of the judgment creditor, if the debtor's non-compliance persists. The court has discretion to decrease the fine if the order is executed by the judgment debtor, or eliminate it altogether.

15 Public access

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

Court hearings are public, except in special circumstances where the court decides, based on a request of a party or at its own discretion, to hold hearing sessions in private for purposes of public policy or morals.

Documents of the case, such as pleadings, witness statements and expert opinions are not made available to the public. However, judgments are publicly rendered, and copies thereof are accessible upon request afterwards.

16 Costs

Does the court have power to order costs?

Judicial fees in courts are moderate fixed fees in addition to 7.5 per cent of the awarded amounts. Further, upon filing of a claim, the claimant pays an amount not exceeding approximately 500 Egyptian pounds. Upon issuance of its decision, the courts ordinarily order the losing party to pay such fees. As for attorneys' fees, each party bears its costs. The prevailing party may not claim attorneys' fees from the losing party except for a nominal value of about the equivalent of US\$5 in Egyptian pounds.

17 Funding arrangements

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 nothing prohibiting 'no win no fee' arrangements between a client and his or her attorney. However, this is quite rare in Egypt. Normally, attorneys are remunerated on the basis of a certain percentage of the value of the dispute, which should not exceed 20 per cent. Parties may bring proceedings in reliance on third-party funding, and may assign part or all of the proceeds to that third party. However, the proceeds must be legally assignable, and in accordance with the parties' agreement, and must not be contrary to public policy or morals.

18 Insurance

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

Egyptian law does not prohibit this type of insurance. However, although possible in principle, this type of insurance is not prevalent in practice in Egypt.

19 Class action

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

Egyptian law does not regulate class action disputes and there have not been any developments in this regard.

20 Appeal

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

See question 1.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

International treaties (bilateral or multilateral) can arrange for the recognition of foreign judgments in Egypt. In general, the Law on Civil and Commercial Procedures provides that foreign judgments can be enforceable in Egypt by a state court decision, pending the satisfaction of certain conditions in the foreign judgment, and reciprocity at the foreign court's state.

Egyptian courts will review a foreign judgment to ensure that:

- the Egyptian courts do not maintain jurisdiction, and that the foreign court was competent to decide on the dispute;
- the judgment is final;
- the principles of due process were abided by;
- the judgment does not contradict a decision rendered by an Egyptian court; and
- it is not contrary to public policy in Egypt.

To obtain an exequatur, a lawsuit is filed in court following the usual procedures for filing a claim.

22 Foreign proceedings

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

Egypt ratified the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1969 (with some reservations). It also ratified the 1954 Hague Convention on Civil Procedure in 1981. Egypt also ratified several bilateral treaties for judicial assistance.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Egyptian Arbitration Law No. 27 of 1994 is based on the UNCITRAL Model Law. However, it carries its own specificities. The law considers an arbitration domestic if it takes place in Egypt or if an international commercial arbitration takes place abroad but the parties choose to apply the Egyptian Arbitration Law to their dispute. International treaties prevail, nonetheless, if applicable. Grounds for the annulment of an arbitral award differ from the UNCITRAL Model Law. See question 31.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

To be valid, an arbitration agreement must be in writing. The requirement of writing is met, if the agreement to arbitrate is concluded via written communication between the parties (exchange of letters,

telegraphs, etc). The condition of writing is also deemed satisfied when the parties refer to a writing containing an existing arbitration agreement.

25 Choice of 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?

In the absence of agreement between the parties, or if no agreed upon rules govern the appointment of arbitrators, the Arbitration Law states that the tribunal shall be constituted by three arbitrators. Each of the parties shall appoint an arbitrator, and the two party-appointed arbitrators choose an umpire to chair the tribunal.

In the event that either party fails to appoint an arbitrator, within 30 days running from the date of the other party's request to appoint an arbitrator, or if the two party-appointed arbitrators fail to agree on an umpire within 30 days from the date of the latest appointment of either, the court shall appoint the missing arbitrator at the aggrieved party's request. The parties may agree to change the legal time limits. The court's decision of appointment cannot be challenged.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

There is a large pool of candidates that includes lawyers, engineers, doctors and other professions. However, the pool of candidates for each case depends on the nature of the dispute.

27 Arbitral procedure

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

Parties are free to determine the procedures to be applied to their arbitral process, including reference to the rules of an arbitral institution. However, in the absence of parties' agreement on arbitral procedures, the arbitrators decide on the applicable procedural rules in accordance with the terms of the Arbitration Law.

The law provides the arbitrators with a great deal of flexibility in determining the procedural rules governing the arbitral process. In any event, arbitrators must abide by mandatory fundamental principles of due process and equality.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Court intervention is minimal, as their role is predominantly supportive; however, state courts maintain exclusive power to issue interim measures if the parties did not explicitly agree to grant such powers to the arbitrators. State courts ordinarily intervene, upon the request of an aggrieved party, only in limited events prescribed by law (eg, the appointment of arbitrators if the parties fail to agree, extension of the deadline of the award, or to order compulsory enforcement of interim measures issued by the arbitrators).

29 Interim relief

Do arbitrators have powers to grant interim relief?

State courts have the competence to order interim measures, such as to preserve assets or documents. The law also provides for the possibility for the parties to expressly agree on granting such powers to the arbitral tribunal.

30 Award

When and in what form must the award be delivered?

In the event that the parties fail to agree on a time limit for the arbitral procedures, and in absence of institutional rules to determine when the award shall be rendered, the tribunal must issue its award within 12 months from the commencement of the arbitration procedures.

Such set time period may be extended by six months at the discretion of the tribunal. Moreover, the president of the competent state court may, upon the request of either party, extend the time period beyond 12 months.

The award must be in writing, and signed by the majority of the arbitrators. The award must include reasoning, unless otherwise agreed by the parties, or if the applicable law does not require reasoning. It must include the names and addresses of the parties; the names of the arbitrators, their addresses, and nationalities; the arbitration agreement; a summary of the requests of the parties, their statements; their exhibits; and it must include the tribunal's ruling, its date and place of issuance. The tribunal delivers the award to all parties within 30 days from the date of its issuance.

31 Appeal

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

An arbitral award cannot be subject to an appeal in a state court. However, an arbitral award may be subject to setting-aside procedures (annulment procedures) on the basis of a limited number of grounds, which the parties to an arbitral dispute may not derogate from. The right to annul a national arbitral award based on the grounds set by the Arbitration Law is non-derogatory.

Those grounds are, as follows:

- an arbitration agreement does not exist or is not valid;
- incapacity of one of the parties to the arbitration agreement;
- impossibility for a party to proceed with its defence;
- the award excludes the application of the law on the merits chosen by the parties;
- the tribunal has been constituted in violation of the law or in deviation from the parties' agreement;
- ultra petita awards;
- the award or substantial procedures are found to be null and void; or
- the award violates the public policy in Egypt.

The Court of Appeal is competent to decide on such request, subject to review of the Court of Cassation.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The procedures of enforcement depend on whether the arbitration is considered national or foreign. National arbitral awards are those rendered in Egypt, including international commercial arbitration, whereas foreign awards are those rendered by tribunals seated abroad. However, if the parties agree to apply the Egyptian Arbitration Law to the proceedings, the law is considered a national arbitral award. Egypt is a signatory state to the 1958 New York Convention for the Enforcement of Arbitral Awards.

The party seeking enforcement of a national award must submit an application for exequatur to the court. The court to issue the order of exequatur is the court of competent jurisdiction, if there had been no arbitration clause. The Cairo Court of Appeal, or any other Court of Appeal agreed between the parties to decide on arbitral matters, shall issue such order regarding awards of international commercial arbitration. The applicant must submit two copies of the application for exequatur, stating all facts in connection to his or her request and must indicate a chosen domicile where the court is located.

The applicant must enclose with his or her application the following documents:

- the original copy of the arbitral award or a copy thereof, signed by the arbitrators;
- a copy of the arbitration agreement;
- an official translation of the arbitral award, if written in a language other than Arabic;
- a copy of the court report evidencing the submittal of the award to the court clerk's office; and
- a copy of the service of the award on the party against whom the award will be enforced.

By law, the court must either order the enforcement of the award, or deny it, by way of writ of enforcement on one of the two copies of the application, granting the exequatur the day after the application is submitted. However, in practice, courts frequently take longer to decide on the application. The following prerequisites must be met before issuing the order of enforcement:

- the time limit for the annulment of the award has lapsed;
- the award must not contradict a decision rendered by a competent Egyptian court; if the conflict affects the award partly the enforcement is still permissible with regard to the non-contradictory part;
- the award does not violate public policy in Egypt; and
- the party against whom the award will be enforced has been properly served with the award. The court does not have to provide reasoning for its decision on the application.

The party seeking the enforcement of a foreign arbitral award must file a claim, following the rules applicable to filing a regular lawsuit. An exequatur is not ordered by a writ of enforcement on application. The initiatory pleading must include the original copy of the award or an official copy thereof, and the original copy of the arbitration agreement. The award and the agreement to arbitrate must be notarised and officially translated.

However, for awards rendered in a signatory state to the New York Convention, the courts will apply the same rules as to national awards.

33 Costs

Can a successful party recover its costs?

Yes. The prevailing party can request recovery of the costs of the arbitral process, including attorney's fees. Egyptian courts enforce such relief.

Alternative dispute resolution

34 Types of ADR

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

Generally, mediation is the most commonly used amicable means of settling disputes in Egypt. It is certainly not a newly introduced concept; however, it is not as pervasive in its modern form as it is currently worldwide. Recently, modern principles of mediation have started gaining momentum among Egyptian lawyers. International entities, such as the IFC, have taken interest in promoting the concepts of mediation in Egypt, and succeeded in spreading awareness of recent

developments. Therefore, the Ministry of Justice has completed a draft of the Law on Settlement of Commercial and Civil Disputes, inspired to a great extent by the UNCITRAL Model Law and Rules on Conciliation. One can fairly conclude that endeavours to introduce the modern rules on mediation will continue to advance in Egypt.

35 Requirements for ADR

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 compel reconciliation and mediation before pursuing specific civil claims, as long as the law permits settlement of the subject matter. For example, the Egyptian Personal Status Law compels the plaintiff to submit a petition for reconciliation in certain family law matters at the Office of Disputes Resolution based in the relevant family court.

Similarly, before filing a court claim against a public entity, a plaintiff must file a petition for amicable settlement to the designated committee of reconciliation.

Miscellaneous

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

The following are features that we deem notable for practitioners.

Grounds for annulment of a national arbitral award differ from those related to the annulment of foreign awards that fall within the scope of the New York Convention. The Egyptian Arbitration Law echoes the same grounds for setting aside an award listed in the UNCITRAL Model Law, however, it added further grounds, as follows:

- the award excludes the application of the law chosen by the parties to govern the merits; and
- the award is tainted with any ground for nullity, or if the proceedings were void in a manner that affected the award itself.

On piercing the corporate veil in arbitration, a parent company is not liable for the contracts that its subsidiary concludes, unless it is proven that the parent company was involved in the performance of the contract, or it contributed to a mistake as to the identity of the obligor.

Egyptian courts do not recognise anti-suit injunctions issued by arbitral tribunals.



ZAKI HASHEM & PARTNERS
ATTORNEYS AT LAW

Zaki Hashem & Partners

23 Kasr El Nil Street
Cairo 11211
Egypt

Tel: +20 2 2399 9999
Fax: +20 2 2393 3585
www.hashemlaw.com

England & Wales

Sophie Lamb, Kavan Bakhda and Aleksandra Chadzynski

Latham & Watkins

Litigation

1 Court system

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, 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 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 (eg, claims falling within a specialist court, which raise questions of public importance, or which are sufficiently complex so as 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, albeit that complex, high-value litigation is 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 Queen's Bench Division, the Chancery Division and the Family Division.

As of May 2017, there were approximately 62 judges in the Queen's Bench Division, 18 judges in the Chancery Division and 17 judges in the Family Division.

The Queen'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, as well as with some contractual claims (there is some overlap with the Queen'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 Queen's Bench Division, and the Bankruptcy Court, Companies Court and Patents Court in the Chancery Division.

In addition, as of October 2015, a new specialist Financial List has been created to handle claims related specifically to the financial markets. 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 is also being piloted in the Financial List until September 2017. Under this scheme, parties can seek declaratory relief without the need for a cause of action. The claim is brought, among others, 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.

From June 2017, the specialist courts and lists of the High Court will be known as the Business and Property Courts. This will include the Chancery Division, the Technology and Construction Court, Commercial Court, Mercantile Court, Admiralty Court, the Financial List, the Companies and Insolvency Court, the Patents Court, the Intellectual Property and Enterprise Court 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 has been undertaken by Lord Justice Briggs and was published in July 2016 (the Briggs Report). The report sets out a number of 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 suggests urgent measures to ease the current workload of the Court of Appeal.

As a result, a number of changes to the appeals process came into force on 3 October 2016. These include 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 to the High Court instead of the Court of Appeal.

Another of the key suggested changes of the Briggs Report is the creation of an online court which would deal with simple claims up to a value of £25,000. The intention is 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.

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 changes have been announced.

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.

2 Judges and juries

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

Judges are appointed by the Judicial Appointments Commission (JAC), 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 most recent judicial diversity statistics report that female judges make up 20 per cent of the Court of Appeal, with the percentage increasing to 45 per cent for tribunals. Of those judges who declared their ethnicity, the percentage who identify as black, Asian and minority ethnic is 6 per cent in courts, and 10 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.

While 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.

Nevertheless, the recent 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 that would lower the temperature rather than raise it.

3 Limitation issues

What are the time limits for bringing civil claims?

Most limitation periods are laid down by the Limitation Act 1980. 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.

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.

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, time does not run until the concealment or fraud is discovered, or could have been discovered with reasonable diligence.

4 Pre-action behaviour

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.

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).

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 13 protocols specific to certain types of proceedings, for example construction and engineering disputes, professional negligence claims and defamation actions. In addition, a pre-action protocol specific to debt claims will come into force on 1 October 2017.

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, 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.

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.

In view of the disclosure regime introduced as part of the 2013 Jackson Reforms to civil litigation and costs (Jackson Reforms) (see question 8), parties need to consider their respective disclosure

obligations far sooner than has previously been the case, even if not as part of a pre-action protocol, or claim for pre-action disclosure.

An extra weapon in the claimant's armoury is the *Norwich Pharmacal* order. Such 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 such 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.

5 Starting proceedings

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 (see below).

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.

As of 25 April 2017, issuing claims and filing documents in the Chancery Division, Commercial Court, Technology and Construction Court, Mercantile Court and Admiralty Court (the Rolls Building Courts) will only be possible through the online filing system, CE-File. Under this system, parties can file documents at court, including claim forms, online 24 hours a day, every day.

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). A recent Court of Appeal case (*Barton v Wright Hassall LLP* [2016] EWCA Civ 177) serves as a reminder to prospective claimants to follow the rules on service set out in the CPR. In that case, the court refused to validate ineffective service by email, the fact that the claim had been effectively brought to the notice of the defendants was not sufficient reason to validate. The decision is currently under appeal.

Defendants domiciled in the EU will normally be served by way of the EU Service Regulation (1393/2007), which provides a mechanism whereby the English courts sanction a form of registered postal service within the EU. Certain formal requirements (such as translation of the claim documents) must be complied with when using this method of service.

The EU Service Regulation is currently under review by the European Commission. However, at the time of writing, no recommendations for change have yet been published.

Where a defendant is domiciled outside the EU, a claimant may be required to obtain permission to serve the claim outside of the jurisdiction, after which a claimant must follow the rules of service laid down by applicable conflict of laws rules (eg, the Hague Convention).

Court permission to serve proceedings outside the jurisdiction is not required in certain circumstances, including where, although neither of the parties are domiciled in England and Wales, they have agreed to the jurisdiction of the English courts (whether exclusively or not). Permission is also not required where proceedings involving the same cause of action have already been commenced in another member state, but the parties have agreed to an exclusive English jurisdiction

clause. These rules are set out in Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (Recast)) and the CPR.

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).

The courts, and in particular the Court of Appeal, have been experiencing capacity issues that have had an impact their ability to list disputes in a timely manner. This issue has been addressed in the Briggs Report, which recommends, among other things, the creation of an online court for low value claims and an increased focus on ADR (see question 1).

6 Timetable

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 do differ between different courts), 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 after service of the particulars of claim.

The timetable for service of a defence may be extended by agreement between the parties or, where the court agrees to such extension, following application by the defendant.

The court will allocate the case to either the small claims track, the fast track or the multi-track 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 that are of extremely high value, can take between one and two years, and sometimes longer.

Two pilot schemes have been introduced in the Rolls Building Courts as of October 2015 with the aim of facilitating shorter and earlier trials for business-related litigation. The schemes will be in operation until 30 September 2018.

Under the Shorter Trials Scheme, suitable cases are expected to reach trial within approximately eight months after the CMC, and have judgment handed down within six weeks after the trial. The maximum length of trial is four days including reading time. This scheme is suitable for cases that do not require extensive disclosure or witness or expert evidence.

Under the Flexible Trials Scheme, parties are able to adapt the procedures currently provided for under the CPR by agreement to suit their particular case.

7 Case management

Can the parties control the procedure and the timetable?

Under the CPR, responsibility for case management belongs largely to the court and the judge enjoys 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 pre-trial review or the trial itself). In certain business disputes, the parties also have the option of bringing proceedings under the Flexible Trials Scheme (see question 6), 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 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 set out by the Court of Appeal the following year in *Denton v TH White Ltd* [2014] EWCA Civ 906 is now considered as the one to follow. Under this three-stage test, the Court will consider the seriousness of the failure to comply, 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.

Although the courts continue to take a strict approach when deciding whether to grant relief from sanctions, 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. 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.

It should be noted, however, that under the CPR, 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 High Court judgment in *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) and the Court of Appeal judgment in *Denton v White*.

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 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 counterclaim 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. Parties to all multi-track cases valued under £10 million, for example, are required to comply with additional rules, in particular the preparation of a costs budget. Cost management rules, however, do not apply to proceedings under the Shorter Trials Scheme unless agreed to between the parties and subject to permission by the court.

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.

For cases valued over £10 million, 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)).

From 6 April 2016, budgets for claims worth over £50,000 should be filed no later than 21 days before the first CMC, rather than seven days as was previously the case. Where the claim is for less than £50,000, the budgets must be filed and served with the parties' directions questionnaire. 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 (AIP) 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.

Recent cases have suggested 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).

8 Evidence – documents

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

The CPR provide that as soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. 'Document' is widely defined by the CPR as 'anything in which information of any description is recorded', which includes electronic communications and metadata. Accordingly, it is very important that parties consider document retention and new document creation carefully from the outset.

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.

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.

Although the CPR include 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'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.

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.

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 least seven days prior to the first CMC to seek to agree a disclosure proposal.

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 will be limited both in 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.

9 Evidence – privilege

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

Documents protected by legal privilege may be withheld from inspection by the other party.

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.

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. 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 recently been confirmed in *Re RBS (Rights Issue Litigation)* [2016] EWHC 3161 (Ch).

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.

A High Court case has taken 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.

The Case Director of *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 is the first to consider the position of legal professional privilege in the context of an internal investigation. In that case, it was decided that documents prepared for the purpose of a criminal investigation did not attract litigation privilege, nor did the record of the evidence-gathering process, even if produced by a lawyer.

Legal professional privilege will be negated by an abuse of the normal solicitor-client relationship under the 'iniquity principle' (ie, when communications are made for wrongful, eg, 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 his or her assets put the advice outside the normal scope of professional engagement and justified an order for disclosure of documents which would otherwise have attracted legal professional 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;
- pass between co-parties to legal proceedings;
- would tend to incriminate a party criminally; or
- would be adverse to the public interest.

10 Evidence – pretrial

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

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.

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.

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.

11 Evidence – trial

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, although where any oral evidence is provided, each party may examine its witness, providing an opportunity to amplify its statements. 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.

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. The process is currently under review by the Civil Procedure Rules Committee (CPRC).

It is possible to 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 witnesses' failure to give oral evidence.

12 Interim remedies

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.

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.

On 17 July 2014, the European Account Preservation Order (EAPO) Regulation entered into force, creating a new procedure under which a creditor is entitled to apply to a member states' national court to freeze monies in any EU bank account held by a debtor, up to the value of its debt. The provisions are applicable in participating member states as of 18 January 2017.

The UK has decided to opt out, meaning that courts of England and Wales will not issue EAPOs, and bank accounts held in the jurisdiction will not be subject to an EAPO from another EU member state. Nonetheless, a UK entity's account held in a participating member state will be subject to the EAPO Regulation.

13 Remedies

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, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction), or orders for the sale,

mortgaging, exchange or partition of land. Interest may be payable on money judgments.

14 Enforcement

What means of enforcement are available?

The following are the principal means of enforcement:

- execution by writ of control in the High Court or a warrant of control in the county court, whereby the sheriff or bailiff has authority to seize and sell the debtor's property;
- third-party debt orders that operate to prevent funds reaching the debtor from a third party by redirecting them to the creditor instead;
- charging orders over land or securities; and
- insolvency proceedings.

15 Public access

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, including where the court considers it necessary 'in the interests of justice', for example, where notice to the other party would defeat the purpose of the application, such as applications for urgent freezing injunctions.

Non-parties can obtain, without permission of the court or notification to the parties, any statement of case filed after 2 October 2006.

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 the case of *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 397 (Ch), a claim with multiple claimants, where the judge drew a distinction between generic particulars of claim and other documents aimed at confining the issues (including notices to admit), and held that a third party was not entitled to copies of the latter under CPR 5.4C(1)).

Permission of the court may be sought to obtain copies of other documents on the court file, but in *Nestec SA v Dualit Limited* [2013] EWHC 2737 (Pat), the High Court clarified that it has no inherent jurisdiction to order non-party access to exhibits to witness statements, and documents put to witnesses in cross-examination, where these are not on the court file.

A party can also apply for an order restricting a non-party from obtaining a copy of a statement of case.

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.

16 Costs

Does the court have power to order costs?

Generally, the losing party will be required to pay the costs of the winning party. However, the court has discretion to order that costs are payable by one party to the other, the amount of those costs and when they are to be paid. Note that even where costs are reasonably or necessarily incurred, if they are deemed disproportionate, the court may nevertheless disallow them.

In determining the way in which it makes costs orders, the court will have regard to a number of factors, including 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 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 some 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.

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; whereas
- 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.

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; 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 which 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 (see question 7).

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 which are to be taken into account in any subsequent assessment proceedings.

However, it should be noted that in the Financial List test case scheme (see question 1), a test case proceeds on the basis that parties bear their own costs.

17 Funding arrangements

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 the client's solicitor receives a lower payment or no payment if the case is lost, 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 an uplift of fees charged (rather than a percentage of the damages secured), and such uplift cannot exceed 100 per cent of the normal rate. These agreements are relatively unusual in commercial cases.

One reason conditional fee arrangements 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 insolvency-related proceedings where the CFA was entered into before 6 April 2016, and in publication and privacy proceedings). As of 6 April 2016, success fees are no longer recoverable in insolvency-related cases.

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.

Such agreements are upheld provided that they are not contrary to public policy. The case law in this area is developing, but there is still scope for uncertainty. *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 is a notable recent case in which the Court of Appeal upheld the lower court's decision ordering the third-party funders to pay costs on the indemnity basis. The court's willingness to make third-party funders liable for the conduct of the party they fund could have potential consequences for the funding market, as funders may seek to be more careful as to whom they choose to fund.

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. Such 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.

In commercial proceedings, the contingency fee is capped at 50 per cent of the sums ultimately recovered by the client. The caps for employment and personal injury claims are, respectively, 35 per cent of the sums ultimately recovered, and 25 per cent of the general damages and pecuniary loss (other than future pecuniary loss).

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.

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.

The government is currently in the process of drafting a new set of DBA regulations. 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 into these agreements.

18 Insurance

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 – such 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 – such 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.

Additionally, ATE insurance premiums are no longer recoverable from the other side in insolvency proceedings if the insurance policy was entered into on or after 6 April 2016.

For claims involving publication and privacy proceedings and mesothelioma claims the abolition of recovery has been delayed, but it has already been decided that eventually the same rule will apply. The delay will be in place for:

- proceedings relating to publication and privacy, until costs protection is introduced in line with the recommendations of the Leveson Report. The consultation on costs protection closed on 8 November 2013, but there has been no published response from the UK government; and
- claims for damages in respect of diffuse mesothelioma, pending a review to be carried out by the Lord Chancellor.

The legality of the recoverability of CFAs and ATE premiums pre-April 2013 has recently 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 article 6 right to a fair trial. The Supreme Court decided it was not incompatible, thus preventing an estimated potential 10 million appeals out of time.

19 Class action

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.

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 – these can be brought by including a large number of claimants to the action or by having one or a small number of claims run as a ‘test case’ that 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 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.

The issue of collective redress is continuing to attract interest and controversy. Businesses in the UK 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.

20 Appeal

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 or from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court.

Permission to appeal must generally 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.

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 CPRC has also proposed to increase the threshold for permission to appeal to the Court of Appeal, so as to require a ‘substantial prospect of success’. At the time of writing, the proposal remains under consideration.

The appeal court will not allow an appeal unless it considers that the decision of the lower court was wrong in law, 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.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The procedure for enforcing a foreign judgment in England and Wales depends on the arrangements made with the foreign country in question. Examples of these arrangements include the Brussels Regulation (Recast) and the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015).

Where there are no relevant arrangements in place, enforcement of judgments of the courts of these countries is governed by common law.

As of 10 January 2015, the CPR have been amended in line with the Brussels Regulation (Recast) (see also question 5) to remove requirements for a declaration of enforceability when enforcing a judgment from a court of another EU member state.

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.

In order to address the uncertainty over the future applicability of the Brussels Regulation (Recast) and other EU legislation, the government has proposed a Great Repeal Bill pursuant to which the status quo will be maintained in the immediate term (see ‘Update and trends’ for further information).

22 Foreign proceedings

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 according to the country in which the proceedings are located. Accordingly:

- requests for evidence for use in EU member states (except Denmark) are processed according to EC Regulation No. 1206/2001 of 28 May 2001. The procedure under the Regulation is highly centralised and permits the transmission of requests for evidence directly between designated courts in each EU member state (except Denmark); and
- requests for evidence for use in all other jurisdictions are processed according to the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to the Hague Convention of 1970 on the taking of evidence. The procedure requires that parties first obtain a letter of request from a court in the jurisdiction where the proceedings are located. The letter of request is submitted either to an agent in this country (usually a solicitor) or the senior master of the Supreme Court, Queen’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

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

The Arbitration Act 1996 (the Arbitration Act) 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 is similar to that of the UNCITRAL Model Law.

However, the Arbitration Act contains provisions that were not included in the UNCITRAL Model Law, 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 a 'defined legal relationship'.

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

Under the Arbitration Act, consistent with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 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, for instance by reason of fraud (see *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20).

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.

Moreover, the English court may grant an injunction to prevent parties from pursuing litigation proceedings in the courts of another country that is not a member state of the EU or European Free Trade Area (EFTA) in breach of an arbitration agreement.

The English courts cannot, however, restrain litigation proceedings brought in the courts of another member state (anti-suit injunctions) of the EU or EFTA in breach of an arbitration agreement where the substantive action relates to a 'civil and commercial' matter, following the ECJ decision in *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] 1 AC 1138.

The Brussels Regulation (Recast) does not explicitly address the courts' power to grant anti-suit injunctions although the Advocate-General's opinion in *Gazprom OAO Case C-536/13* argued that anti-suit injunctions in support of arbitration are permitted by the Brussels Regulation (Recast), specifically paragraph 4 of recital 12.

Nor can the English courts make declarations on the validity of an arbitration clause once it has been ruled upon by the courts of another EU or EFTA member state: see *Endesa Generacion SA v National Navigation Company* (2009) EWCA Civ 1397.

Oral arbitration agreements are recognised by English law, but fall outside the scope of the Arbitration Act and the New York Convention.

The Brussels Regulation (Recast) states explicitly that the New York Convention will take precedence over the Brussels Regulation (Recast).

25 Choice of 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 there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. In such case, one party may serve a written request on the other to make a joint appointment. This appointment must be made within 28 days of service of a request in writing by either party to do so. In the case of dispute about an arbitrator, the aggrieved party may apply for an order of the court to appoint an arbitrator or to give directions.

In *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] EWHC 455 (Comm) (as applied in *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain & Anor* [2013] EWHC 3188 (Comm)), where New India failed to respond to Through Transport's requests to agree to the appointment of an arbitrator, the High Court confirmed its discretion under the Arbitration Act and proceeded to appoint an arbitrator under section 18(3) of the Arbitration Act.

A party may apply to the court to remove an arbitrator on limited grounds, including:

- that circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality;
- that the arbitrator does not possess the qualifications required by the arbitration agreement;
- that 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
- that 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.

A recent case (*P v Q* [2017] EWHC 194 Comm) considered an application to remove arbitrators on the basis of their alleged failure to conduct proceedings due to an 'over-delegation' of duties to the tribunal secretary. One of the arbitrators had sought the secretary's comments on submission by one of the parties, which request was inadvertently sent to the party in question. The court dismissed the application, however, holding that this did not in and of itself constitute a trial to conduct proceedings.

Pending the outcome of an application to remove an arbitrator, the tribunal can proceed with the arbitration and make an award.

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

When choosing an arbitrator parties must first consider whether the arbitration clause specifies that the arbitration is to be governed by a particular set of institutional rules, as these will determine whether the parties may choose their arbitrator, or whether the arbitrator is nominated by the arbitral court.

The selection of the right arbitrator can, especially in the case of arbitrations involving a sole arbitrator, have a significant impact on the outcome of the dispute.

If it is open to parties to choose the arbitrator, the parties should bear a number of points in mind, such as the arbitrator's knowledge of the industry involved, his or her willingness to act (arbitrators are not obliged to accept appointments) and in some instances, his or her nationality. The International Chamber of Commerce Rules (ICC Rules) for example, stipulate that a sole arbitrator or chairman of a tribunal should not be of the same nationality as one of the parties.

The Chartered Institute of Arbitrators in London and the London Court of International Arbitration each maintain lists of arbitrators.

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

As party autonomy is the overriding objective of the law, it is 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 to act fairly and impartially between the parties.

28 Court intervention**On what grounds can the court intervene during an arbitration?**

The court's role is strictly supportive, and there is minimal intervention by domestic courts in the arbitral process. However, the court may

Update and trends

Since the publication of last year's chapter, the UK has voted to leave the EU, and the formal withdrawal process has been triggered. As of 29 March 2017, the UK and EU have two years to negotiate the withdrawal agreement, unless all EU member states agree to an extension. Until the expiry of that deadline, the UK remains a full member of the EU and all EU laws remain in force.

The government has published its intentions as to the effects of Brexit, stating that it aims to convert EU law into UK law as it stands at the moment of the UK's withdrawal from the EU, giving the UK government further time to consider which laws it intends to keep.

A March 2017 report on the implications of Brexit for the justice system published by the Justice Committee stresses that protecting the UK's status as a top-class commercial law centre should be a priority for the government during the Brexit negotiations. Protecting court choices and maintaining mutual recognition and enforcement of judgments are central to this objective.

Separately, the recommendations of the final Briggs Report published last year are also set to transform the current landscape of the civil justice system, if implemented. Many of its suggestions, including easing the burden on the Court of Appeal via amendments to appeal routes, and the digitisation of the litigation process, are already being put into practice.

Costs management continues to be closely monitored by with further reforms in the pipeline aimed at ensuring that the costs of disputes are proportionate.

provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances.

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).

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.

With regard to urgent interim relief, in *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) it was held that in circumstances where the arbitral tribunal is able to provide timely relief, in particular under the emergency arbitrator provisions under certain institutional rules, a party's ability to seek relief from court is restricted.

29 Interim relief

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 preservation of property and evidence.

If the parties have expressly agreed in writing, the tribunal also has the power to order provisional relief, such as payment of money or disposal of property. Provisional relief is subject to the final decision of the tribunal on the case.

However, the tribunal has no general power to grant interim injunctions. Such power must be conferred either by express agreement of the parties to the arbitration under the Arbitration Act. 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).

Although there is some debate over whether an arbitral tribunal has the power to grant a freezing injunction, in any event it could only do so by agreement of the parties. The court route is therefore likely to provide more certainty.

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).

30 Award

When and in what form must the award be delivered?

Unless otherwise agreed by the parties, 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 parties are also free to agree on the form of the award. Otherwise, it should 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.

The court can order an extension of time for an award to be made (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).

31 Appeal

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.

The test for 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 recently applied in *S v A* [2016] EWHC 846 (Comm)). *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) has confirmed and summarised the position succinctly.

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 requires the agreement of all the other parties to the proceedings or the leave of the court.

Parties may exclude the right to appeal to the court on any question of law arising out of the award.

Sufficiently clear wording to that effect is required within the arbitration clause: see *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp)* [2009] EWHC 2097 (Comm).

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).

32 Enforcement

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 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.

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.

Awards made in other countries 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.

Parties should note that pursuant to the Supreme Court decision in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16, English courts do not have the power to make an order for security for costs in the context of a challenge to the enforcement of a New York Convention award. This case was applied most recently in *Eastern European Engineering v Vijay Constitution* [2017] EWHC 797 (Comm), where the court held that the defendant's application to set aside the arbitral award should not be conditioned upon his provision of security.

The enforcement of arbitral awards in England and Wales as well as the enforcement of awards issued by tribunals seated in the UK will not be affected by Brexit as the UK will remain a party to the New York Convention.

33 Costs**Can a successful party recover its costs?**

Unless agreed to the contrary, the arbitrator 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 arbitrator, who 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.

Following a recent landmark High Court decision (*Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)), third-party funding costs are 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, although it was emphasised by the court that that costs incurred must be reasonable in order to qualify for recovery.

Additionally, the court 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.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?****Mediation**

This is by far the most popular form of 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 multi-tiered 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.

35 Requirements for ADR**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. In addition, the pre-action protocols require parties to consider ADR and parties may be required to provide the court with evidence that ADR was considered.

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.

Under applicable ethical rules, a solicitor should discuss with his or her client whether ADR may be appropriate.

Case law has 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 has been made clear that ignoring an invitation to participate in ADR is generally of itself unreasonable, and may lead to potentially severe costs sanctions.

LATHAM & WATKINS

Sophie Lamb
Kavan Bakhda
Aleksandra Chadzynski

sophie.lamb@lw.com
kavan.bakhda@lw.com
aleksandra.chadzynski@lw.com

99 Bishopsgate
London
EC2M 3XF
United Kingdom

Tel: +44 20 7710 1000
Fax: +44 20 7710 4460
www.lw.com

Miscellaneous

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.

Germany

Karl von Hase

Luther Rechtsanwaltsgesellschaft mbH

Litigation

1 Court system

What is the structure of the civil court system?

Civil and commercial litigation is handled by the ordinary courts. All ordinary courts – except for the Federal Court of Justice as supreme court – are at state level, but organised in a uniform way by federal law:

- 639 local courts (one professional judge) as entry level for petty claims (value up to €5,000) and – under certain circumstances – with the power to order provisional remedies irrespective of the value of the disputes;
- 115 regional courts (panels of three professional judges, but generally handling cases by a single professional judge; as to ‘mixed’ panels see question 2) for claims exceeding €5,000 and for appeals against most judgments of local courts;
- 24 higher regional courts (generally panels of three professional judges) for appeals against judgments of regional courts and in certain cases local courts, but also entry-level jurisdiction for certain special matters (eg, recognition and enforcement of arbitral awards); and
- the Federal Court of Justice (panels of five professional judges), which acts as supreme court in civil litigation and decides on further appeals.

Cases at the higher regional courts and the Federal Court of Justice are allocated on the basis of subject matter, thereby allowing the different panels to develop a thorough expertise in different fields. In addition, certain regional courts have exclusive entry level jurisdiction within a federal state for certain subject matters (eg, the regional court of Düsseldorf for disputes regarding intellectual property in North-Rhine Westphalia. (Düsseldorf is regarded as Europe’s most important venue for patent litigation as about 50 per cent of all European cases are handled there).

2 Judges and juries

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

Judges are selected from the top graduates by an independent commission mainly (but not only) on the basis of academic qualifications. They are highly esteemed and regarded as incorruptible. After reunification, the whole East German judiciary was replaced and taken over by West German professionals. The percentage of female judges increases from year to year (43.08 per cent as of 31 December 2012 in civil courts).

In civil litigation there are no juries. At larger regional courts there are particular ‘mixed’ panels for commercial matters in which one professional judge and two juror-like lay judges with knowledge of business and commercial practices decide together.

Apart from setting the timetable (hearings and deadlines for the parties’ briefs), the court’s main tasks are:

- to ensure that the parties understand all decisive legal issues. There is an express prohibition on basing judgments on a point of law that one of the parties has obviously overlooked, or has assessed differently from the court, and in respect of which such party was not given the chance to state its views. Therefore, the court may have to issue an explanatory court order identifying certain points of law that have not yet been sufficiently considered by the parties;

- to make certain that the parties state all relevant facts completely. Court orders requesting the parties to specify or explain certain allegations are common;
- to take and evaluate the evidence (in particular, interpreting documents, examining witnesses and appointing impartial experts);
- to promote compromise throughout the proceedings; and
- if necessary, to render a well-structured judgment including finding of facts and an analysis of legal issues.

3 Limitation issues

What are the time limits for bringing civil claims?

The standard limitation amounts to three full calendar years, beginning on 1 January following the time when the creditor becomes aware or ought to have become aware of the circumstances giving rise to the claim and of the identity of the person liable.

However, after a certain time all claims become time-barred irrespective of the creditor’s knowledge (mostly after 10 or 30 years). For certain claims there are particular rules and the standard period does not apply at all.

Limitation is suspended, for example, when negotiations are undertaken by the parties or where the creditor takes legal steps such as a legal action (a simple warning letter is not sufficient).

The parties may agree to prolong the limitation period, but not beyond a period of 30 years.

4 Pre-action behaviour

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

In Germany, there is no pretrial discovery or disclosure or other pretrial procedure. Disclosure claims will have to be based on substantive law, such as the shareholders’ right of inspection of the company’s commercial books.

The primary source of information is the material and information already held by the respective parties. A lawyer is not expected to distrust his or her own client. He or she will acquire additional reliable information by consulting public registers and researching various media.

As to a compulsory conciliation attempt, see question 35.

5 Starting proceedings

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?

Firstly, the claimant files a statement of claim with a court. The claimant’s motions determine the type of action and relief requested (see question 13).

The statement of claim will also present the factual basis for the claim plus possible means of evidence (mostly copies of documents, names and addresses of witnesses and request for a neutral expert opinion).

Before the court will effect service of the statement of claim and of the first court order on the defendant – by which the lawsuit becomes

legally pending – the claimant will have to pay the full court fees of the first instance proceedings.

If the defendant has its domicile abroad and does not speak German, the court will also ask for the costs of the necessary translations.

6 Timetable

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

There are no strict timetable and no case management conferences. The court is expected to handle the case as rapidly as possible and where possible in a single hearing. Few provisions contain compulsory time frames:

- the court's first order, which will be served by the court on the defendant together with the statement of claim, will set the deadline for the defendant's response – it will amount to:
- at least two weeks from service of statement of claim if the court opts for an 'early first hearing'; or
- at least four weeks if the court chooses to have a 'written preparatory phase' first (apart from that extended deadline, there is no relevant difference between the two proceedings);
- additional written submissions that contain new facts must be filed so in advance that the court can effect service on the other party at least one week before the scheduled hearing;
- there must be at least one week between the service of the summons for a hearing and the date of the hearing; and
- there are strict deadlines to present an appeal or a further appeal.

Typically, the procedure develops as follows:

- the court will fix at its discretion the hearing (about three to four months after the statement of claim has been filed with the court) and set the deadline for the defendant's response;
- the parties will generally exchange a second round of briefs before the hearing as German procedure tends to avoid surprises. All factual statements must be filed before oral hearings;
- the court may also issue a court order identifying relevant aspects before the hearing (see question 2);
- at the beginning of the hearing, the court will attempt to find a settlement unless it is evidently hopeless. In this context the court will already have discussed factual and legal issues (the judge knows the dossier very well). If the parties do not settle, the discussion continues;
- the judge will conduct the court hearing. Discussion of the legal arguments will be extremely focused on the key issues. Most hearings will only last for 10 to 15 minutes. It has been said that German hearings have the tone not of the theatre, but of a routine business meeting; and
- if the court deems necessary to take evidence or new issues arise that need further discussion, it will fix further hearings. Otherwise it will render its judgment.

According to data for 2014, the average length of civil proceedings at first instance was 9.1 months before regional courts and where the court was required to issue a judgment, 14.5 months.

Commercial cases that started at a regional court and were appealed to a higher regional court took altogether 26.9 months (31.2 months with a judgment).

According to the World Bank's report 'Doing Business 2017' it took on average 499 days (in 2016 it were 429 days) to enforce a commercial contract in Germany.

7 Case management

Can the parties control the procedure and the timetable?

There is no case management conferencing and the parties have no possibility to shape the procedure.

The timetable is fixed by the court at its discretion within certain statutory limits (see question 6).

The parties must comply, but may apply for the extension of deadlines or the postponement of hearings.

Courts usually grant a first extension quite generously, but request the other party's consent for further extensions.

The parties can agree that the proceedings shall be stayed to have settlement negotiations or for other relevant reasons.

8 Evidence – documents

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

The concealment or destruction of evidence is a criminal offence only if a third party had a right to claim access to such evidence. This is rarely the case, as there is no duty on the parties to present all documents relevant to the dispute. On that issue, German law is quite contradictory:

- on one hand, the parties are under an obligation to state the facts of the case completely and truthfully before the court. A violation of this duty can be prosecuted as (attempted) fraud in trial; but
- on the other hand, the Federal Court of Justice highlights the principle that no one is obliged to provide the opponent with material that will support the opponent's case.

As a result, a party will often have a lack of knowledge about the other side's facts. To counterbalance this deficiency, the Federal Court of Justice will allow a party to state that particular facts are true even if the party only assumes that such facts are true and try to prove them using witnesses or neutral experts, or - in limited cases - shift the burden of proof ('secondary burden of proof').

Since a reform in 2002, German courts can, at their discretion, order a party to submit documents and similar objects (photos, etc) that are in its possession. However, this power of the courts is very seldom applied. The idea is not to give one party the opportunity to gain information held by the other party, but to help the court understand the issues in dispute by clarifying questions that arise.

9 Evidence – privilege

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

As there is no concept of discovery under German law and no duty on the parties to present all documents relevant to the dispute, there is no need for legal privilege in such cases. There is, however, testimonial privilege: where lawyers act as counsel they can refuse to give evidence as a witness unless their clients grant their consent. It is disputed whether testimonial privilege also applies to in-house lawyers. In 2005 the Regional Court of Berlin denied such privilege.

Section 5.3.1 of the CCBCE Code of Conduct, which requires lawyers not to disclose to their own clients correspondence of the opponent's lawyer if marked as 'confidential', contravenes German law. A German lawyer is obliged to pass on to his or her client all information and correspondence related to the case.

However, if a foreign lawyer asks a German lawyer to have talks or correspondence 'without prejudice', the German lawyer is obliged to inform and ask his client about such proposal and - depending on the client's decision on the matter - give a clear answer to the foreign lawyer whether 'without prejudice' talks or correspondence are possible or not.

10 Evidence – pretrial

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

No.

11 Evidence – trial

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

In commercial matters the courts generally do not investigate the facts of a case on their own account, but restrict themselves to the evidence offered by the parties (see also question 8). The court will only take evidence if the contested facts to be proven:

- have been previously alleged in the pleadings. German courts are very strict about this point – no fishing expeditions;
- are not obvious or already known to the court; and
- are relevant as to the outcome of the claim.

There are no sequence rules as to which evidence has to be taken first. The court will decide this according to logic and effectiveness.

Generally, witnesses must be examined orally. The impression of witnesses' oral testimony is deemed to be most relevant in evaluating the credibility of their statements. The presentation by the parties of a written testimony (affidavit) is almost only possible in proceedings for interim remedies.

The examination of witnesses is mainly performed by the judge. After introductory questions to the witness (age, profession, relationship to parties) and a briefing regarding any possible privilege (family privilege, etc; see also question 9) and his or her duties as witness, the judge will start asking more general questions in order to permit the witness to tell the full story. The questions will then become more and more specific.

The examination of the witness often resembles a pleasant conversation. From time to time the presiding judge will dictate a summary of the testimony into the dossier, while the lawyers will pay attention to ensure that nuances important for their case are rendered correctly. Thereafter the parties can conduct supplemental questioning. The party's lawyer that named the witness will start. It is rare that the court interferes and excludes irrelevant or redundant questions, but there is no culture of cross-examination. There is no witness conferencing. Witnesses are heard one after the other, but may be heard repeatedly to face them with other testimonies.

Experts are appointed by the court to assist the court in determining the facts. The court selects the expert. Most commonly, the expert will have to prepare a written opinion, which will be circulated to the parties.

If necessary, the court will ask the expert to supplement it with additional considerations to clarify certain issues or to reply to the parties' comments. If requested, the court will schedule a hearing at which the parties can confront and interrogate the expert. If the court deems the expert opinion to be deficient, it can ask the expert to prepare a new one or appoint another expert for a second opinion.

12 Interim remedies

What interim remedies are available?

Two forms of interim remedies are available while proceedings – including foreign proceedings – on the merits are pending or imminent: freezing injunctions and preliminary injunctions.

Freezing injunctions

The defendant is prohibited from disposing of his or her assets (up to the claimed amount). Freezing injunctions are only available in order to secure monetary claims or claims capable of becoming a claim for the payment of money and in order to prevent a possible attempt to frustrate the enforcement of a future judgment. The frozen assets serve as security. In practice, it is quite difficult to obtain a freezing injunction. The fact that the debtor already has financial difficulties is not a valid reason. It is necessary to show that the debtor will take a dishonest or unfair course of action to elude future enforcement.

In theory, the claimant may also ask that the debtor be taken into personal custody. In practice, it never happens.

Preliminary injunctions

These secure all types of non-money claims against irreparable injury until such time as a final judgment on the merits is entered. The court has the discretion to decide the precise detail of each injunction according to the circumstances of the case.

There are no search orders under German law.

13 Remedies

What substantive remedies are available?

A party can ask for:

- affirmatory relief, namely, specific performance (eg, agreed supply of a good) or payment as well as negative declaratory relief;
- alteration of a legal relationship; or
- where such actions are not possible, for example, if the claimant seeks compensation, but the damage is still evolving, the claimant may ask for a declaratory judgment.

German law is hostile to the very concept of 'punitive', 'exemplary' or 'penal' damages.

They are regarded as contrary to German public policy: punishment must only derive from public prosecution under criminal law with its particular procedural safeguards.

A money judgment bears default interests until payment.

14 Enforcement

What means of enforcement are available?

The means of execution of a payment judgment depend on the debtor's assets:

- moveable assets can be seized by a bailiff and sold at a public auction;
- claims are seized by a court order; and
- real property is sold at a public auction or administered in favour of the judgment creditor through a court appointed administrator; the judgment creditor may also request a mortgage in the land register.

A cease and desist order will be enforced inflicting pecuniary sanctions (maximum €250,000) or alternatively a prison term (up to two years). The same applies for an order to perform acts that can only be performed by the debtor. If that act could be performed by a third party, the court may authorise the creditor to have a third party performing the act at the debtor's expense. At the claimant's request the court will order the defendant to pay an advance on the costs.

15 Public access

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

As a general rule, court sessions (hearings, taking of evidence, pronouncement of judgments) are open to the public. The public may be excluded by the court to protect business secrets or privacy-related interests.

The court's dossier of the proceedings containing all documents is open to inspection for the parties' counsels and for third parties having a legitimate interest, but not for the public.

16 Costs

Does the court have power to order costs?

The courts assess the costs pursuant to the 'loser pays' rule: the losing party has to bear all costs of the proceedings. This includes the other party's legal fees up to the statutory amount and all reasonably incurred expenses as well as the statutory court fees. In a split judgment, where both parties are partly successful, the costs will be split proportionately to the outcome.

There are no wasted costs orders to impose liabilities on lawyers whose conduct has been improper or negligent. Also, there are no other kinds of increased costs orders against parties who have behaved unreasonably. It has no consequence if a party refuses an acceptable settlement.

However, a successful defendant who did not appear at a hearing that resulted in a default judgment (later set aside) has to bear the costs of the default judgment and the additional hearing. In addition, even a successful party may be ordered to pay for costs caused by single arguments or defences it raised unsuccessfully (eg, costs for hearing witnesses who did not confirm such party's pleadings).

Claimants who have their habitual residence or, in the case of companies, their seat in an EU or EEA state are not subject to any obligation to provide security for the costs of the proceedings.

All other claimants have to provide security at the defendant's request, except where:

- international treaties exclude such obligations;
- a German decision on the reimbursement of costs would be enforceable against the claimant under an international treaty; or
- the claimant owns sufficient property in Germany (or other types of asset considered to be secure) to cover the costs of the proceedings.

A defendant that files a counterclaim will be exempt from any security for costs hereby caused.

The amount of security to be provided is fixed by the court at its discretion.

If the claimant does not provide the security, the court will upon the defendant's motion declare the action to have been withdrawn or dismiss an appeal filed by the claimant.

17 Funding arrangements

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 statutory provisions encourage lawyers and their parties to negotiate lawyers' fees. However, lawyers are prevented from charging less than the statutory fees for trial work. In addition, 'no win, no fee' agreements or 'success fees' were strictly forbidden in Germany. The legislator regards success fees as possibly dangerous because lawyers who have their own personal economic interest in the outcome of a claim may be tempted to act unethically. Moreover, there is the perception that success fees contradict the idea of a level playing field because only a claimant, and not a defendant, can rely on a success fee agreement. However, following a ruling by the Federal Constitutional Court, success fees can be agreed in cases where the client would otherwise be prevented from litigation for economic reasons.

There are several companies specialised in third-party funding. The requested share of any proceeds of the claim varies considerably (10 per cent–75 per cent). It is not customary that a claimant sells some 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.

18 Insurance

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

Insurance to cover specifically litigation costs (the party's own and opponent's costs, but limited to statutory fees) is available and quite common for private people, but not so much for commercial litigation. Other insurance schemes (eg, for professional or product liability and D&O) also cover litigation costs. Companies quite often have insurance covering costs for labour law disputes.

19 Class action

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

Under German law there are no US-style class actions. Several claimants may start an action jointly, if they have similar claims, but are still treated individually.

In 2005, and limited now to 1 November 2020, the German legislator introduced 'model case proceedings' regarding disputes under capital markets law. A model case proceeding allows joining at least 10 proceedings having the same legal issue in dispute (English version under www.gesetze-im-internet.de/englisch_kapmug/index.html). It is presently discussed to have such model case proceedings also in other cases of disputes.

20 Appeal

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

Each judgment of a court of first instance can be appealed against, if the value of the contested issues exceeds €600. Appeals can be based on points of fact and law. In principle, an appeal court will review the appealed judgment on the basis of the facts established at first instance, and the parties can only bring forward new arguments and new evidence if they could not have done so at first instance or if new statements are uncontested. The appeal court is, however, free to evaluate evidence or to interpret an agreement as it sees fit. It may also decide to repeat the taking of evidence, for example, by hearing the same witnesses or gathering additional evidence.

A further appeal to the Federal Court of Justice is possible (except for injunctions) if the appeal court has explicitly granted a further

appeal or the appellant can show that the issue raised by the further appeal is of fundamental significance, namely, that it is necessary to further develop the law or to secure consistency in court rulings. In the latter case the value of the contested issues must exceed €20,000.

The scope of the further appeal is much narrower than that of an appeal trial because the facts duly established in the preceding courts will remain the basis for the re-hearing of the case. The Federal Court of Justice only reviews points of law. In contrast to an appeal court, the Federal Court of Justice is not independent to evaluate evidence if the appeal court has evaluated the evidence without any logical error.

German courts are obliged to inform parties not assisted by lawyers about remedies available to them against court decisions.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Judgments from EU courts or from Switzerland, Norway or Iceland will be recognised under the EU Brussels Ia Regulation and the Lugano Convention without the requirement of any special procedure (however, a judgment will not be recognised if the recognition is manifestly contrary to German public policy). To enforce a judgment of a court of an EU member state in another member state it is not necessary to obtain an enforcement judgment or a declaration of enforceability. Such judgment can be enforced with the same authority as a German judgment.

Where the EU Brussels Ia Regulation, the Lugano Convention, or any other multilateral or bilateral convention (eg, with Israel and Tunisia) do not apply, the recognition and enforcement of foreign judgments is governed by German domestic rules:

The foreign judgment must be conclusive (ie, it cannot be appealed against in its state of origin) and recognisable. A foreign judgment is not recognisable if:

- the foreign court rendering the judgment had no jurisdiction under German law;
- the defendant's right to be heard in a due process of law has been violated;
- another judgment or other proceedings have priority;
- the recognition would be evidently contrary to fundamental principles of German law, in particular, if the recognition would violate constitutional rights; or
- reciprocity is not guaranteed.

US judgments granting punitive damages are unenforceable because they are deemed contrary to the clear separation between civil and criminal proceedings in the German legal system.

22 Foreign proceedings

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

Courts of EU states (except Denmark) may directly request German courts to take evidence under the EU Evidence Regulation No. 1206/2001. Requests are executed in accordance with German law. However, if the requesting court calls for the request to be executed in accordance with a special procedure, the German court must comply with this requirement unless it is prevented by legal or practical obstacles.

Witnesses may rely on rules of privilege under both German law and the law of the country of the requesting court.

With respect to, inter alia, the US, China, Switzerland and Turkey, the Hague Evidence Convention of 1970 applies, which eliminates the cumbersome diplomatic channels.

The German authorities may refuse execution of a request only on limited grounds. In particular, execution will not be denied because the claim is for punitive damages.

However, Germany, like most signatories to the Convention, made specific reservations objecting to the pretrial discovery of documents. Witnesses may rely on rules of privilege under both German law and the law of the country of the requesting court. Otherwise, requests may be executed according to:

- the Hague Civil Procedure Convention;
- any bilateral international treaties; or finally

- general principles of judicial assistance involving long-winded diplomatic channels.

A request for discovery of documents will not be executed.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Germany adopted the UNCITRAL Model Law in 1998 with some minor modifications (an English translation of the German provisions is available at www.dis-arb.de).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Beyond the written form described in article 2 of the New York Convention of 1958, German law also accepts:

- an exchange of telefaxes or other means of telecommunication that provide a record of the agreement;
- a document containing an arbitration agreement, which summarises an oral agreement between the parties and which was transmitted from one party to the other party and against which no objection was raised in good time by such other party, if all involved parties are merchants, companies or commercial partnerships; or
- the issuance of a bill of lading, if it expressly refers to an arbitration clause in a charter party.

Stricter rules apply with respect to arbitration agreements to which a consumer is a party.

25 Choice of 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?

There will be three arbitrators (each party appoints one, the two party-appointed arbitrators appoint the chairperson). If a party fails to appoint the arbitrator or if the two arbitrators fail to agree on the third arbitrator, the appointment shall be made, upon request of a party, by the court.

A written statement explaining the reasons for a challenge must be sent to the arbitral tribunal within two weeks after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that justifies the challenge. If a challenge is not successful, the challenging party may request within one month a court to decide on the challenge.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

German law does not provide any particular requirements for becoming an arbitrator such as minimum age, particular professional training or nationality. Hence, the parties are free to make their choice (as long as they choose independent and impartial candidates avoiding the risk of challenges). The parties may, however, agree on any qualifications to be required from the prospected arbitrators. In the majority of cases, no particular qualifications are specified by the parties. The most common qualification requirement to be found in arbitration agreements is that the arbitrators or at least the chairperson must have completed the standard legal education that is necessary to become a judge or a lawyer. Sometimes particular non-legal know-how is required by agreement of the parties. Language skills are also an issue (ie, the requirement that in addition to the language of the arbitral proceedings the arbitrators may have command of a second language in order to avoid certain documents needing to be translated). In international arbitration a provision according to which the chairperson shall not have the same nationality as one of the parties is also quite common. The different nationality is also an aspect that shall be taken into account by a state court if it is to appoint a sole arbitrator or a chairperson.

Update and trends

On 11 June 2013 the European Commission recommended introducing collective redress mechanisms throughout the EU member states proposing a series of principles that would allow many single claims (relating to the same case) to be bundled into a single court action. The system to be introduced is intended to be clearly distinguished from ‘class actions’ as under the US legal system. Germany, however, is not planning to adopt the EU recommendations, but is discussing to simply extend its ‘model case proceedings’ (see question 19) to other areas of law. The bill prepared by the Justice Ministry has been opposed by one coalition party and it is unclear whether the bill will be passed before the general election in September 2017.

Past plans for a major reform of the German civil litigation system aimed at economising funds have been shelved. However, the federal Minister of Justice announced plans to evaluate some proposals (for example, to increase the specialisation within the courts, in particular for construction cases, medical malpractice and cases related to capital market, financial transactions and insurance, and to avoid delays due to experts not delivering their expert report.) At present, the major focus is on creating and testing the necessary software for introducing e-trials and paperless court files. As of 1 January 2018 lawyers will be able to submit files to the court electronically and at the latest as of 1 January 2022 they must do it exclusively electronically. The functionality of different electronic case management and filing systems is being piloted with courts.

In January 2017 the administrative services of the Higher Regional Court of Hamm (North-Rhine-Westphalia) certified to ISO 9001.

There is quite an active arbitration scene in Germany and certain specialised lawyers, (former) judges and university professors provide regular services as arbitrators. Arbitrators for certain particular fields may concentrate in certain cities (eg, banking law in Frankfurt am Main, maritime law in Hamburg and IP law in Düsseldorf). Different institutions provide lists of possible arbitrators from which the parties may choose. The German Institution of Arbitration (DIS) organises regular conferences and training sessions and cooperates with a major German publishing house in publishing the German Arbitration Journal (*Zeitschrift für Schiedsverfahren – SchiedsVZ*).

27 Arbitral procedure

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

It is mandatory that:

- the parties must be treated equally; in particular, a court can be requested to intervene if the arbitrator appointment procedure as originally agreed among the parties is unfavourable to one of the parties to the extent that it violates public policy. Therefore, German courts do not accept if one party has already fixed the name of the single arbitrator in its general terms and conditions;
- the parties must be given full opportunity to present their case; and
- it is prohibited to exclude that the parties may be represented by counsel.

28 Court intervention

On what grounds can the court intervene during an arbitration?

A party can revert to the state court in order to:

- challenge the arbitral court’s jurisdiction;
- challenge the way the arbitrators are appointed;
- further challenge an arbitrator (see the end of question 25);
- request interim relief (see question 28); and
- enforce an interim measure ordered by an arbitral tribunal.

The arbitral tribunal or, with the approval of the arbitral tribunal, a party may request a state court to assist in taking evidence or perform other judicial acts that the arbitral tribunal is not empowered to carry out.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

Yes. In arbitration proceedings state courts and arbitral tribunals have parallel jurisdiction as to interim relief.

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

There are no statutory time limits for rendering an award.

The award shall be made in writing and signed by the arbitrator or arbitrators (the signatures of the majority is sufficient, if the reason for any omitted signature is stated).

The award shall state the reasons upon which it is based, unless otherwise agreed by the parties. The award shall state its date and the place of arbitration.

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

An award cannot be appealed to the courts, but it may be set aside for the grounds also set out in article V New York Convention of 1958:

- invalid arbitration agreement;
- violation of due process;
- unauthorised excess of authority;
- improper composition of arbitral tribunal and violation of procedural arbitration rules;
- no arbitrability of subject matter; and
- violation of public policy such as EU antitrust law.

Matter jurisdiction is with the higher regional court. Its decision can be appealed to the Federal Court of Justice.

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

If no more favourable treaty applies, Germany recognises and enforces all foreign arbitral awards according to the New York Convention 1958, irrespective of the country of origin. US awards granting punitive damages are regarded as contrary to German public policy and, therefore, unenforceable.

Domestic awards must be declared enforceable. The competent higher regional court will refuse enforceability and set aside the award if one of the grounds therefor exists.

33 Costs**Can a successful party recover its costs?**

Where the parties have not agreed on the recovery of costs, the arbitral tribunal decides at its discretion on the amount of costs it deems reimbursable and on their allocation. Generally, German arbitrators

will tend to apply the 'loser pays' rule used in state proceedings (see question 16).

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

In arbitration, particularly under the standard arbitration rules of the German Institution of Arbitration (the DIS rules), and expert determination are regularly used in Germany for commercial disputes. There are no comprehensive figures as to the use and success of mediation in Germany. The construction industry uses mediation more than any other industry. Many contracts for complex construction work provide for conciliation or mediation within 'multi-step' or 'escalation' clauses. Early neutral evaluation is uncommon in Germany.

35 Requirement for ADR**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 general, no. In 1999 the federal legislature introduced a provision under which individual states may require the completion of a conciliation procedure through a certified conciliation body before starting petty litigation (up to €750). In other particular cases (eg, with respect to employee inventions or certain copyrights disputes) prior conciliation procedures are also compulsory. The European directive on mediation 2008/52 which is intended to promote the use of mediation in cross-border disputes throughout the whole EU, was implemented by Germany in 2012. The German mediation act does not require the parties to make a mediation attempt before starting litigation, but the claimant is expected to explain in its statement of claim whether a mediation has been tried and - if not - why not. Already in 2008 renowned German companies established the Round Table Mediation and Conflict Management of the German Economy (www.rtmkm.de/home/welcome).

As of 1 April 2016, Germany implemented the EU Directive 2013/11 on alternative dispute resolution for consumer disputes. Under the new act the consumer is not obliged to first attempt ADR proceedings. If the consumer starts ADR proceedings, the ADR entity will not impose a binding solution on the parties, but will propose a solution within 90 days from having received all necessary information from both parties.

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

According to the World Bank report 'Doing Business 2017' Germany ranks 17th out of 190 states as to the efficiency of its commercial

Luther.

Karl von Hase

Graf-Adolf-Platz 15
40213 Düsseldorf
Germany

karl.von.hase@luther-lawfirm.com

Tel: +49 211 5660 25035
Fax: +49 211 5660 110
www.luther-lawfirm.com

litigation system (quality of judicial processes, time and cost to enforce a contract). Similarly, out of 102 countries, Germany ranks fifth in the civil justice system category in the 'Rule of Law Index 2015'. More data as to the German judicial system can be obtained from the 2016 EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf).

After a European Court of Human Rights ruling on 2 September 2010, Germany in 2011 introduced a domestic remedy to deal with excessively long proceedings under which €1,200 are granted as damages for each year of delay. In the first two years since introduction of this remedy, there were 124 claims for compensation of which 30.68 per cent were successful (compensation ranging between €600 - €8,700).

In a battle of brochures, German professionals replied to the brochure 'England and Wales: The jurisdiction of choice' (published in 2007 by the Law Society of England and Wales) with their own brochure in 2009 (www.lawmadeingermany.de/Law-Made_in_Germany.pdf) which highlights the advantages of a German jurisdiction. In the meantime, major institutional legal players have established an Action Alliance for German Law and in February 2011 published, together with their French counterparts, a brochure (www.brak.de/w/files/05_zur_rechtspolitik/international/broschuere_de.pdf).

Hong Kong

Simon Powell and Chi Ho Kwan

Latham & Watkins

Litigation

1 Court system

What is the structure of the civil court system?

The Hong Kong judiciary comprises various courts and tribunals, and includes the following:

- the Court of Final Appeal (CFA): the highest appellate court in Hong Kong, which hears appeals on matters from the High Court. The CFA may also seek interpretation from the Standing Committee of the National People's Congress on certain matters pertaining to the Basic Law of Hong Kong. The CFA usually comprises five judges, including the Chief Justice, three permanent judges, and either one non-permanent Hong Kong judge or one judge from another common law jurisdiction;
- the Court of Appeal (CA) is part of the High Court and mainly hears appeals on matters from the Court of First Instance and the District Court. It also hears appeals from the Lands Tribunal, and various other tribunals and statutory bodies. There are 13 justices of appeal of the CA, including the Chief Judge;
- the Court of First Instance (CFI) is the other part of the High Court and has unlimited jurisdiction. It hears appeals from magistrates' courts and various tribunals such as the Small Claims Tribunal and the Obscene Articles Tribunal. At present, there are 25 judges of the CFI;
- the Competition Tribunal deals with competition related cases. All judges of the CFI are members of the Competition Tribunal;
- the District Court (DC) has limited jurisdiction over civil disputes of a value up to HK\$1 million. The DC has one Chief District Judge, one Principal Family Court Judge and 35 district judges;
- the Family Court deals mainly with divorce cases and related matters such as maintenance and the welfare of children;
- the Lands Tribunal determines claims for compensation payable for resumption of land and appeals where provisions are made in specified ordinances for the tribunal to do so. It also makes orders for possession or ejectment, or for the payment of rent or any other money due under a tenancy under the Landlord and Tenant (Consolidation) Ordinance;
- the Labour Tribunal deals with labour disputes and hears cases where the amount of the claim exceeds HK\$8,000 for at least one of the plaintiffs in a claim or where the number of plaintiffs in the claim exceeds 10. Hearings are informal and no legal representation is allowed; and
- the Small Claims Tribunal has jurisdiction over civil disputes of a value not more than HK\$50,000. Hearings are informal and no legal representation is allowed.

The Chief Justice is empowered to provide for separate lists of particular types of proceedings in the High Court. The most relevant lists concerning commercial and financial matters are the Commercial List, which facilitates the disposal of actions involving commercial matters, and the Construction and Arbitration List, which is not restricted to cases involving only a construction element but includes all arbitration matters dealt with by the CFI. Corporate insolvency and shareholder disputes are generally handled in an informal 'companies' list headed by a judge experienced in such matters.

2 Judges and juries

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

Hong Kong follows the common law adversarial system. Judges adopt a passive role in proceedings, listening to evidence and arguments presented by the parties. The judges' inquisitorial role is limited.

Civil cases are usually heard by a judge sitting alone. A party to a civil action in the CFI can apply for an order for trial by jury where claims are made in respect of libel, slander, malicious prosecution, false imprisonment or sedition, or where otherwise prescribed by the rules of court, but even then an order will not be granted if the trial requires any prolonged examination of documents or accounts, or any scientific or local investigation that cannot conveniently be made with a jury.

Judges are appointed by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission, which is an independent statutory body composed of judges, persons from the legal profession and eminent persons from other sectors.

Judges are chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

3 Limitation issues

What are the time limits for bringing civil claims?

Time limits for bringing civil claims are set out in the Limitation Ordinance, such as:

- actions to recover land: 12 years from the date when the right accrued (60 years if the claim is brought by the government);
- contract: six years from the date of breach;
- deeds: 12 years from the date of breach;
- fraudulent breach of trust: no limitation period; and
- tort: six years from either the date of the wrongful act or when damage occurs as a result of the wrongful act.

The Limitation Ordinance is silent as to whether parties may contract out of the statutory limitation periods by agreeing to vary the period (to be longer or shorter), or to suspend or extend it. However, if the period agreed is reasonable and does not fall foul of the Control of Exemption Clauses Ordinance, there is nothing to preclude limitation periods for contract and tort claims being varied. The Limitation Ordinance also sets out certain instances where limitation periods are subject to extension, exclusion or postponement; for example, where an action is based on fraud or for relief from the consequences of a mistake, or where there has been deliberate concealment by the defendant of facts relevant to the plaintiff's cause of action. In those cases, the limitation period does not begin to run until the plaintiff has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.

4 Pre-action behaviour

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

No formal demand letter or mediation is required before issuing proceedings. However, failure to make such a demand before issuing

proceedings might, in some circumstances, have costs implications. For example:

- in personal injuries cases, the plaintiff should serve a demand letter on the proposed defendant and his or her insurer providing requisite information at least four months before commencing proceedings. The absence of a demand letter without good reasons may lead the court to grant an adverse costs order or a stay of proceedings; and
- the Hong Kong courts encourage the use of mediation and may make an adverse costs order if a party refuses, on unreasonable grounds, to attempt mediation.

An application for an order for the disclosure of documents prior to commencement of proceedings might be made if:

- the applicant appears likely to be a party to subsequent court proceedings;
- the person against whom an order is sought appears likely to be a party to such proceedings; and
- such latter person appears likely to have or have had in his or her possession, custody or power any relevant documents.

5 Starting proceedings

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?

Generally, to commence civil proceedings, the plaintiff issues and serves on the defendant one of the following:

- a writ of summons (where disputed questions of fact are involved);
- an originating summons or motion (where there are no or few disputes of fact and the main issues are points of law, or the interpretation of certain terms in a legal document is raised for the court's determination); and
- a petition (which is required for particular matters, such as certain applications concerning companies and patents).

There are three principal methods of service of an originating process on a defendant who is in Hong Kong, namely by:

- personal service on the defendant;
- service by registered mail, addressed to the defendant at his or her usual or last known address (or, where the defendant is a limited company, by posting the notice or leaving it at its registered office address); or
- insertion through the defendant's letter box in a sealed envelope.

Service of originating process on defendants outside the jurisdiction may only be effected with the leave of the court.

Once leave is obtained to serve process out of the jurisdiction, service may be effected by personal service; by service in accordance with the law of the country or place in which service is effected; or pursuant to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention).

To serve process in the People's Republic of China (PRC), a request should be lodged with the Hong Kong court, which will send the documents to be served to the judicial authorities of the PRC for service on the defendant.

The courts have relatively limited means to address the problems encountered by their persistently heavy caseload. That said, the courts have extensive case management powers to ensure that a case is dealt with as expeditiously as is reasonably practicable, including but not limited to striking out a claim for want of prosecution on grounds of inordinate delay. In 2016, the average waiting time for civil cases at the CFI, from application to fix date to hearing, was 155 days. Further, the Chief Judge of the High Court issued a note in January 2016 setting out the High Court's current administrative practice on notifying parties to a hearing at the conclusion of which judgment is reserved of the estimated time for handing down the reserved judgment. The note stipulates that, if judgment is reserved at the conclusion of a hearing and remains outstanding for 90 days or more, the court will provide an estimated handing down date to the parties which is expected to be realistic and adhered to by the court, and only revised in exceptional circumstances. The parties can request the court to provide an

estimated handing down date if for some reason the court has not provided one in accordance with the practice note. In the event that there is serious departure from the estimated handing down date, the parties may bring the matter to the attention of the Chief Judge of the High Court. The note applies to reserved reasons for judgment, decisions, rulings, determinations, etc, and not just judgments.

One of the key factors affecting court waiting times in the High Court is the shortfall in judicial manpower. In an attempt to address this issue, the judiciary has created additional judicial posts and appointed deputy judges. The judiciary has also looked at other ways in which to shorten waiting times, such as reviewing the retirement ages and conditions of service for judges, and embarking on regular recruitment exercises to entice new blood into the judicial ranks.

6 Timetable

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

The documents to be served and their time limits, and the typical procedure and timetable for a civil claim are as follows:

- assuming a writ of summons has been duly served on a defendant within Hong Kong, the defendant will have a period of 14 days to acknowledge service and give notice of intention to defend the claim;
- the plaintiff must then serve on the defendant the statement of claim, in cases where it was not endorsed on the writ, within 14 days after the defendant has acknowledged service;
- if the defendant intends to defend the claim, it must file and serve a defence within the later of 28 days after the time prescribed for acknowledging service of the writ or from receipt of the statement of claim;
- the plaintiff may then file and serve a reply to that defence within 28 days, setting out additional facts in answer to the defence;
- if the defendant counterclaims, a plaintiff wishing to dispute the counterclaim must file and serve a defence to the counterclaim within 28 days; and
- the pleadings are deemed to be closed at the expiration of 14 days after service of the reply or the defence to counterclaim, or if neither a reply nor a defence to counterclaim is served, at the expiration of 28 days after service of the defence.

The subsequent proceedings are as follows:

- discovery (see question 8);
- exchange of witness statements and (if applicable) the filing of experts' reports; and
- listing for trial: after the court has given directions for setting down, the parties should file an application to set the case down for trial and provide notice of setting down.

7 Case management

Can the parties control the procedure and the timetable?

The parties and the court will usually set the procedure and timetable in the following manner:

- the parties are required to try to agree directions with each other;
- with the agreement of all parties, the plaintiff should procure and file agreed directions on procedure and timetable for the court's consideration and approval; and
- if no agreement has been reached, parties should file with the court 'timetabling questionnaires' that contain the proposed directions, and attend a hearing at which the court will give directions on case management.

Courts may impose sanctions for non-compliance with orders and rules on case management and directions, unless the party in default provides a good reason for non-compliance. Generally, sanctions are self-executing unless an application is made to the court to obtain relief within 14 days.

Parties may control the timetable by applying to vary non-milestone dates (in the absence of agreement), but the court will only grant the application if sufficient grounds are shown. Milestone dates (ie, the dates of the case management conference, pretrial review and the trial) can only be moved in exceptional circumstances.

8 Evidence – documents

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

Parties must disclose and are entitled to discovery of relevant documents in civil cases. Documents relevant to pending trials must be preserved intact as from the time litigation is contemplated. There are two main categories of discovery:

- automatic discovery: the parties have a continuing duty to disclose all documents in their possession, custody or power relevant to the issues in dispute, including those that may be unhelpful to their case. According to the Rules of the High Court (and the Rules of the District Court), each party must prepare and submit a list of all such documents. This process is administered by the parties. The court may, on the application of a party, order discovery where a party who is required to make automatic discovery fails to do so; and
- specific discovery: the court may also order a party to disclose specific documents or classes of documents upon the application of another party, if those documents are relevant and discovery is necessary for either disposing fairly of the cause or matter or saving costs. This process is administered by the court.

Documents disclosed in parties' lists of documents are generally subject to production and inspection by other parties. However, privileged documents (see question 9) have to be disclosed as to existence only, but not as to contents.

9 Evidence – privilege

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

Documents may be privileged on various grounds, including:

- legal professional privilege (LPP) – the concept of LPP is well recognised in Hong Kong. There are two main categories of LPP:
 - legal advice privilege: applies to communications between clients and their lawyers made for the purpose of giving or receiving legal advice. Advice from in-house lawyers is also privileged, provided that the in-house lawyer was performing a legal function in entering into such communications; and
 - litigation privilege: applies to communications between lawyers (and in some circumstances their clients) and third parties made for the dominant purpose of obtaining legal advice or collecting evidence in respect of existing or contemplated litigation;
- 'without prejudice' correspondence created for the purpose of settling the dispute;
- documents covered by 'common interest' privilege (documents exchanged between parties who have a common interest in the subject matter of the document or litigation); and
- public interest grounds.

10 Evidence – pretrial

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

Parties exchange written statements of fact from witnesses prior to trial. Written evidence may occasionally be in the form of an affidavit sworn by the witness instead. A witness will not be allowed, without the court's leave, to give evidence at trial where a witness statement has not been served beforehand.

No expert evidence can be adduced without the court's leave or the parties' agreement. Where the court grants leave or the parties agree to adduce expert evidence, the nominated experts prepare joint or separate reports (depending on circumstances) prior to trial to be exchanged between the parties. Parties usually appoint their own experts but are also entitled to agree on the appointment of a single joint expert.

11 Evidence – trial

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

In general, witnesses must attend trial to give evidence to prove all the facts in their statements. Without the court's leave, where a witness statement has not been served beforehand, a witness will not be allowed to give evidence at trial. The CFI will generally direct that the witness statement will stand as the witness's evidence in chief. The opposing party can cross-examine the witness and the witness can then be re-examined by the party calling him or her on matters arising out of the cross-examination.

Experts are also usually called to give oral evidence and be cross-examined at trial.

12 Interim remedies

What interim remedies are available?

Interim remedies that the court may order include:

- *Anton Piller* orders: mandatory injunctions requiring a defendant to provide access to its premises to allow documents and materials to be removed and preserved pending trial, in order to preserve the subject matter of a cause of action and of related documents;
- interim injunctions: orders directing a defendant to do or refrain from doing something pending the trial may be issued where there is a serious issue to be tried or the balance of convenience lies in favour of granting an injunction;
- interim payments: a party may be required to pay a sum of money into court on account of damages, debts or other sums that he or she may be held liable to pay the other party. A party may also be required to pay a portion of the sum claimed by the other party if the court is satisfied that, if the action proceeded to trial, the other party would obtain judgment for substantial damages against that party;
- provisional liquidators may be appointed by the court at any time after the presentation of a winding-up petition to preserve the assets of the company pending the hearing of the petition in company winding-up proceedings; and
- receivers and managers may be appointed by the court when it appears just and appropriate to do so to receive, manage or preserve property, or to restrain other parties from taking such property pending the trial.

The court also has jurisdiction to grant pre-action interim relief in support of foreign proceedings. Pursuant to the High Court Ordinance, the CFI may appoint a receiver or grant other interim relief in relation to proceedings that have been or are to be commenced outside Hong Kong, and that are capable of giving rise to a judgment that may be enforced in Hong Kong.

13 Remedies

What substantive remedies are available?

The substantive remedies generally available in commercial disputes include:

- damages: generally compensatory in nature under Hong Kong law. Punitive damages are available, but only in very limited circumstances and are rarely awarded;
- declarations: may be made under the discretionary power of the courts. Binding declarations of a right can be made, in circumstances where the plaintiff seeks the judge's determination of the parties' rights, under a contract or a statute, so that he or she can take appropriate action;
- injunctions: may be granted where it is just and convenient to do so; and
- specific performance: may be awarded where damages are not an adequate remedy.

Interest may be awarded on money judgments. The CFI and the DC can award interest to a successful party in proceedings (at such rate as it thinks fit) on all or any part of the debt or damages, in respect

of which judgment is given for all or any part of the period between the date when the cause of action arose and the date of the judgment. Thereafter interest runs on the judgment debt from the date of the judgment until payment.

14 Enforcement

What means of enforcement are available?

There are several means of enforcement available, including:

- a writ of fieri facias: requiring the bailiff to seize such of the goods, chattels and other property of the judgment debtor as are reasonably sufficient to satisfy the judgment debt together with interest and incidental expenses of execution;
- charging orders: an order imposing, for the purpose of securing the payment of a sum of money, a charge on the property of the judgment debtor; and
- garnishee orders: where a third party (the garnishee) owes money to the judgment debtor, the court may order the garnishee to pay the owed sum directly to the judgment creditor instead of the judgment debtor. This is only available if the garnishee is within the jurisdiction.

A judgment creditor may apply to the courts for the oral examination of a judgment debtor. Such examination is available in respect of money judgments, and where any difficulty arises in or in connection with the enforcement of any judgment or order. Following an oral examination, the court may order the imprisonment of the judgment debtor for a period not exceeding three months in certain circumstances.

Where, by a judgment, a person is directed to do an act within a specific time or abstain from doing an act, that order can be enforced by committal proceedings (for an individual judgment debtor) and a writ of sequestration (for a corporate judgment debtor). Such methods of enforcement are usually adopted as a penalty for contempt of court.

15 Public access

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

In accordance with the principle of open justice, hearings in Hong Kong are generally held in open court where the public and press may attend. There are, however, certain exceptions. For example:

- arbitration proceedings;
- matters relating to children and applications for financial provision and ancillary relief;
- intellectual property; and
- obtaining evidence for foreign courts.

Court documents available to the public include writs of summons filed to initiate civil suits and the related court judgment, but other documents used in the proceedings remain private and confidential unless or until they are referred to in open court.

16 Costs

Does the court have power to order costs?

The court has discretion to order the payment of costs by one party to another. The general rule is that the unsuccessful party will be ordered to pay the costs of the winning party. If the party who bears costs disputes the amount of costs claimed, he or she may proceed to taxation (an assessment by the court of the appropriate quantum of costs to be awarded). Costs in an action can be taxed on the following bases:

- common fund: the court will allow a reasonable amount in respect of all costs reasonably incurred;
- indemnity: all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred;
- party and party: all costs that were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed will be allowed; and
- trustee: no costs will be disallowed unless they should not, in accordance with the duty of the trustee or personal representative, have been incurred or paid.

In lieu of taxation, the court also has the power to assess costs summarily and to award a gross sum.

A plaintiff is not generally required to provide security for the defendant's costs, but a defendant may apply for such an order on various grounds, including where the plaintiff is ordinarily resident out of the jurisdiction; is (not being a plaintiff suing in a representative capacity) a nominal plaintiff who is suing for the benefit of some other person, and there is a reason to believe that the nominal plaintiff will be unable to pay the costs of the defendant if ordered to do so; or is a company incorporated under the Companies Ordinance and there is reason to believe that the company will be unable to pay the defendant's costs if the defendant succeeds in the defence.

There are no new rules governing how courts rule on costs.

17 Funding arrangements

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 generally not permitted in Hong Kong in respect of contentious business. Section 64 of the Legal Practitioners Ordinance provides that such fee arrangements shall not be valid, and disregard of these rules is covered by section 101I of the Criminal Procedures Ordinance, which states that failure to comply could attract a fine and a prison sentence of up to seven years.

Parties are also generally not permitted to bring proceedings using third-party funding in commercial disputes, but they may in limited circumstances do so, such as in insolvency proceedings, to enable liquidators to pursue claims. Arrangements where third parties (as maintainers) act for a share of the proceeds of the action in question are generally illegal at common law and can constitute criminal offences (maintenance or champerty, or both), but there are certain exceptions, such as in insolvency proceedings.

18 Insurance

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

There is no established practice of insuring for litigation costs.

19 Class action

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

There is technically no mechanism available for class actions in Hong Kong. The sole mechanism for litigants with similar claims to bring a collective action are the rules on representative proceedings contained in the Rules of the High Court, which state that, where numerous persons have the same interest in any proceedings, one or more litigants may, as representatives, represent all the persons (or all of them with one or more exceptions).

20 Appeal

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

Parties may appeal on matters of law or fact, or against the court's exercise of its discretion. Appellate courts are generally reluctant to reverse judgments based on findings of fact, particularly where such findings depended on the sitting judge's view of the credibility of the witnesses who gave oral evidence before the CFI.

Appeals from judgments of the CFI and the DC are to the CA. No leave is required for appeals against final judgments of the CFI. Leave is required for appeals against interlocutory decisions of the CFI or decisions made in the DC.

Parties can also seek leave to appeal to the CFA on the grounds set out in section 22 of the Hong Kong Court of Final Appeal Ordinance.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Not all foreign judgments will be recognised or can be enforced in Hong Kong. Foreign judgments (excluding those from mainland China) are recognised and enforced via two methods in Hong Kong:

- statutory registration scheme. By virtue of the Foreign Judgments (Reciprocal Enforcement) Ordinance, judgments from designated countries with which Hong Kong has reciprocal agreements may be registered and enforced in Hong Kong. Designated countries include Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka; and
- common law. For non-designated countries, which include, for instance, England and Wales and the United States, an action may be brought by writ on the foreign judgment. The judgment creditor may apply for summary judgment.

The Mainland Judgments (Reciprocal Enforcement) Ordinance provides for the reciprocal enforcement of money judgments of designated courts in mainland China and Hong Kong, where the dispute arises from civil or commercial contracts and where the parties concerned have agreed in writing that the courts of mainland China or Hong Kong have exclusive jurisdiction to resolve such disputes.

22 Foreign proceedings

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

Where the witness is willing to attend to give evidence, there are no restrictions to the taking of evidence from a witness in Hong Kong for use in existing foreign proceedings. If a witness is unwilling to give evidence voluntarily, the foreign court must issue a letter of request to the Hong Kong courts requiring the witness to give evidence.

Part VIII of the Evidence Ordinance sets out circumstances in which the Hong Kong court will render assistance to foreign courts by ordering the taking of evidence within the jurisdiction. The application is made *ex parte*, and supported by an affidavit exhibiting the letter of request and explaining the issues in the foreign proceedings and the evidence to be sought.

The courts will ordinarily give effect to such a request insofar as is proper and practicable and to the extent that is permissible under Hong Kong law.

On 1 March 2017 the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region which was signed on 29 December 2016 (the Arrangement) came into effect. The Arrangement aims at assisting litigants in Mainland China and in Hong Kong to obtain evidence in civil and commercial matters more speedily and with greater certainty as to the scope of assistance available to them. Pursuant to the Arrangement, a litigant in Hong Kong may make a request for the taking of evidence through the Administration Wing of the Chief Secretary for Administration's Office of Hong Kong by submitting a letter of request.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Ordinance (Chapter 609) (the Arbitration Ordinance) is based on the UNCITRAL Model Law (save for modifications and supplements expressly provided for in the Arbitration Ordinance).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be made in writing or recorded in any written form (including, for example, electronic communication or

the reference in a contract to any documents containing an arbitration clause) to be enforceable in Hong Kong.

25 Choice of 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?

Where the arbitration agreement and relevant rules are silent on the matter, the number of arbitrators will be either one or three, as decided by the Hong Kong International Arbitration Centre, taking into account the circumstances of the case.

Parties are generally free to agree on the procedure for appointing the arbitrator or arbitrators. The Arbitration Ordinance provides for the procedure to be adopted where the parties are unable to agree on the arbitrator or arbitrators.

An arbitrator may be challenged if justifiable doubts exist as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the requisite qualifications. Parties are free to agree on a procedure for challenging an arbitrator. Otherwise, the Arbitration Ordinance provides for the procedure to challenge an arbitrator.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Parties are entirely free to choose arbitrators with the qualifications required to meet the needs of their disputes, which might include expertise in the subject matter, a particular nationality, specific language skills, etc. While there is a large pool of candidates available locally in Hong Kong to act as arbitrators, parties are free to choose arbitrators from around the world. The Hong Kong International Arbitration Centre maintains a panel and a list of arbitrators to assist users to search for appropriate arbitrators for their disputes. The pool of candidates is large and experienced, and more than sufficient to meet the needs of complex arbitration.

27 Arbitral procedure

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

Hong Kong domestic law does not contain substantive requirements for the procedure to be followed in arbitration proceedings. Generally speaking, the arbitral tribunal has the power to adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense. In exercising such power, the arbitral tribunal is required to be independent, fair and impartial. Parties have the right to be treated equally, and to have a reasonable opportunity to present their cases.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The Arbitration Ordinance states that the court cannot intervene in arbitration proceedings, except as provided for in the Arbitration Ordinance. The court's role is limited to matters such as ruling on challenges to the appointment of an arbitrator and assisting in taking evidence.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Arbitrators have powers to grant a wide range of interim protective measures in the form of an award or in another form by which a party can be ordered to:

- maintain or restore the status quo 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; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

30 Award

When and in what form must the award be delivered?

Generally speaking, there is no set time limit or form in which the award must be delivered unless otherwise agreed by the parties. The time, if any, limited for the making of an award may be extended by order of the court on the application of any party. The award must be in writing and signed by the arbitrator or arbitrators.

31 Appeal

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

Arbitral awards are usually not subject to appeal on the merits. However, parties may expressly agree in the arbitration agreement (as provided for in opt-in provisions in Schedule 2 of the Arbitration Ordinance) that awards may be challenged on the grounds of serious irregularity and appeals to court be allowed on questions of law.

Generally, the recourse for a party dissatisfied with an award in an international arbitration is to apply to the tribunal for a correction or interpretation of the award, or for an additional award, or to apply to the court to set aside the award under the limited grounds set out in Part 9 of the Arbitration Ordinance.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

An award made in or outside Hong Kong is enforceable in the same manner as a judgment of the Hong Kong courts, with the leave of the court.

Arbitral awards are divided into several categories:

- Convention award. A Convention award (made in a country that is a party to the New York Convention, other than mainland China) is enforceable either by an action in the court or with court leave under the general provision of section 84 of the Arbitration Ordinance;
- mainland award. An arbitral award made in the PRC by a recognised arbitral authority pursuant to the Arbitration Law of the PRC can be enforced in Hong Kong in the same manner as a Convention award. The Arbitration Ordinance contains provisions to guard against double recovery where enforcement proceedings are taken in both the PRC and Hong Kong; and
- other awards. Any other awards are enforceable with the court's leave under the general provisions of section 84 of the Arbitration Ordinance.

Parties seeking to enforce an award under the Arbitration Ordinance must produce certain documents, including the duly authenticated original award and the original arbitration agreement, or duly certified copies of the award and the arbitration agreement.

Hong Kong remains an arbitration-friendly jurisdiction and there is a strong presumption in favour of enforcement of Convention awards.

33 Costs

Can a successful party recover its costs?

In general, a tribunal has full discretion in awarding costs, including to award a successful party its costs. Where an award has been made as to costs, the tribunal will generally fix the amount of costs to be paid by one party to the other. If the tribunal does not fix the quantum of costs to be paid, the parties may agree on the sum payable or, failing this, may agree to have costs taxed by the court.

As it currently stands, third-party funding of arbitrations is not expressly permitted in Hong Kong. However, in October 2016, the Law Reform Commission of Hong Kong released a report recommending that the law be amended to make it clear that third-party funding of arbitration taking place in Hong Kong is permissible. Subsequently the government has introduced the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 into the Legislative Council, the main objective of which is to amend the Arbitration Ordinance to clarify that third-party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty. However, the tribunal's power to award costs against third-party funders remains uncertain: while in its October 2016 Report the Law Reform Commission agreed, in principle, that a tribunal should be given the power under the Arbitration Ordinance to award costs against a third-party funder in appropriate circumstances, it considered it premature at that stage to amend the Arbitration Ordinance to provide for this power.

Alternative dispute resolution

34 Types of ADR

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

Arbitration remains the most popular ADR method in Hong Kong. Aside from arbitration, the following processes are common alternatives to litigation: negotiation, mediation, privately constituted tribunals and statute-based or public tribunals.

LATHAM & WATKINS

Simon Powell
Chi Ho Kwan

simon.powell@lw.com
chiho.kwan@lw.com

18th Floor, One Exchange Square
8 Connaught Place
Central
Hong Kong

Tel: +852 2912 2500
Fax: +852 2912 2600
www.lw.com

35 Requirements for ADR

**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 actively encourage settlement and the use of ADR, in particular the use of mediation, but generally cannot compel parties to participate in an ADR process. However, the court has issued a practice direction requiring the parties to file a mediation certificate early on in court proceedings stating whether they are willing to attempt mediation before proceeding to trial and, if not, the reasons for refusing to do so. The court may impose costs sanctions if a party unreasonably refuses to attempt mediation.

Miscellaneous

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

No.

Hungary

Csaba Pigler and Viktor Jéger

Nagy és Trócsányi Ügyvédi Iroda

Litigation

1 Court system

What is the structure of the civil court system?

The Hungarian court system has four levels. There are:

- 111 local courts (105 in towns and six in the various districts of Budapest, the capital city);
- 20 county courts, including the Metropolitan Court of Budapest;
- five courts of appeal operating in five major towns; and
- the Supreme Court (Curia).

Specific administrative and labour courts operating in the same towns as the county courts deal, as courts of first instance, with the judicial revision of administrative decisions as well as labour matters as defined by the Civil Procedure Act (CPA). In addition, specific subdivisions of the county courts deal with these matters at the second instance.

The Constitutional Court, which has a duty to protect the Fundamental Law of Hungary, is not part of the ordinary court system. However, a case under the CPA may be referred to the Constitutional Court by an ordinary court if it considers that the law applicable to the case is against the Fundamental Law of Hungary or an international treaty. In addition, under certain circumstances, a person or organisation involved in a case under the CPA may also turn to the Constitutional Court if the law applied in the case or the final decision passed by an ordinary court is against the Fundamental Law of Hungary.

At first instance, the trial is held by a single professional judge. In administrative matters the court may consist of three professional judges if it is reasonable owing to the complexity of the case. In employment matters there are also two lay judges in the court in addition to the professional judge. In every second-instance procedure, there is a court consisting of three professional judges.

There are no specialist commercial or financial courts; however, special divisions were established at most of the courts for managing commercial matters. (Usually, judges have a certain portfolio of matters, which is publicly available in the case of some courts.) Special courts have been established for managing administrative and labour cases.

2 Judges and juries

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

The role of the judge encompasses pre-hearing responsibilities, which include examination of the statement of claim, the decision whether to refuse the claim or suspend the procedure, decisions on interim remedies and determination of the time of the hearing.

At the hearing, the judge leads the trial and determines the sequence of procedural acts; he or she listens to the arguments raised, then renders his or her judgment based on interpretation of the law and the evidence adduced.

The responsibility for producing evidence for the purposes of litigation lies with the parties.

The jury system is unknown in Hungary.

Pre-qualification criteria of judges

Candidates to be appointed in Hungary as judges (i) shall be at least 30 years of age, (ii) shall be Hungarian citizens, (iii) shall not be under guardianship or conservatorship or under the effect of advocated

decision-making, (iv) shall have a law degree, (v) shall have passed the bar examination, (vi) shall agree to file a declaration of personal wealth as set out in the relevant law, (vii) shall have at least one year relevant experience (as specified in the relevant act), and (viii) must be found suitable based on the results of the professional aptitude test.

Selection process of judges

Vacancies shall be filled through a public selection process. The selection process shall be conducted in a way to ensure that the judge's position is filled upon an open selection procedure designed to ensure equal conditions for all candidates who are able to satisfy the requirements prescribed in the CPA and in the notice of vacancy, and as a result, to choose the best suitable candidate for the position. The president of the National Office for Judiciary (OBH) shall have competence to publish the notice of vacancy. When determining the ranking of applicants only certain criteria may be taken into account (experience, results of the professional aptitude test and the bar examination, postgraduate diploma in law or other secondary diploma, language skills, legal publications, etc).

3 Limitation issues

What are the time limits for bringing civil claims?

The statute of limitations is considered to be a matter of substantive law. Limitation of actions is regulated in the Civil Code, and a general regime applies to most civil claims. As a general rule, the limitation period for breach of contract, property damage, economic loss and personal injury is five years. If the damage or personal injury is caused by a crime, the limitation period is the same as the period during which the crime is punishable, but is at least five years. Ownership claims may be pursued without any time limit.

Some special rules provide for shorter limitation periods such as three years or one year (eg, implied warranty) and for special torts. Generally, the parties to a contract are also free to change the prescribed period in writing but they cannot rule it out completely.

Where the claimant is not in a position to bring an action for good cause, his or her claim is not time-barred for one year from the date on which the reason ceased to hinder the claimant, even if the limitation period has expired.

The limitation period commences on the date when service is due or the damage is done, irrespective of whether the party has knowledge of this fact. The limitation period is interrupted by:

- the start of judicial proceedings in which a final decision on the merits of the case would be adopted;
- amendment by the parties of the underlying contract or the settlement of a dispute relevant to the obligation in question;
- notification of the claim in bankruptcy proceedings; or
- acknowledgment of the debt by the debtor.

The limitation period recommences after interruption.

There is a different regime of very short ordinary and long-stop limitation periods for lawsuits in connection with company law cases. Special rules also apply to certain claims based on securities, such as a bill of exchange.

4 Pre-action behaviour

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

In order to reduce the courts' workload, legal entities are obliged to try to settle their business disputes before bringing an action. This requirement includes the exchange of letters setting out their position in detail. The parties must attach this correspondence to the statement of claim.

If any voluntary mediation procedure was in progress between the parties, this fact must be referred to in the statement of claim.

Pre-action disclosure orders are not known in Hungarian law, but it is possible to request the conduct of preliminary evidentiary procedures by courts or notaries. (Ordinary evidentiary procedures are conducted by the court during the hearing of a case for acquiring evidence relevant to the adjudication of the case.)

5 Starting proceedings

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?

An action is started with the submission of a statement of claim to the appropriate court and must include the name and address of the parties, a concise statement of the nature of the case and a statement of value; specify the remedies the claimant seeks; and indicate particulars such as facts and supporting evidence.

A filing fee (procedural duty) must also be paid, the amount of which is based on the value of the claim. In the case of monetary claims, an action can (or must, in the case of claims under 1 million forints) be started by a request for the issuance of an order to pay.

Under Hungarian law, the other party shall not be informed of the start of the judicial proceeding, nor shall the statement of claim be delivered directly to him or her. The summons and the claim are served by the court on the defendant. For further details, see question 6.

The caseload of courts is uneven: in general, metropolitan courts are overflooded, while courts in the countryside have free capacity. Available judges and panels may be appointed to manage cases of other courts as secondments. (This means in practice that the case in question will be managed by another court, eg, hearings will be held at the court in which the judge or panel usually acts.) The secondment judge or panel may be appointed in certain cases by the president of the county (metropolitan) court, and in other cases by the OBH.

6 Timetable

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

Following the filing of the statement of claim the court has 30 days to decide whether the case falls within its competence and the claim is suitable for trial. If the court determines the lack of its competence and it can identify the competent court or authority, it transfers the case. If the claimant omits necessary elements of the claim, the court is bound to reject the claim *ex officio*. The omission of certain other elements of the claim may give grounds for the court to order the claimant to submit further particulars. If no further particulars are necessary, or if the claimant submits the missing particulars, the court sets the date of the first hearing, issues a summons and simultaneously forwards the claim to the defendant.

The summons and the claim must be duly served on the defendant, which is done by the court by post to the address indicated by the claimant in the claim. The proceedings between the claimant and the defendant start officially at the moment when the summons is served. Proceedings are often drawn out, as summons cannot be duly served for various reasons.

The first hearing should be held within four months as from the date on which the claim was filed with the court. The defendant submits its defence at the first hearing at the latest. The defendant can request the court to dismiss the claim and end proceedings on procedural grounds, or reject the claim on its merits. In this case, the court usually rules on the procedural issue first, but the court can also hear the parties on the merits of the case.

If the case proceeds to substantive issues, the court notifies the parties of the facts that must be evidenced and the burden of proof. The case then proceeds through the phase of presenting evidence for

the case (evidence phase). Hearings are held for one to four months, depending on the court's workload. Oral evidence is produced in hearings and written evidence can be submitted at any time until the evidence phase is over. Parties must act in good faith and produce evidence in a timely manner.

When the court is satisfied that the evidence phase has come to its end, it informs the parties that it intends to close the trial. This is usually done at the last court hearing. After closing the trial, the court gives judgment. No time limit is set for the court to give judgment. The first-instance phase of an action usually takes one to three years.

7 Case management

Can the parties control the procedure and the timetable?

Under the CPA, the procedure and the timetable are controlled by the court. On the other hand, parties may influence the procedure and the timetable by dilatory behaviour (which may, however, be sanctioned by the court according to the CPA) in order to have case hearings postponed.

8 Evidence – documents

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

In Hungary, the court can only order production of those documents to which the defendant must, by substantive provisions of civil law, give the claimant access.

The court can obtain numerous documents *ex officio*. Government bodies, for example, the Revenue Office and Social Security Office, must comply with the court's request.

The prospective claimant must also file the documents:

- to which he or she refers;
- which prove the jurisdiction and competence of the court; and
- which certify the facts to be taken into account *ex officio*.

9 Evidence – privilege

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

Legal privilege (attorney-client or legal professional privilege) as known in common law jurisdictions is not recognised by statute as an obstacle to the disclosure of a document. An attorney can refuse to be heard as a witness, and this rule has been extended by legal practice to attorney-client documents as well. Similar rules apply to relatives, doctors, priests and persons who hold business secrets.

There are certain areas of law, for example, competition law, where the concept of legal privilege is accepted by statute. However, documents written by in-house counsel are not privileged, even in this context. In other areas of law, privilege can be used as an argument, but the principle itself is not established in court practice. However, disclosure obligations cover only a very narrow field of documents. In addition, for non-disclosure of confidential information, the court may order that the hearings are not held publicly (see question 15).

Classified information, for example state secrets, must not be disclosed. If a third party's business secret or professional confidence is affected, and the third party does not consent to disclosure, the document cannot be used as evidence. If the court deems that the content of a submitted document concerns business or professional secrets, it must approach the person or entity entitled to approve the use of the secret (secret-holder) to obtain approval. If the secret-holder does not respond within eight days or gives its consent, the secret can be used.

10 Evidence – pretrial

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

See question 4. In addition, the claimant may present any type of evidence he or she may have in the statement of claim, and he or she basically has an obligation to do so under the CPA. The defendant in his or her response may also present any type of evidence.

In practice, the timing and scope of evidence presented by the parties is often a matter of tactics.

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

Court witnesses of fact usually only give oral evidence in person, in court before the judge (written evidence is generally treated as a document and not as witness testimony).

The court usually appoints experts upon the request of a party. The court's first choice will always be someone registered as a judicial expert, and preferably a member of the local chamber of judicial experts or of a state-owned expert institute. The parties can agree on a specific expert. If so, the court will probably appoint that expert.

Any party is free to submit expert opinions. However, these opinions are treated by the court as documentary evidence or a statement of that party, and not as an expert opinion.

There is a right to reply to expert evidence, and if the written expert opinion is unclear, there is also a right to hear and cross-examine the expert. The court can also order the expert to supplement his or her opinion.

The appointment of new or further experts can also be suggested, but the court has a discretionary right to grant the request.

12 Interim remedies**What interim remedies are available?**

Interim injunctions may be requested, but only if the claim (or counter-claim) is filed before, or simultaneously with, the application. The court grants an interim injunction if instant damage is threatening, the status quo should be maintained, or it is justified by the special circumstances of the applicant, as well as the advantage to be attained exceeds the disadvantage caused.

An interim injunction is granted only after a hearing of the parties, unless the case is of extreme urgency, which is rare in commercial matters. Although the court must act promptly, same-day orders are not available in practice.

An interim injunction takes the form of an order, and the court is free to request the respondent to do, refrain from doing or stop doing, anything. If the respondent does not comply with the order, the order can be enforced. The order is enforceable irrespective of whether an appeal was submitted against it, and remains in force until it is overruled by the court.

13 Remedies**What substantive remedies are available?**

Depending on the circumstances of the case, the remedies sought and the substantive provisions of law, final remedies can take any form the court considers appropriate, including:

- specific performance;
- compensatory damages;
- injunctions;
- declarations; and
- in special cases, conclusion or amendment of contracts (eg, general terms and conditions shall be regarded as unfair).

Nevertheless, the court cannot apply a remedy that the claimant did not specify in the statement of claim as a relief sought. Punitive damages are not awarded. Interest on money judgments must be paid even if not specifically requested in the statement of claim.

14 Enforcement**What means of enforcement are available?**

Enforcement is a separate, standalone court procedure. It is governed by Act LIII of 1994 on Judicial Enforcement.

If the due date set in a final judgment has passed and the unsuccessful party has not performed, the other party can apply for enforcement to the local court with jurisdiction. The local court then seals the judgment as enforceable and, if requested, instructs a judicial bailiff (a registered official enforcement agent) to enforce it. The applicant has a right to choose the method of enforcement, subject to certain limits.

Enforcement for the recovery of sums of money takes one of the following forms: seizing goods, financial assets, including bank assets

and shareholdings, outstanding claims, portion of salaries and other regular earnings, or real properties.

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

Generally, court hearings are public; however, under certain circumstances a closed hearing can be ordered.

Since 2007, all judgments of higher courts are, after anonymisation, made available online. Upon request or ex officio, the court can try the case in a closed hearing or protect the confidentiality of sensitive information in other ways. Apart from the hearings, the court procedure is not public. Pleadings, motions and other submissions, as well as court orders, are only accessible to the parties to the lawsuit.

16 Costs**Does the court have power to order costs?**

Costs paid in advance in the procedure, procedural fees and expert costs are usually borne by the losing party in proportion to the winning or losing ratio. In allocating the costs, the court can consider other factors such as delaying tactics and actions of the parties violating the good-faith principle in relation to proceedings. However, the court does not normally consider factors outside the proceedings. In practice, legal fees, although part of the costs, are frequently not recovered in full for various reasons. In addition, courts often reduce the costs incurred in connection with the lawsuit.

Any other costs that arise out of the litigation are only enforceable in narrow circumstances, except for pre-action legal and expert fees.

Non-resident claimants are required to provide security – when so requested by the respondent – for covering the costs arising out of the litigation, except if (i) otherwise provided for by an international treaty to which the Hungarian state is a party, or unless the principle of reciprocity suggests otherwise; (ii) the claimant's claim recognised by the respondent provides sufficient cover; or (iii) the court granted a complete exemption from costs to the claimant.

17 Funding arrangements**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?**

Client and counsel are free to agree on any fee arrangement. In practice, task-based billing is the most common in litigation matters. However, in the case of high-profile cases, law firms usually bill hourly. Both solutions are often combined with a success fee. A contingency fee can also be agreed, but in practice it is not frequently used. If legal counsel does not disclose his or her agreement with the client, which is mostly the case, the court determines legal fees and costs on the basis of statutory provisions.

The parties to the litigation advance, and very often pay, the costs of litigation. Third-party funding is theoretically possible, but in practice is not available on a commercial level.

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

Generally, insurance is available for litigation costs only as a part of liability insurance. Otherwise it is not known or applied in Hungary.

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

The CPA does not provide for a special proceeding for complex class action litigations in contrast to certain common law jurisdictions. The Civil Code and, more generally, consumer protection and competition laws entitle the following to bring an action against any party causing

substantial harm to a wide range of consumers by illegal activities, aimed at enforcing the interests of consumers, even if the identity of the injured consumers cannot be determined: Hungarian consumer protection and competition authorities; Hungarian and EU non-governmental organisations for the protection of consumers' interests; and the public prosecutor.

The new Code of Civil Procedure entering into force on 1 January 2018 lays down two types of collective lawsuits: lawsuits initiated in the public interest and lawsuits initiated based on association. The former may be initiated, for example, in respect of contracts that involve a consumer and a business party by, among others, the public prosecutor for the annulment of an unfair contract term that has been incorporated into a contract. The latter may be initiated by at least 10 claimants for enforcement of identical rights in the event the factual background is the same and the court grants its approval. Lawsuits based on association may be initiated in respect of claims arising from consumer contracts or from health damages caused by unforeseeable environmental incidents, and in labour cases. The legislature formulated lawsuits based on association in line with the opt-in concept of class actions.

20 Appeal

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

An appeal can be brought on certain grounds, including:

- lack of clarification of the facts, or of examination of all relevant evidence;
- procedural error;
- misinterpretation of the applicable substantive provisions of law;
- improper application of law;
- improper assessment of facts or the evidence presented; and
- granting of unsought relief.

However, new statements of facts or new evidence are not allowed in the appeal or during the second-instance procedure, except in special circumstances.

The appeal must be filed with the court that issued the judgment within 15 days from the date of receipt of the judgment.

There is no right of further appeal. Nevertheless, a request for the judicial review of the final judgment or a final ruling adopted on the merits of the case can be submitted to the Supreme Court, on the grounds of violation of law.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

EU member states

The Brussels Regulation applies to the enforcement in Hungary of judgments passed by a court in another EU member state.

Under the Brussels Regulation, a judgment given in an EU member state is recognised in Hungary without any special procedure required. Judgment means any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution. In no circumstances may a foreign judgment be reviewed as to its substance.

A judgment will not be recognised if:

- recognition is manifestly contrary to Hungarian public policy;
- the defendant was not served with the document that started the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his or her defence;
- it is irreconcilable with a judgment given in a dispute between the same parties in Hungary; or
- it is irreconcilable with an earlier judgment given in another EU member state or in a third state involving the same cause of action and between the same parties.

With the revised Brussels Regulation (Regulation 1215/2012 of the European Parliament and of the Council) being applicable from 10 January 2015, the recognition and enforcement of judgments in the EU became automatic. However, the denial of enforcement may be requested on the grounds listed above as exceptions to recognition. Under Council Regulation 1346/2000/EC on insolvency proceedings,

insolvency of a company ordered by a court in a member state is automatically acknowledged by Hungarian courts.

Other countries

Similar rules as under the Brussels Regulation apply between Hungary and the EFTA countries, other than Liechtenstein, under the New Lugano Convention dated 30 October 2007.

A judgment adopted by a court of a non-EU country or by a court of a country that has not ratified the New Lugano Convention will be recognised in Hungary in line with the Hungarian Code of International Private Law if:

- the jurisdiction of the foreign court in question is found legitimate under the rules of jurisdiction of Hungarian law;
- the decision is final and enforceable in the country in which it was made; and
- there is reciprocity between Hungary and the foreign country in question (there is no reciprocity with the US, for example).

Recognition of the judgment can be refused if:

- it violates Hungarian public policy;
- the defendant to the judgment did not attend the proceedings in person (or through a representative) because the document on the basis of which the proceedings were initiated was not served at his or her domicile or residence properly, or in a timely fashion in order to allow adequate time to prepare his or her defence;
- it was based on the findings of a procedure that seriously violates the basic principles of Hungarian law;
- a procedure for the same right arising from the same factual basis between the same parties was already conducted before a Hungarian court or a Hungarian authority before the foreign proceeding was initiated; or
- a Hungarian court or a Hungarian authority has already adopted a final decision concerning the same right arising from the same factual basis between the same parties.

The party that intends to enforce a judgment may request a special court procedure for the recognition of an official foreign judgment in Hungary. The judgment is then enforced in the same way as domestic judgments. If the party does not initiate a separate procedure, the judgment, as a general rule, shall be examined and recognised (or denied) by the court or authority in the procedure where it was referenced.

22 Foreign proceedings

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

EU member states

Hungary provides assistance to other EU member states in line with Council Regulation No. 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters.

Other countries

According to the Hungarian Code of International Private Law, at the request of a foreign court or an authority, a Hungarian court or an authority shall provide legal aid on the basis of an international treaty or in the case of reciprocity. Hungary ratified the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters on 13 July 2004. In line with article 2 of the Convention, Hungary designated the Ministry of Justice as Central Authority.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Act LXXI of 1994 on Arbitration (the Arbitration Act) closely follows the UNCITRAL Model Law but does not reflect the 2006 amendments. The Arbitration Act applies if the place (seat) of the ad hoc or permanent arbitration court is in Hungary. It also includes a specific chapter relating to international arbitration.

Certain procedural provisions in the Hungarian Code of International Private Law apply mainly in relation to jurisdiction.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Except for the requirement that the agreement be in writing, there are no statutory requirements relating to the arbitration agreement. (An arbitration agreement can be concluded as part of another contract or in a separate agreement.) The interpretation of the term 'in writing' is not always straightforward, but it is usually accepted as being in writing if the arbitration clause is signed by each party and mailed or faxed to the other. The signature must originate from a person duly authorised to represent the party (valid proxy). In many cases, the validity of an arbitration clause is challenged on the grounds that the signing party was not an authorised representative.

An arbitration clause is often included in one of the party's standard terms and conditions. However, this type of arbitration clause forms part of the parties' agreement only if both the party using the general terms and conditions specifically draws the attention of the other party to the arbitration clause; and the other party expressly accepts the arbitration clause.

25 Choice of 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?

The Arbitration Act provides default rules on the appointment and removal of arbitrators, as well as the start of arbitral proceedings. However, these provisions, except for certain mandatory rules, such as disqualification, apply only if the parties have not agreed otherwise or chosen a permanent arbitration court of which procedural rules regulate these issues in detail.

In order to secure the appointment of an independent and impartial arbitrator, it is necessary to observe both the requirements set out in the parties' agreement concerning the arbitrator's qualifications, and any other considerations, such as statutory rules and any applicable rules of the arbitration institution.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The parties may freely agree upon the number of the arbitrators as long as it is an odd number. Failing an agreement of the parties, the number of arbitrators appointed to a tribunal shall be three. The parties may freely agree on a procedure for the appointment of the arbitrator or arbitrators. If the parties agreed on a specific arbitration court, its rules of procedure would most likely provide for the appointment procedure.

In the absence of the parties' agreement, the rules laid down by the Arbitration Act are applicable (eg, in connection with an arbitration tribunal which consists of three arbitrators, each party shall have the right to appoint one arbitrator, and the two arbitrators thus appointed shall designate the third arbitrator). Where either party fails to appoint its own arbitrator within 30 days from the date of receipt of the other party's request to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the third arbitrator shall be appointed – upon the request of any of the parties – by the county (or metropolitan) court.

Most arbitration cases are pending before the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Budapest. The rules of procedure of this arbitration court set forth that the board of directors has an approval right if the arbitrators appointed by the parties intend to elect a chairman not included in the list of the arbitration court.

27 Arbitral procedure

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

The Arbitration Act provides default rules governing the commencement of arbitral proceedings, although it does not cover all procedural rules, and additional legislation may apply, for example, the CPA.

Except for certain mandatory provisions of the Arbitration Act and general principles of civil procedure, the parties can freely:

- agree the procedural rules to be observed by the arbitral tribunal (permanent arbitration courts are free to establish their procedural rules within the boundaries of the Arbitration Act; their rules must be respected, and the infringement of these rules can be a ground to invalidate the award); and
- stipulate the use of an arbitration institution's rules.

In the event of default of the parties' agreement, an arbitral tribunal can determine the procedural rules at its own discretion, within the framework of the default rules provided by the Arbitration Act.

It is debatable whether the procedural provisions of a foreign state can be applied by the arbitration court. Some commentators believe the procedural laws cannot be chosen by the parties because of their public law nature.

28 Court intervention

On what grounds can the court intervene during an arbitration?

State courts can assist with the following:

- appointment or disqualification of arbitrators (on the parties' request);
- taking evidence – on the arbitral tribunal's request, local courts can apply coercive measures necessary to present evidence (eg, securing witness attendance at hearings or preserving evidence);
- granting during the ongoing arbitration (on the parties' request): (i) interim measures and injunctions; (ii) and protective measures, if the requesting party can produce an authentic instrument or private document of full probative force to prove the creation, quantity and expiry of the claim (this is usually requested if a party fears that the other party may not be able to pay or would transfer its assets to stop foreclosure and enforcement; the court can request a party to make a deposit of the litigated amount).

Courts are not frequently requested to exercise these powers.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Unless otherwise agreed by the parties, the arbitral tribunal can, on request, order interim measures if the tribunal considers it necessary in relation to the dispute. This can include an appropriate security, usually to secure the amount in dispute or the costs of the proceedings (eg, the cost of tribunal-appointed experts).

A decision in relation to interim measures is valid until either the new tribunal's decision is adopted to replace it or an award is made.

These interim measures are only enforceable by courts. In practice, they are very rare in Hungary.

30 Award

When and in what form must the award be delivered?

The award is committed in a written form and signed by the arbitrators. The award will state the reasons upon which it is based, unless it is an award on agreed terms. In addition, the award includes its date and the place of arbitration. One copy bearing the signature of the arbitrators will be delivered to each party. It usually takes six months to two years for an arbitration award to be made.

31 Appeal

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

Arbitral awards are final and not appealable. However, a party to the arbitration and any third person affected by the award can file an annulment action with a court within 60 days of the date of delivery of the award. Legal grounds for the annulment are as follows:

- any of the parties to the arbitration agreement lacked legal capacity;
- the arbitration agreement is invalid under the law the parties have chosen or, in the absence of this choice, under Hungarian law;
- a party was not given proper notice of the arbitrator's appointment or of the arbitration proceedings, or was unable to present his or her case for other reasons;

Update and trends

The draft of the new Code of Civil Procedure as well as its general explanation and specific explanation of its rules were published for public opinion in April 2016, and the act was adopted by the national assembly in November 2016. Act CXXX of 2016 on the Code of Civil Procedure will enter into force on 1 January 2018. The new code is based on the Compendium of 'best practices' on time management of judicial proceedings issued by the European Commission for the Efficiency of Justice in 2006. Therefore, the main concept is to provide good time management in civil procedures in order to improve efficiency of lawsuits. The principles on which the new code is based are the following: strong court commitment in setting out time frames and in carrying out actions in compliance with them, and active role of the judge in the procedure.

The draft of a new Arbitration Act was submitted to the national assembly on 26 April 2017. The draft considers the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.

- the award was made in a legal dispute to which the arbitration clause did not apply or that was not covered by the arbitration agreement; if the award contains decisions on matters beyond the scope of the arbitration agreement, and decisions on matters validly submitted to arbitration can be separated from them, only the part of the award containing decisions not validly submitted to arbitration can be annulled;
- the composition of the arbitral tribunal or the arbitration procedure did not comply with the arbitration agreement, unless the agreement was in conflict with any provisions of the Arbitration Act from which the parties cannot derogate, or the agreement was not in accordance with the Arbitration Act;
- the matter of the dispute cannot be subject to arbitration under Hungarian law; or
- the award violates Hungarian public policy.

The following may invalidate the award during the annulment proceedings: breach of the arbitral institution's rules; breach of the parties' agreement (including the procedural rules), unless the agreement conflicts with any mandatory provision of the Arbitration Act; or the tribunal proceeded in a case where there was no arbitration clause.

In addition, an arbitral award must respect the case law of the Hungarian civil courts, including but not limited to the publicised judgments of the Supreme Court. If the arbitral award contradicts case law, this can be a ground for annulment, but only if the contradiction also amounts to a breach of Hungarian public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The enforcement of arbitral awards is subject to substantive rules. An arbitral award has the same effect as a final court judgment. Therefore, it is final and enforceable. However, a court will refuse to execute an arbitral award if, in its judgment, the matter in dispute cannot be subject to arbitration under Hungarian law or the award violates Hungarian public policy.

The enforcement procedure for domestic arbitral awards is regulated by the Arbitration Act and the Act on Judicial Execution. A party that makes reference to an arbitral award or applies for its enforcement must supply the original award or a certified copy of it.

According to the Hungarian Code of International Private Law, if a foreign decision (eg, a foreign arbitration award) determining an obligation is recognised under the laws of Hungary, the general rules apply to its enforcement.

The party applying for enforcement must send the following to the competent local Hungarian court:

- an application for enforcement, together with official translations of all foreign-language documents into Hungarian; and
- the original or a certified copy of the award and arbitration agreement.

Upon receipt of the application, the local court shall issue an execution sheet, provided the award complies with the Hungarian procedural rules, that is, the award is construed as final and non-appealable by the law of the state in which it was made; the award contains an obligation (ruling against the debtor); and the award is enforceable or is subject to preliminary enforcement and the deadline of performance has expired.

The court sends the execution sheet to the judicial executor (bailiff).

Hungary acceded to the 1958 New York Convention in 1962 and to the European Convention on International Commercial Arbitration 1961 (Geneva Convention) in 1964. Under the New York Convention, arbitral awards made in Hungary are enforceable in other member states of the New York Convention, save for the grounds listed in article V of the New York Convention. In certain jurisdictions, local rules may further limit the enforceability of awards made in Hungary.

33 Costs

Can a successful party recover its costs?

Arbitration costs and legal fees are not regulated by law (except of the amount of duty payable to the state), and are a matter of custom. Any fee structure can be used, including a reasonable contingency fee. Generally, the basis of the legal fee is around 5 per cent of the litigated amount, subject to adjustments based on the value or complexity of the case. Generally, it is a matter of the arbitrators' discretion and any applicable procedural rules.

In a widely cited case (BH 2003.127), the arbitration tribunal set the lawyers' fees at less than 1 per cent of the litigated amount, which amounted to the equivalent of nearly US\$1 million. The Supreme Court considered that this fee was unreasonably high and that it violated public policy. Therefore, it annulled this part of the award. Many have criticised this Supreme Court judgment, as there is no right to annul awards on the grounds of legal fees and the arbitration tribunal had respected the 5 per cent limit applied by civil courts.

The losing party typically bears the following:

- arbitration costs, including the registration fee and the duty;
- fees of the arbitration (including the arbitrators' fees); and
- fees and costs of the legal representatives.

If it is difficult to decide who has won, or both parties were equally successful and unsuccessful, each party bears its own costs and legal fees. The arbitral tribunal can also decide that a party must pay surplus costs because of delaying tactics, unreasonable acts or bad faith.

There are no rules or a universal standpoint on recovery of third-party funding costs.

Alternative dispute resolution

34 Types of ADR

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

The main ADR method used in Hungary is arbitration. Arbitration is used in almost all industries, and particularly in banking, insurance, aviation and shipping.

Ad hoc arbitration is not a frequent choice of parties and counsels. If not resolved at court, commercial disputes are resolved through institutional arbitration before one of the several permanent arbitration courts.

Although available, mediation has not yet become popular for large commercial disputes.

35 Requirements for ADR

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 does not form part of court procedures. ADR, such as arbitration and mediation, only apply if the parties agree to it. Courts cannot compel the use of ADR.

Miscellaneous

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

From 1 January 2012 to 18 March 2015, commercial contracts that concern assets that qualify as national property within the meaning of Act CXCVI of 2011 on national property might not contain an arbitration clause, and could not be disputed through arbitration. This prohibition on making any such assets subject to arbitration could not be circumvented by the choice of foreign governing law. On 19 March 2015 a new rule entered into force. Since then it is now possible to settle a dispute concerning the assets that qualify as a national property by arbitration. There are, however, still certain restrictions: the parties may settle their dispute only under the scope of Hungarian law before a Hungarian (arbitration) court and in Hungarian language if an international treaty does not make an exception.

NAGY & TRÓCSÁNYI

Csaba Pigler
Viktor Jéger

pigler.csaba@nt.hu
jeger.viktor@nt.hu

Ugocsa utca 4/B
Budapest 1126
Hungary

Tel: +36 1 487 8700
Fax: +36 1 487 8701
www.nt.hu

India

Vivek Vashi, Kanika Sharma and Hrushi Narvekar

Bharucha & Partners

Litigation

1 Court system

What is the structure of the civil court system?

The hierarchical relationship of Indian courts is set out in the diagram at the end of this chapter. At the apex of the Indian judicial system is the Honourable Supreme Court of India, which is the highest court of law in India, followed by 24 High Courts, which also supervise and govern numerous district and small causes courts within a state.

Civil courts (subject to the provisions of the Civil Procedure Code, 1908 (CPC)) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred.

Civil proceedings are ordinarily instituted in the court of the lowest grade competent to try, entertain and dispose of the same.

The High Court of each state exercises supervisory jurisdiction over subordinate courts and tribunals in that state and within its jurisdiction. The chartered High Courts of Bombay (at Mumbai), Madras (at Chennai) and Calcutta (at Kolkata) in addition to their supervisory jurisdiction also exercise ordinary original civil jurisdiction. Even the High Courts at Delhi and Karnataka exercise ordinary original civil jurisdiction to an extent. Furthermore, all High Courts exercise ordinary original jurisdiction in relation to matters covered under article 226 of the Constitution of India, which basically deals with issuing to any person or authority, including in appropriate cases, any government, within those territories directions, orders or writs, for the enforcement of any fundamental rights conferred by Part III of the Constitution of India and for any other purpose (ie, enforcement of any other legal right in the public sphere).

Depending on the nature of the decision, appeals from a single judge of the High Court would ordinarily be heard by a division bench of such High Court. Matters involving substantial questions of law may be referred to a larger bench or a full bench of the same court or to the Supreme Court if the High Court certifies the same under article 134A of the Constitution of India.

The Supreme Court of India is the final court of appeal and exercises overall supervisory jurisdiction over the subordinate High Courts, courts and tribunals in India. The Supreme Court also exercises original jurisdiction with respect to matters covered under article 32 of the Constitution of India, which basically deals with issuing to any person or authority directions, orders or writs, for the enforcement of any fundamental rights conferred by Part III of the Constitution of India. Additionally, the Supreme Court, under article 142 of the Constitution of India, in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and any decree so passed or order so made shall be enforceable throughout the territory of India. The Supreme Court typically sits in benches of two judges or three judges (where the bench also comprises the Chief Justice of India), but sometimes in larger benches of five or even seven or nine judges (full bench or constitutional bench), for deciding a particular question of law that has been settled by a smaller bench of the Supreme Court and requires re-examination, or if a constitutional question is involved.

With effect from 23 October 2015, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (the Commercial Courts Act) was passed by Parliament to ensure speedy disposal of commercial cases of a specified value.

Under the Commercial Courts Act, Commercial Courts were established at the district and High Court level to deal with disputes of a 'specified value' falling within the meaning of a 'commercial dispute'. The Commercial Courts Act has also amended the CPC, which consequently also deals specifically with commercial disputes of a specified value. Although the Commercial Courts Act has been notified, a commercial division has not been established by all district courts to which the Act is applicable.

2 Judges and juries

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

The government of India abolished the jury system in 1960. The last Indian case tried by a jury was *K M Nanavati v State of Maharashtra*, 1962 AIR 605, in 1959. Juries, therefore, are no longer involved in civil or criminal proceedings in India except matters that fall within the jurisdiction of the Parsi Matrimonial Court, which sits a few times in a year and deals only with Parsi matrimonial matters.

Indian court proceedings are adversarial in nature, where counsel plead their case before the judge who is expected to be, and must be, an impartial and independent referee. The judge adjudicates the dispute both on fact and law. Unlike civil law countries, the judge does not have an inquisitorial role. The court may, to rule effectively on any issue, put questions to a witness or direct parties to lead evidence on certain aspects. The court may even determine issues such as limitation as preliminary issues. The civil court has inherent powers to make such orders as may be necessary for meeting the ends of justice.

Judges of the Supreme Court and High Courts are appointed by the President of India under articles 124(2) and 217 of the Constitution. The President is required to hold consultations with such of the judges of the Supreme Court and of the High Courts as he may deem necessary for this purpose.

In *S P Gupta v Union of India*, AIR 1982 SC 149, the Supreme Court held that the concept of primacy of the Chief Justice of India was not to be found in the constitution. This resulted in tilting the balance of power in favour of the executive. In *Supreme Court Advocates-on-Record Association v Union of India*, 1993 (4) SCC 441, 1993, a nine-judge Constitution Bench overruled the decision in *S P Gupta* and devised a specific procedure called 'Collegium System' for the appointment and transfer of judges in the higher judiciary. The court stated that the recommendation should be made by the Chief Justice of India in consultation with his two senior-most colleagues, and that such recommendation should normally be given effect to by the executive. The majority verdict accorded primacy to the Chief Justice of India in matters of appointment and transfers. In 2014, the National Judicial Appointments Commission Act, 2014 was passed to replace the Collegium System with the National Judicial Appointments Commission (NJAC). By its judgment in *Supreme Court Advocates-on-Record-Association v Union of India*, the Supreme Court declared the NJAC unconstitutional and upheld the Collegium System. Currently, a Memorandum of Procedure for appointment of judges is being discussed between the collegium and the government.

Although there is no formal rule to this effect, efforts are generally made to appoint judges from different parts of the country at the Supreme Court level.

The appointment to subordinate judiciary is governed by articles 233 to 237 of the constitution and the rules made under the proviso to

article 309. The district judges are appointed both by direct recruitment and by promotion. The selection of direct recruitment district judges is made by the High Court. On the basis of the recommendation of the High Court, the governor appoints them. So far as promotion to the post of district judge is concerned, this is also made by the High Court and the formal orders for the same are issued by the governor. So far as the appointment of *munsiffs* and magistrates is concerned, their selection is made by the Public Service Commission and the High Court.

Senior arguing counsel of High Courts often get recommended for an elevation to the post of a judge as well.

3 Limitation issues

What are the time limits for bringing civil claims?

The limitation period for instituting civil suits in India is determined by the Limitation Act 1963, which comprehensively sets out the prescribed period of limitation for various types of civil suits, together with the manner in which the same ought to be computed.

Generally, the prescribed period of limitation for instituting civil suits in India is three years from the date on which the cause of action arose. However, this varies from case to case; for example, a suit to recover possession of immovable property ought to be instituted within 12 years from the date on which the possession of the defendant becomes adverse to that of the plaintiff, whereas the prescribed period of limitation for claims on tortious liability is, generally, one year from the date of accrual of the cause of action.

The prescribed period of limitation may be extended under specific circumstances that are recognised under the Limitation Act (such as part-payment, acknowledgement of liability in writing, proceeding bona fide in a court having no jurisdiction or where the plaintiff is under a legal disability (ie, a minor, insane or mentally impaired)).

In India, every suit instituted, appeal preferred and application made after the prescribed period of limitation shall be dismissed, even though limitation has not been set up as a defence. However, only in the case of any appeal or any application (other than an application under any provisions of Order 21 of the CPC) the court may admit the same after the prescribed period of limitation if the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period of limitation. Parties in India cannot waive or contract themselves out of the law of limitation and any such agreement would not be enforceable as it is against the public policy of India.

Limitation is a question of jurisdiction and therefore can be raised as a preliminary issue before the trial of a suit commences. Once such an issue is framed, the court proceeds to determine the same by way of a mini-trial and can then decide whether to proceed with the matter or not.

4 Pre-action behaviour

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

The pre-action considerations that parties must take into account are, inter alia:

- a bona fide cause of action;
- the suit is not barred by any law;
- the suit has been framed and drafted as per the rules set out in the CPC;
- whether the court has jurisdiction to entertain the dispute;
- whether the suit falls within the meaning of a 'commercial dispute' and is of the 'specified value' as defined under the Commercial Courts Act, and if so then the suit is to be instituted in the appropriate Commercial Court; and to be framed and filed as per the rules set out in the Commercial Courts Act, which has, in turn, amended the CPC with respect to commercial disputes of a specified value. It is pertinent to point out here that the Commercial Courts Act was enacted by Parliament only recently to ensure speedy disposal of commercial causes of a specified value, by establishing Commercial Courts and amending the CPC. So currently the CPC deals with regular suits as well as commercial disputes of a specified value as defined under the Commercial Courts Act; therefore, the provisions of the CPC run in a parallel manner depending upon the type of suit;
- service of summons or pleadings;

- urgency of moving for ad interim or interim relief: that is, whether any delay can be demonstrated;
- whether the defendant is amenable to the concerned court's jurisdiction in which the proceedings being sought are instituted. In some cases if the defendant is amenable to another court's jurisdiction or if part of the cause of action arises outside the court's territorial jurisdiction, leave would have to be obtained from the court prior to the institution of the suit;
- whether a mandatory notice prescribed by any statute has been served (for instance, section 80 of the CPC mandates that notice of two months be given before any suit is instituted against the government or against a public officer in respect of any act purporting to be done by such officer in his or her official capacity);
- whether any special enactments require certain acts to be done as a precondition for instituting a proceeding; and
- As per Order 2 Rule 2 of the CPC, whether the suit includes whole of the claim that the plaintiff is entitled to make in respect of the same cause of action; but a plaintiff may relinquish any portion of his or her claim in order to bring the suit within the jurisdiction of the court. In the event that one omits to sue in respect of, or intentionally relinquishes, any portion of his or her claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. On the other hand, a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he or she omits, except with the leave of the court, to sue for all such reliefs, he or she shall not afterwards sue for any relief so omitted.

In India disclosures can be requisitioned only after the action has been instituted. However, the Law Commission of India is currently looking into this issue.

5 Starting proceedings

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 instituted by presentation of a plaint to a court of competent jurisdiction, setting out in a concise form the facts, the cause of action and the reliefs sought against the defendant or defendants.

Suits that seek a relief having nexus to immovable property (such as recovery of possessions, partition, foreclosure, sale or redemption of mortgage of the property) must necessarily be instituted in the court within the local limits of whose jurisdiction the property is situated. Where a suit is for compensation for wrong done to a person or to moveable property, it must be instituted in the court within the local limits of the jurisdiction where the wrong was done or where the defendant resides, or carries on business or personally works for gain, at the option of the plaintiff. Other suits are to be instituted in a court within the local limits of the jurisdiction where the defendant resides or where the cause of action, wholly or in part, has arisen. In the event that part of the cause of action arises outside the court's territorial jurisdiction or a part of the immovable property is situated outside the territorial jurisdiction of the court, leave would have to be obtained from the court, prior to the institution of the suit.

The plaint must be framed as per the rules of the CPC (as far as practicable) and supported by an affidavit deposed by the plaintiff verifying the correctness of the facts within.

Courts in India are swamped with a number of pending cases (more than 30 million pending cases). The major reasons for such pendency are:

- a shortfall of judges (for instance, the Allahabad High Court has an approved capacity of 160 judges, but there are 77 vacancies);
- inadequate infrastructure (few courtrooms, archaic systems for management of court papers, lack of facilities for live transcription of evidence and training sessions for judges to update them with the latest trends); and
- the litigious nature of Indians.

To tackle these issues the Centre in the Union Budget for 2017-2018 has earmarked 17.44 billion rupees for administration of justice, including justice delivery, legal reforms, development of infrastructural facilities

and autonomous bodies associated with legal matters. Courts are also taking steps to ensure expediency. Thus, for instance, in the Bombay High Court, judges have been reprimanding lawyers for lengthy pleadings, poor organisation of case papers and adjournments. In fact, under the Commercial Courts Act, strict time schedules are required to be followed by the parties and judges are required to deliver their judgments within 90 days of the conclusion of arguments.

6 Timetable

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

Once a suit is duly instituted, a summons must be served on the defendants within 30 days of institution of the suit. Ordinarily, a summons is served through an officer of the court, but the court may permit service by courier, fax or email. In all cases, a copy of the plaint must be served with the summons.

Upon service of the summons the defendant must appear (through an advocate or in person) before the court on the date stipulated in the summons. The written statement of the defendant must be filed within 30 days of service of summons and if he or she fails to do so within the said period then the defendant shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. The Supreme Court has held (in *Kailash v Nanhku & Ors* (2005) 4 SCC 480; *Salem Bar Association v Union of India* (2005) 6 SCC 344) that these timelines are not mandatory, in that the court may, with sufficient cause, extend the timelines. However, in the case of a commercial dispute of a specified value as defined under the Commercial Courts Act, the written statement of the defendant must be filed within 30 days of service of summons and if he or she fails to do so within the said period then the defendant shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than 120 days from the date of service of summons. If the defendant fails to file the written statement within such time period then the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.

If a defendant does not appear before the court on the returnable date indicated in the summons, the court may proceed to hear the plaintiff *ex parte* and proceed to pronounce a judgment.

The procedure taken by courts in a civil claim is as follows:

- (i) Completion of pleadings.
- (ii) Discovery and inspection: in the case of a commercial dispute of a specified value as defined under the Commercial Courts Act the plaintiff is required to file a list of all documents and photocopies of those documents in its power, possession, control or custody pertaining to the suit along with the plaint. The same also applies to a defendant while filing his or her written statement. Furthermore, all parties are required to complete inspection of all documents disclosed within 30 days of the date of filing the written statement.
- (iii) Admission and denial of documents: the parties or their representatives then carry out admission or denial of documents filed by the opposite party. Documents that are admitted need not be proved, but all others require proof in such manner as may be appropriate.
- (iv) Framing of issues: the court at the first hearing of the suit, after reading the pleadings and after examination of the parties, and after hearing the parties and their pleaders, ascertain upon what material propositions of fact and/or law the parties are at variance and thereafter frames issues.
- (v) Confirmation of list of witnesses.
- (vi) Evidence: in every case, the examination in chief of a witness shall be on affidavit and the cross-examination and re-examination of the witness, whose evidence (examination in chief) by affidavit has been furnished to the court is required to be taken either by the court or by the commissioner appointed by it.
- (vii) Hearing or arguments: after evidence has been closed, final arguments are addressed.
- (viii) Judgment: after arguments are completed, the court proceeds to pronounce its judgment. Where the judgment is not pronounced

at once, every endeavour shall be made by the court to pronounce judgment within 30 days from the date on which the hearing of the case was concluded but, where it is not practicable to do so on the grounds of exceptional and extraordinary circumstances of the case, the court shall fix a future day for pronouncement of judgment that shall not ordinarily be a day beyond 60 days from the date of the case being concluded. However, in the case of a commercial dispute of a specified value as defined under the Commercial Courts Act, the court is required to pronounce judgment within 90 days of the conclusion of arguments.

- (ix) Decree: after a judgment is pronounced, a decree is to be drawn up in accordance with the judgment. The CPC prescribes that every endeavour ought to be made to ensure that the decree is drawn up as expeditiously as possible and in any case within 15 days from the date on which the judgment is pronounced.
- (x) Execution: in some cases where the judgment debtor fails to comply with the judgment or decree, the decree holder may need to initiate execution proceedings to enforce the decree obtained.

In the case of a commercial dispute of a specified value as defined under the Commercial Courts Act, a case management hearing is held not later than four weeks from the date of filing the affidavit of admission and denial of documents by all parties to the suit, at which time the court frames issues; confirms the list of witness to be examined by the parties; and sets a timeline for matters mentioned in points (v) and (vi) above. While setting the timeline, the court is required to ensure that the arguments are closed not later than six months from the date of the first case management hearing.

7 Case management

Can the parties control the procedure and the timetable?

The CPC governs the procedure and the courts can, to the extent permitted by the CPC, extend the timelines. Unlike arbitrations, the parties cannot unilaterally control the procedure or timetable. However, the Commercial Courts Act by amending the CPC has introduced a new Order 13A, which deals with summary judgment by, *inter alia*, empowering parties to a commercial dispute of a specified value, irrespective of the nature of the relief sought, to apply for a summary judgment at any stage prior to framing of issues. A summary judgment procedure is different from a normal suit and takes place in a speedy manner. Accordingly, this amendment to the CPC partially empowers parties to decide the procedure that can be adopted.

In this modern age evidence is invariably in electronic form and in order for the same to be admissible in evidence, the provisions of section 65B of the Evidence Act are required to be complied with. Since the same is a non obstante clause, most opposing parties use the provisions of section 65B to knock out the admissibility of any evidence that has not been presented as per the provisions of section 65B.

Additionally, it is pertinent to note that the number of adjournments available to each party has been limited by the CPC. However, the Supreme Court of India, in *Salem Bar Association v Union of India* (2005) 6 SCC 344, held that this does not preclude a court from granting adjournments beyond the statutory limit where the party concerned has no control over circumstances necessitating the adjournment request.

8 Evidence – documents

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

All documents and other evidence capable of being produced in court, which the parties rely upon in support of their case, are required to be filed in court not only by way of photocopies but also originals. Additionally, at the first hearing of the suit, the court issues directions to the parties to disclose, under oath, relevant documents and offer inspection of the same. If a party's disclosure is inadequate or a party does not provide inspection, the other party has the right to request the court to direct disclosure or inspection. Similarly, a party has the right to request the court for directions against the other party to provide particulars or to answer interrogatories. The court may dismiss a plaint or strike out the defence of a defendant who has failed to comply with an order to answer interrogatories, or an order for discovery or inspection.

On completion of disclosure, the court proceeds to admission and denial of documents and thereafter, in consultation with the parties, frames issues and the matter proceeds to trial.

There is thus an implied duty on the parties to preserve documents and other evidence pending trial. The test for a party being required to share documents is relevance, and the fact that it is unhelpful for such party's case is immaterial.

In certain cases, given the delay in completing trials, the courts compel parties to provide an undertaking to preserve documents.

9 Evidence – privilege

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

Sections 126 to 129 of the Indian Evidence Act 1872 deal with privilege attached to professional communications. Section 126 mandates that no barrister, attorney, pleader or *vakil* (an Indian attorney) shall at any time be permitted, unless with his or her client's express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment as such barrister, pleader, attorney or *vakil*, by or on behalf of his or her client; to state the contents or condition of any document with which he or she has become acquainted in the course and for the purpose of his or her professional employment; or to disclose any advice given by him or her to his or her client in the course of and for the purpose of such employment. This obligation continues even after the employment has ceased, and also extends to interpreters, clerks and servants. Moreover, Part VI, Chapter II, section II, Rule 17 of the Bar Council of India Rules prohibits an advocate from breaching the obligations imposed by section 126 of the Indian Evidence Act either directly or indirectly, and thereby makes the breach of attorney-client privilege a violation of the Bar Council Rules.

This privilege is, however, not available to any communication made in furtherance of an illegal purpose or with respect to any fact observed after the commencement of employment, as such showing that any crime or fraud has been committed since the commencement of his or her employment.

Section 129 protects a client from being compelled to disclose to the court any confidential communication that has taken place between him or her and his or her legal adviser, unless he or she offers him or herself as a witness.

The Indian Evidence Act also prohibits any evidence to be given that is derived from unpublished official records relating to the affairs of state, except with the permission of the head of department concerned. No public officer can be compelled to disclose communications made to him or her in official confidence if he or she believes that the same would be against the public interest.

Professional communication with an in-house lawyer is not protected in the same manner as that with an advocate. Chapter II, section VII, Rule 49 of the Bar Council of India Rules states that an advocate cannot be a full-time salaried employee and shall cease to practise as an advocate as long as he or she continues to be a full-time salaried employee. Therefore, communications between clients and in-house lawyers would generally have to be tested whether the in-house counsel is a full-time salaried employee as contemplated by law. The Supreme Court, in *Satish Kumar Sharma v Bar Council of Himachal Pradesh* (AIR 2001 SC 509), clarified that: 'If a full-time employee is not pleading on behalf of his employer, or if terms of employment are such that he does not have to act or plead but is required to do other kinds of functions, then he ceases to be an advocate. The latter is then a mere employee of the government or the body corporate.' Accordingly, professional communication with an in-house counsel is not protected as 'privileged communication' with an advocate.

However, in practice, the employment contract of an in-house counsel would presumably contain a confidentiality clause protecting all professional communication with the in-house counsel.

10 Evidence – pretrial

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

In India, a trial is deemed to commence when issues are settled, and the case is then set down for recording of evidence. Evidence of witnesses and experts is normally preceded by an affidavit in lieu of examination-in-chief on commencement of a trial. Recent trends indicate that

parties are directed to file their evidence simultaneously so that the delaying party does not have any advantage of tweaking his or her evidence. As in England, even in India the best evidence rule runs supreme. Where the best evidence is not adduced, it throws suspicion on the case and decreases the reliability of belief on any other evidence that may be produced.

11 Evidence – trial

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

Evidentiary rules are prescribed by the Indian Evidence Act, 1872. Evidence may be documentary or through witness testimony. The Evidence Act recognises digital records. During the hearing, any party may introduce evidence through witnesses. Evidence may be recorded in court, or the court may appoint a commissioner to record evidence. Evidence-in-chief is taken by way of affidavit; however, the court may, for reasons recorded in writing, allow evidence-in-chief to be led by examination in open court. Evidence-in-chief is followed by cross-examination unless cross-examination is waived. Re-examination of witnesses is permissible under limited circumstances.

Recent trends indicate that parties lead witnesses of fact along with expert witnesses in large disputes. The parties do elect to lead expert witnesses in the same field or industry or a quantum expert, if need be.

While relying upon documentary evidence which is in an electronic form, parties ought to keep in mind the provisions of section 65B of the Indian Evidence Act, 1872, which sets out the circumstances under which the electronic evidence will be admitted. Parties in India invariably ignore the provisions of this section owing to which their evidence is not admitted.

12 Interim remedies

What interim remedies are available?

Indian courts have extensive powers to grant interim relief, including injunctions to preserve the subject matter of the dispute, to maintain the status quo, to prevent a party from removing or alienating property, to prevent a party from creating any third-party rights or for the preservation of property by appointment of a receiver for the property.

To prevent the ends of justice from being defeated the courts may also, before a judgment is pronounced, issue a warrant to arrest the defendant who is absconding or has left the local limits of the court's jurisdiction; or has removed property from the court's jurisdiction; or is likely to take any such action with intent of delaying the proceedings by avoiding the process of the court; or acts to obstruct or delay the execution of a decree that has been, or may be, passed against him or her and bring him or her before the court to show cause why he or she should not give security for his or her appearance, and if he or she fails to comply with any order for security commit him or her to civil prison. Additionally, before pronouncement of judgment the court may direct a defendant who is about to dispose of or remove the whole or any part of his or her property, with the intent to obstruct or delay the execution of any decree that may be passed against him or her, furnish security to produce any property belonging to him or her and to place the same at the disposal of the court and order the attachment of any property upon failure to furnish security. Indian courts have also held that orders such as a 'freezing order' or a *Mareva* injunction and 'search order' or an *Anton Piller* order can be issued even if the property or the person concerned is outside the jurisdiction of the courts. Such remedies are also available in support of foreign proceedings. As discussed below, the court also has the power to grant interim measures of protection as provided under section 9 of the Arbitration and Conciliation Act, 1996 with respect to the subject matter of the arbitration, either before or during an arbitral proceeding or after the award is made but before it is enforced under section 36 of the said Act. Pertinently, relief under section 9 of the Arbitration and Conciliation Act, 1996 may also be granted in a foreign-seated arbitration where the relevant assets are in India.

13 Remedies

What substantive remedies are available?

Indian courts have wide powers to award substantive relief or remedies. Such relief includes declarations of title or status, specific performance, permanent injunctions, damages and accounts. In exceptional

circumstances, courts are competent to award punitive or non-compensatory damages. The power of the court to award interest is governed by the Interest Act 1978. Where a provision for interest is made on any debt or damages in any agreement, interest shall be paid in accordance with such agreement. Where payment of interest on any debt or damages is barred by express provision in the contract, no interest shall be awarded. Where there is no express bar in the contract and where there is also no provision for payment of interest, the principles of section 3 of the Interest Act will apply, and consequently interest will be payable:

- where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings; or
- where the proceedings are for recovery of damages or for recovery of a debt that is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed to the date of institution of proceedings.

14 Enforcement

What means of enforcement are available?

Enforcement of a decree is by way of execution proceedings through the courts. Money decrees are executed by attachment and sale of the judgment debtor's properties, both moveable and immovable. Certain properties (enumerated in section 66 of the CPC) are immune from execution. In exceptional circumstances, Indian courts will allow money decrees to be executed by the arrest and detention in civil prison of the judgment debtor.

The court may require the judgment debtor to be examined on oath to ascertain the assets available for execution and may, if required, appoint a receiver. Decrees for execution of a document or endorsement of a negotiable instrument may be executed by an officer of the court.

Disobedience of the court's order may invite contempt proceedings, including punishment for the contemnors.

In the case of disobedience of any temporary injunction by a party, the court may commit the person guilty thereof to civil prison and order that his or her property be attached and sold and the proceeds thereof be transferred to the party who is affected by such disobedience, as and by way of compensation.

However, invariably execution proceedings in India are delayed owing to the judgment debtor taking up various hyper-technical objections.

15 Public access

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

Court hearings are ordinarily held in public. However, in certain cases of special sensitivities the court has an inherent power to permit an in-camera trial, which usually takes place in the judge's chamber. As a general rule, while the records of decided cases are open to the inspection of the public, subject only to the general control of the head of registry, the records of pending cases are open to the inspection of the parties and their attorneys alone. Court documents are available to the parties upon payment of the necessary fees. If the person placing a request for the court documents is not a party to the case, he or she must show 'good cause' to be so allowed to search, inspect and obtain copies.

16 Costs

Does the court have power to order costs?

Costs usually follow the event, that is, the successful party is awarded costs unless the court, for reasons recorded in writing, makes orders to the contrary. The court may also direct payment of compensatory costs by a party who delays proceedings or knowingly raises false or vexatious claims or defences.

The CPC read with the High Court rules determines the scale and quantum of costs that may be awarded. In practice, the costs awarded are substantially lower than the costs actually incurred.

Indian courts will order security for costs from a plaintiff not resident in India if the plaintiff does not possess sufficient immovable property in India. The suit may be dismissed if such security is not provided.

Of late the courts (including consumer courts) are driven towards granting costs on actuals. Unfortunately, we are a few years away from the grant of punitive damages and substantial costs.

In the case of *Haldyn Corporation Limited v Oriental Fire and General Insurance Company Limited & Ors*, the Bombay High Court recognised that over a period of 28 years, Haldyn incurred substantial costs to pursue legal proceedings. The High Court quoted several Supreme Court rulings and stated that there is a need to adopt a realistic approach while awarding costs. The High Court also observed that the provisions of law to date entitled Haldyn to a mere fraction of the entire amount. Accordingly, the High Court called for an urgent revision of the law on costs so as to reflect the decisions of the Supreme Court and also the extraordinary costs of litigation in Bombay.

As is evidenced by the case of *Haldyn*, courts would normally not impose the burden of costs on unsuccessful parties or impose costs of such a quantum which may act as a deterrent. However, in the cases of commercial disputes of a specified value as defined under the Commercial Courts Act, costs are to be determined in a different manner – as per the provisions of section 35 of the CPC (which has been amended by Commercial Courts Act), several important parameters must be taken into consideration by the court while awarding costs. An interesting parameter that has been included for awarding costs is an unreasonable refusal of a reasonable offer for settlement made by a party. This clearly is aimed at promoting settlement of disputes and encouraging a reasonable approach by parties towards such discussions. Section 35 of the CPC as amended by the Commercial Courts Act showcases that the intention of the legislature has been to ensure that litigants come to court with clean hands and that courts have the requisite statutory power to impose costs on erring litigants. It is important to note that the legislature has also taken into account the fact that courts had in the past imposed nominal costs on litigants which were not commensurate with actual costs. However, the amended section 35 of the CPC has specifically mentioned that 'legal fees' and 'fees and expenses of witnesses' are to be taken into consideration while awarding costs to the successful party.

17 Funding arrangements

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?

Success fees or fees contingent upon the outcome of the litigation are prohibited. Part VI, Chapter II, section II, Rule 20 of the Bar Council of India Rules stipulates that an advocate shall not stipulate for a fee contingent on the results of the litigation or agree to share the proceeds thereof. Third-party funding is not permitted. Fees are pre-agreed between lawyers and their clients. In lower courts, lawyers generally charge lump sum fees that are non-refundable.

18 Insurance

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

Insurance is ordinarily not available to cover a party's legal costs.

19 Class action

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

Order 1, Rule 1 of the CPC provides that all persons may be joined in one suit as plaintiffs where any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and if such persons brought separate suits, any common question of law or fact would arise.

Additionally, Order I, Rule 8 of the CPC provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue on behalf of or for the benefit of all persons so interested. Such suit is ordinarily known as a 'representative suit'. Such permission is only granted after a

notice of such suit is issued to the interested parties by personal service or published by the court in a popular daily newspaper of the locality at the expense of the plaintiff. The people interested in the suit or opposing the suit may join the proceedings by making an application to the court. If permission is not granted by the court, then the court is obliged to dismiss the suit.

Class actions can also take shape as public interest litigation. This is well recognised in cases where legal injury has been caused to a person or a determinate class of persons, or on behalf of victims who, by reason of poverty, helplessness or disability, or a socially and economically disadvantaged position, are unable to approach the court for relief. In such cases, any member of the public can maintain such public interest litigation for an appropriate direction, order or writ in the High Court under article 226 of the constitution and, in the case of breach of a fundamental right, in the Supreme Court under article 32. For instance, the Centre for Public Interest Litigation, a non-government organisation, filed a public interest litigation in the Supreme Court in relation to the infamous '2-G scam', dealing with allegations that the 2-G spectrum was allocated fraudulently during the tenure of then Telecoms Minister Andimuthu Raja. Consequently, the Supreme Court revoked 122 spectrum licences granted in 2008 amid allegations of fraud over their allocation.

The first class action suits in India were in the context of the securities market, when the Satyam scam broke out in 2009. At that time, Indian investors in India could not take any legal recourse against the company, while their counterparts in the US filed a class action suit claiming damages from the company and the auditing firm. Following the Satyam scam, the concept of class action suits is among one of the many novelties introduced by section 245 of the Companies Act 2013. Although the concept per se is not new, in the Indian context it has found statutory recognition and enforceability only by means of the Companies Act 2013.

Nowadays, class action suits are also being filed against eminent builders who play a fraud on the public at large. Even NGOs are using this mechanism to fight injustice.

20 Appeal

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

Every original decree may be appealed from unless an appeal is precluded by statute. An appeal also lies against certain original orders specified in the CPC. The first appeal may be on questions of fact or law. Unless barred by statute, second appeals lie to the High Court on substantial questions of law.

Pursuant to Clause 15 of the Letters Patent, the chartered High Courts of Bombay, Madras and Calcutta can hear appeals from any judgment passed by a single judge of such court except where the judgment has been passed in exercise of (i) appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subject to the superintendence of such High Court; (ii) revisional jurisdiction; (iii) criminal jurisdiction; or (iv) the power of superintendence under the provisions of section 107 of the Government of India Act.

Section 100A of the CPC provides that where any appeal from an original or appellate decree or order is heard and decided by a judge of a High Court, no further appeal shall lie from the judgment and decree of such judge.

The judgment or decree or final order of a High Court may be appealed before the Supreme Court if the High Court concerned certifies that the matter involves a substantial question of law of general importance, or if the High Court believes that the matter needs to be decided by the Supreme Court.

The Supreme Court may, on application by way of a special leave petition, grant special leave to appeal against any order, judgment, decree, determination or sentence in any cause or matter passed or made by any court or tribunal in the territory of India (except by any court or tribunal constituted by the armed forces). Special leave is discretionary and generally available only in respect of a substantial question of law.

It is important to note that the execution of a decree is not suspended only because an appeal is pending. The appeal court may, for good reasons that must be recorded, stay execution pending the appeal.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Sections 13 and 44A of the CPC deal with recognition and enforcement of foreign judgments.

Section 13 of the CPC provides that a foreign judgment shall be conclusive as to any matter directly adjudicated upon between the same parties or between parties under whom they or any of them claim, except in the following cases:

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been pronounced on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or refusal to recognise the law of India in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where it has been obtained by fraud; and
- where it sustains a claim founded on a breach of any law in force in India.

Section 44A of the CPC provides that foreign decrees passed in reciprocating countries may be executed in India in the same manner as if they were decrees passed by a civil court in India. Accordingly, such decrees can be filed before the executing court (which would be the district court in which the subject matter is situated) along with a certified copy of the decree. Execution of such decrees is refused if the decree fulfils any of the exceptions set out in section 13.

In cases of foreign decrees by non-reciprocating countries there is no provision for enforcement, and such foreign decrees can be executed only by a suit upon the judgment.

22 Foreign proceedings

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

The CPC makes provision for a foreign court to obtain evidence through courts in India. The High Court of any state, on being satisfied that a foreign court wishes to obtain the evidence of a witness in any civil proceeding before it and that the witness is residing within the limits of the High Court's appellate jurisdiction may, upon an application, issue a commission for the examination of such witness. Such evidence may be recorded on receiving a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the central government; by a letter of request issued by the foreign court and transmitted to the High Court through the central government; or by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding.

A commission may be issued to any court within the local limits of the jurisdiction where the witness resides or, if the witness resides within the local limits of the ordinary original civil jurisdiction of the High Court, to any person whom the court thinks fit to execute the commission.

Nowadays the courts have also started using videoconferencing through Skype and other online portals for obtaining oral or documentary evidence from persons not within its jurisdiction.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Indian Arbitration and Conciliation Act 1996 (the Act) has been enacted based on the UNCITRAL Model Law provisions, with some minor modifications. The preamble of the Act states that 'it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law'.

Part I of the Act deals with arbitrations having its seat in India and is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Arbitration Rules 1976. However, the Act has made some minor departures from the Model Law. The Law Commission of India by its 246th Report (August 2014) in fact recommended that the Act be amended to bring it in line with the 2006

amendments to the UNCITRAL Model Law. Illustratively, the 2006 amendments to the UNCITRAL Model Law provide for the enforceability of interim orders of an arbitration tribunal and with no corresponding provision in the Indian Arbitration Act.

Part II of the Act deals with the enforcement of foreign awards and is based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, section 44 of the Act) and the Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention, section 53 of the Act).

Although the Act had been in force for almost two decades, and in this period of time, although arbitration had fast emerged as a frequently chosen alternative to litigation, it had come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace, or litigation, to which it intended to provide an alternative. Delays were inherent in the arbitration process, and costs of arbitration were tremendous. Even though courts played a pivotal role in giving finality to certain issues that arose before, after and even during an arbitration, there existed a serious threat of arbitration-related litigation getting caught up in the huge list of pending cases before the courts. Further, after the award, a challenge under section 34 made the award inexecutable and such applications remained pending for several years. The object of quick alternative disputes resolution frequently stood frustrated. Considering these factors, the current government promulgated the Arbitration and Conciliation (Amendment) Ordinance 2015 to amend certain provisions of the Act, which received assent from the President on 23 October 2015. Thereafter, the Arbitration and Conciliation (Amendment) Bill 2015 (Amendment Bill) was introduced in both houses of parliament to replace the Arbitration and Conciliation (Amendment) Ordinance 2015 and was subsequently passed by the Lok Sabha and Rajya Sabha on 17 December 2015 and on 23 December 2015 respectively. This Amendment Bill has now become an Amendment Act after having received the President's assent on 31 December 2015 (2015 Amendment).

Some of the key amendments brought to the Act by the 2015 Amendment are as follows:

- definition of the term 'court' in section 2(1)(e) of the Act: the Court for International Commercial Arbitrations shall be only the High Court.
- Section 7: an arbitration agreement contained in the form of communication through electronic means shall also be treated as an arbitration agreement in writing.
- Section 8: if the judicial authority finds that there is no prima facie arbitration agreement then it will not refer the parties to arbitration.
- Section 9: where the court passes an order for any interim measure under subsection (1) of section 9 before the commencement of arbitral proceedings, the arbitral proceedings shall be commenced within a period of 90 days from the date of such order. It further provides that once the arbitral tribunal is constituted, the court shall not entertain an application for interim measure unless it finds circumstances that may render the remedy provided under section 17 inefficacious. Further, interim relief under this provision shall be available notwithstanding that the arbitration is not seated in India.
- Section 11: limitation on rates of fees of arbitrators.
- Section 12: ensuring neutrality of arbitrators, when a person is approached in connection with the possible appointment as arbitrator, he or she is required to disclose in the writing the existence of any relationship or interest of any kind that is likely to give rise to justifiable doubts as to his or her neutrality. He or she is also required to disclose any circumstances which are likely to affect his or her ability to devote sufficient time to the arbitration and complete the arbitration within the specified period. A person having relationships as specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.
- Section 17: the arbitral tribunal shall have power to grant all kinds of interim measures that the court is empowered to grant under section 9 of the Act. Any order issued by the arbitral tribunal for grant of interim measures shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the court.

- Section 29A: time limit for arbitral award. This is a completely new section, which, inter alia, provides that the tribunal shall ensure speedy completion of the arbitration proceedings and pass the award within a period of 12 months from the date when the arbitral tribunal enters upon the reference. However, the parties may extend such period for a further period not exceeding six months. If the award is made within a period of six months, the arbitral tribunal shall be entitled to receive additional fees as the parties agree. If the award is not made within specified period or extended period, the mandate of the arbitrator shall terminate unless the time is extended by the court.
- Section 29B: fast-track procedure. This is also a completely new section that, inter alia, provides for a fast-track procedure for conducting arbitral proceedings where parties agree to the same. In such cases, the arbitral tribunal consisting of a sole arbitrator shall decide the dispute on the basis of written pleadings, documents and written submission and shall not hold oral hearing. The award is to be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- Section 34 and 36: the grounds for challenge of an award have now been narrowed. Further, there is no automatic stay on the enforcement of an award upon the mere filing of an application to set aside the award. A party seeking to set aside the award will now have to make an application for stay of the award which may be granted subject to certain conditions (including deposit of monies in the case of a money decree).

The Supreme Court is currently deciding the question of law whether the Arbitration and Conciliation (Amendment) Act, 2015 will apply to applications arising out of arbitral proceedings that commenced before the Amendment Act came into force. The reason for this is that different High Courts in India have expressed divergent views in relation to the same and the matter is currently in a state of flux. Some notable judgments in relation to the same are:

- Act prior to amendment will apply:
 - (a) *Electrosteel Castings Ltd v Reacon Engineers (India) Pvt Ltd* (2016 SCCOnline Cal 1257);
 - *Nitya Ranjan Jena v Tata Capital Financial Services Ltd* (Calcutta High Court; G.A. No. 145 of 2016 with A.P. No. 15 of 2016);
 - *M/s Reliance Capital Ltd v Chandana Creations & Ors* (EC 301/2012 with GA 1406/2016); and
 - *Ardee Infrastructure Pvt Ltd v Anuradha Bhatia* (Division Bench – FAO (OS) No. 221 of 2016).
- Act post-amendment will apply:
 - *Tufan Chatterjee v Rangan Dhar* (AIR 2016 Cal 213);
 - *Raffles Design International India Pvt Ltd & Ors v Educomp Professional Education Ltd & Ors* (2016 SCCOnline Del 5521);
 - *Rendezvous Sports World v BCCI* (2016 SCC Online Bom 6064); and
 - *New Tiruppur Area Development Corporation Ltd v Hindustan Constructions Co Ltd* (Madras High Court, A. No. 7674 of 2015).

The government of India is also taking steps towards making India an arbitration hub in Asia. In this regard, the Singapore International Arbitration Centre has set up offices in Mumbai and Delhi. Further, the Mumbai Centre for International Arbitration has been recently set up in Mumbai with a view to encourage and promote institutional arbitration.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The only legal requirement for an enforceable arbitration agreement is laid down in section 7 of the Act, which mandates that arbitration agreements must be in writing. There is, however, no legal requirement as to the form and content of an arbitration agreement, as is apparent from section 7 of the Act, which provides that an arbitration agreement is in writing if:

- an agreement contains an arbitration clause;
- an arbitration agreement is in a document signed by the parties;
- an agreement to submit disputes to arbitration is recorded in an exchange of letters, telexes, telegrams or other means of telecommunication, including communication through electronic means;

- such agreement to arbitrate is evidenced by an exchange of statements of claim and defence in which one party alleges the existence of the agreement and the allegation is not denied by the other party; or
- there is a reference in a contract to a document that contains an arbitration clause such as to make the clause a part of the contract, provided that the contract is in writing.

Similarly, courts have also held that an arbitration clause or agreement is not required to be in any particular form. If the intention of the parties to refer the dispute to arbitration can be ascertained from the terms of the agreement, it is immaterial whether the expression 'arbitration' or 'arbitrator' or 'arbitrators' has been used in the agreement (*M Dayanand Reddy v AP Industrial Infrastructure Corporation Limited & Ors* (1993) 2 SCR 629; *Nandan Biometrix Ltd v DI Oils* (2009) 4 SCC 495). It has also been held in this case that if the intention of the parties was to arbitrate, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or the implementation thereof. Moreover, an unsigned written agreement is also valid and enforceable (*Trimex International FZE Ltd, Dubai v Vedanta Aluminium Limited, India* (2010) 3 SCC 1; *Orchid Electronics v Vinitec Electronics Pvt Ltd*, 2007 (Suppl) Arb LR 266 [Delhi]).

Courts have held that an arbitration clause is severable from the rest of the agreement of which it forms part and, therefore, a valid arbitration clause survives the invalidity of the rest of the agreement (*Firm Ashok Traders v Gurumukh Das Saluja & Ors* (2004) 3 SCC 155, *Shin Satellite Public Co Ltd v Jain Studios Ltd* (2006) (1) Arb LR 286 (SC)). The Supreme Court in *Enercon (India) Ltd & Ors v Enercon GmbH & Ors* (2014) 5 SCC 1, held that an arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear; any allegation of non-conclusion of the main contract is immaterial. In the case of *Enercon* the Supreme Court not only ordered the parties to arbitration but also constituted the arbitral tribunal itself. The Supreme Court in the case of *Jagdish Chander v Ramesh Chander* (2007) 5 SCC 719 held that the main attribute to an arbitration agreement is consensus ad idem. In the case of *Chloro Controls (I) (P) Ltd v Severn Trent Water Purification Inc & Ors* (2013) 1 SCC 641, the Supreme Court has held that in certain circumstances (such as implied consent, third-party beneficiaries, guarantors, assignees, theories of agencies, piercing of the corporate veil) even a non-signatory to an arbitration agreement can be bound by the arbitration agreement (it is pertinent to note that this judgment was passed with respect to an international commercial arbitration). In *Geo-Group Communications Inc v IOL Broadband Ltd* (2010) 1 SCC 562, the Supreme Court held that an arbitration clause in an agreement does not attract stamp duty.

25 Choice of 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?

Section 10 of the Act provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, courts have held that even if parties appoint only two arbitrators, the agreement will not be invalid and the two arbitrators can together appoint a third or appoint a third at a later stage if they differ (*Narayan Prasad Lohia v Nikunj Kumar Lohia & Ors* (2002) 3 SCC 572). Failing such determination, the arbitral tribunal shall consist of a sole arbitrator. Section 11 of the Act provides that where the parties have agreed that the arbitral tribunal will consist of three arbitrators and have failed to agree upon any procedure for this appointment, then each party will appoint one arbitrator and the appointed arbitrators will appoint the third. Section 11 further provides that the arbitrator will be appointed in accordance with the procedure agreed by the parties and where the parties fail to agree on a procedure or an arbitrator then the arbitrator will be appointed by the High Court (in the case of domestic arbitrations) or the Supreme Court (in the case of international commercial arbitrations). Section 11(7) of the Act provides that the appointment of the arbitrator by the High Court or Supreme Court, as the case may be, is final. In *SBP & Co v Patel Engineering Ltd & Anr* (2005) 7 SCC 618, the Supreme Court ruled that the appointment by the relevant chief justice of a High Court or his or her respective designate cannot

be appealed except by way of a special leave petition filed before the Supreme Court.

Section 12 of the Act provides that the appointment of an arbitrator may be challenged by a party who has justifiable doubts as to the arbitrator's independence or impartiality, or if the arbitrator does not possess the qualifications agreed to by the parties. It was held by the Supreme Court in *Bihar State Mineral Development Corporation & Anr v Encon Builders (I)(P) Limited* (2003) 7 SCC 418 that actual bias would lead to an automatic disqualification where the decision maker is shown to have an interest in the outcome of the case. If a party has appointed or participated in the appointment of an arbitrator, he or she may challenge the arbitrator only for reasons that he or she becomes aware of after the appointment has been made. Section 12 of the Act has been amended by the 2015 Amendment to include, inter alia, the following:

- a prospective arbitrator has to disclose in writing in the form specified in the Sixth Schedule to the Act: (i) the existence of any past or present relationship with either of the parties or the subject matter of the dispute which is likely to give rise to justifiable doubts as to his or her independence and impartiality (the Fifth Schedule to the Act shall act as a guide in determining whether these circumstances exist); and (ii) any circumstances likely to affect his or her ability to complete the entire arbitration within 12 months; and
- any person whose relationship with the parties, or the counsel, or the subject matter of the dispute falls within the categories specified in the Seventh Schedule to the Act, will not be eligible for appointment as an arbitrator. However, parties may waive the applicability of this provision by an agreement in writing subsequent to the disputes arising.

Section 13 of the Act provides that parties are free to agree on the procedure for challenging the appointment of an arbitrator. In the absence of an agreed challenge procedure, a party must submit a written challenge to the tribunal within 15 days of becoming aware of the circumstances provided under section 12 of the Act. The arbitral tribunal shall decide on the challenge raised by a party, and if it finds no merit in the same then shall proceed with the arbitration. The party aggrieved by such a decision may challenge the same only at the time of making an application for setting aside the award under section 34 of the Act.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The pool of arbitrators available for selection would depend on whether the arbitration is proceeding via an institution or whether it is ad hoc. In the case of an institution, the parties may choose from the panel of arbitrators that the institution offers. Thus, for instance, the Mumbai Centre for International Arbitration offers a wide panel of arbitrators from which a party may choose. In the case of ad hoc arbitrations, parties usually appoint retired judges (whether of the Supreme Court or of High Courts) as arbitrators. It is also becoming increasingly common to appoint practising lawyers as arbitrators. For instance, the Bombay High Court now often appoints lawyers practising before it as arbitrators in applications under section 11 of the Arbitration and Conciliation Act, 1996.

Technical members are sometimes appointed as arbitrators in matters of technical complexity (especially in construction disputes), although this is not very common. Thus, given that most Indian tribunals comprise lawyers and not technical experts, this may sometimes result in an inadequacy to meet the needs of complex and technical arbitrations. This inadequacy may, however, be addressed with the assistance of experts in the field who can guide non-technical members.

There are also various entities such as the Indian Council of Arbitrators, Rubber Board, etc, which have their own arbitrators who are experts in the field.

27 Arbitral procedure

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

Section 19 of the Act provides that the arbitral tribunal shall not be bound by the CPC or the Indian Evidence Act 1872. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing any agreement, the arbitral tribunal

may conduct the proceedings in the manner it considers appropriate (the power of the tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence). Furthermore, section 24 of the Act states that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or whether the proceedings shall be conducted on the basis of documents and other materials.

In *National Thermal Power Corporation v Wig Brothers (Builders & Engineers) Ltd* 2009 (2) Arb LR 238 (Delhi), it was held that in the absence of any agreement to the contrary an arbitral tribunal may in terms of section 19(3) of the Act conduct the proceedings in the manner it considered fair and appropriate. Moreover, the only real restriction on the freedom given to arbitral tribunals in the conduct of proceedings is contained in section 18 of the Act, which mandates that the arbitral tribunal must ensure that the parties are treated equally and are given a full opportunity to present their case.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Although the Act seeks to harmonise arbitration and the judicial process, the emphasis is on reducing intervention by courts. The Act, in its Statement of Object and Reasons, enlists the minimisation of the supervisory role of courts as one of the main objectives of the Act. Accordingly, section 5 of the Act restricts intervention of courts to the extent provided under Part I of the Act.

A court can intervene during an arbitration only in the following cases:

- where an application is made by a party under section 9 of the Act either before or during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced under section 36, to a court defined under section 2(1)(e) of the Act for, inter alia, appointment of a guardian for a minor or person of unsound mind for the purposes of the arbitral proceedings; or for an interim measure of protection in respect of the subject matter of the arbitration as may appear to the court to be just and convenient. However, it is pertinent to note that pursuant to the 2015 Amendment, once the arbitral tribunal has been constituted, the court shall not entertain an application under section 9 of the Act unless the court finds that circumstances exist that may not render the remedy provided under section 17 of the Act (interim measure of protection by the arbitral tribunal) to be efficacious. Furthermore, where relief under section 9 is granted before commencement of the arbitration proceedings, then the arbitration proceedings are required to commence within 90 days of the order granting interim relief or such other time as may be decided by the court;
- under section 11 of the Act for the appointment an arbitrator where the parties fail to reach an agreement on the same; and
- under section 27 of the Act the arbitral tribunal or the parties after taking the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence. The Supreme Court in *Delta Distilleries Ltd v United Spirits Ltd & Anr* ((2014) 1 SCC 113) held that an arbitral tribunal is entitled to seek assistance from the court due to non-cooperation of a person or where evidence is required from any person, be it a party to the proceedings or others, in order to make an award on the merits.

In *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, the Supreme Court held that the provisions of Part I of the Act (which includes provisions relating to setting aside of an award) apply to all arbitrations, including international commercial arbitrations seated outside India, unless the parties have expressly or impliedly excluded its application. However, the decision in *Bhatia International* was overruled by the constitutional bench of the Supreme Court of India in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*, wherein it was held that the provisions of Part I of the Act would only apply to arbitrations seated in India. The decision in *Bharat Aluminium* had been made applicable only prospectively to all arbitration agreements executed after the date of the judgment (6 September 2012), which has led to a scenario where *Bhatia*, despite the fact that it has ceased to be good law, will continue to apply. By the 2015 Amendment to the Arbitration and Conciliation Act 1996, the court has crystallised the law laid down in *Bharat Aluminium*. However, section 2(2) of the Act has been amended, which in a way

relates back to the law laid down by *Bhatia* by, inter alia, providing that subject to an agreement to the contrary, the provisions of sections 9, 27 and 37(1)(a) of the Act (which form part of Part I of the Act) shall also apply to international commercial arbitration, even if the place of arbitration is outside India and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of the Act. This has ensured that an Indian court can grant interim relief notwithstanding that the arbitration is not seated in India.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Pursuant to section 17 of the Act, the arbitral tribunal has power to grant interim relief, unless otherwise agreed by the parties. The Supreme Court in *MD, Army Welfare Housing Organisation v Sumangal Services Pvt Ltd* (2004) 9 SCC 619, held that the power of the arbitral tribunal under section 17 of the Act is limited and cannot go beyond the reference or the arbitration agreement. However, the 2015 Amendment has substantially amended section 17 and now section 17 is very similar to section 9 of the Act and the following are the highlights:

- the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it under section 9 of the Act;
- any order issued by the tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the CPC in the same manner as if it were an order of the court; and
- the parties cannot contract to exclude the provisions of section 17.

30 Award

When and in what form must the award be delivered?

Before the 2015 Amendment the Act did not prescribe a period within which the award is required to be delivered. However, after the 2015 Amendment section 29A of the Act, inter alia, provides as follows:

- the award shall be made within a period of 12 months from the date the arbitral tribunal enters upon the reference;
- if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree;
- the parties can by consent extend the 12-month period for a further period not exceeding six months; and
- if the arbitral tribunal fails to pass the award within the time period provided above then the mandate of the arbitrator shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period. While extending time the court may reduce the arbitrators' fees. Furthermore, while extending the period the court may even substitute one or more of the arbitrators.

In this context it is pertinent to mention section 29B of the Act (introduced pursuant to the 2015 Amendment), which provides for a fast-track procedure for disposal of arbitral proceedings. Section 29B, inter alia, provides that the parties may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast-track procedure and once the same is entered into then the conduct of the proceedings shall be as follows:

- the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearings. However, an oral hearing may be held only if all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing; and
- the award to be made within a period of six months from the date of the arbitral tribunal enters upon the reference and failure to do so entails the same procedure and consequences as set out in section 29A.

Section 31 of the Act provides for the form and content of an award as follows:

- the award must be in writing and must state the date and place of arbitration;
- it must be signed by all members of the arbitral tribunal, or by majority of the tribunal in which case the reasons for the omission of any signature must be stated;

- the award must state the reasons on which it is based unless the award is based on agreed terms or the parties have waived the requirement of a speaking order;
- unless otherwise agreed by the parties, where insofar as the award is for payment of money, the arbitral tribunal may include in the sum for which the award has made interest, at such rate as it deems reasonable, on the whole or any part of the money for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made; and
- a sum directed to be paid by an arbitral award shall unless the award otherwise directs, carry interest at the rate of 2 per cent higher than the current rate of interest (as provided under the Interests Act 1978) prevalent on the date of award, from the date of award to the date of payment.

31 Appeal

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

Section 34 of the Act provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award on the following grounds:

- the applicant furnishes proof that:
 - a party was under some incapacity;
 - the arbitration agreement was invalid according to the governing law or the law in force;
 - the applicant party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present his or her case;
 - the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. Provided that the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award containing the decisions on matters not submitted to arbitration may be set aside; and
 - the composition of the tribunal or the procedure followed was different from that agreed by the parties or as per Part I of the Act;
- the court finds that:
 - the subject matter of the dispute was incapable of resolution or settlement under Indian law; or
 - the award is in conflict with the public policy of India.

There has been much debate over the meaning of 'an award in conflict with public policy of India'. In the case of *Renusagar Power Plant Ltd v General Electric Co* AIR 1994 SC 860, the Supreme Court has held that an award ought to be held in conflict with the public policy of India if the award is in conflict with the fundamental policy of India; interests of India; or justice or morality. Thereafter, in the case of *ONGC v Saw Pipes Ltd* (2003) 5 SCC 705, the Supreme Court expanded the meaning further by including awards that are patently illegal and such illegality went to the root of the matter or was so unfair and unreasonable that it shocked the conscience of the court (this decision has been criticised as it has the tendency of converting the application into a full-fledged appeal). By *McDermott International Inc v Burn Standard Co Ltd* 2006 (11) SCC 181 the Supreme Court clarified that courts have a supervisory role under section 34 of the Act and the intervention of courts ought to be minimal. This judgment also provided that an award shall be in conflict with the public policy of India if the award is perverse or contains internal contradictions.

In the case of foreign awards, the Supreme Court in *Shri Lal Mahal v Progetto Grano Spa* (2013) 3 ARBLR 1 (SC) stated that the Act does not permit a review of foreign award on merits, as the Act does not give courts an opportunity to have a 'second look' at foreign awards. Accordingly, courts have held that the public policy doctrine for foreign awards must be given a narrow and restrictive meaning.

The Supreme Court in *ONGC v Western Geco* (2014) 9 SCC 263 and *Associate Builders v Delhi Development Authority* (2014) (4) ARBLR 307 (SC) has held that the expression 'public policy' is different for domestic awards and foreign awards. The courts may resist enforcement of a foreign award if:

- enforcement would be contrary to the fundamental policy of Indian law, which would include judicial approach; principles of justice; and *Wednesbury's* principles of reasonableness;
- enforcement would be contrary to the interests of India; or
- enforcement would be contrary to justice or morality and patent illegality.

Given the findings in the above judgments, section 34 came to be slightly amended by the 2015 Amendment to provide that an award shall be in conflict with the public policy of India if the award is (i) in contravention with the fundamental policy of Indian law; (ii) in conflict with the most basic notions of morality or justice (but this shall not entail a review on the merits of the dispute); and (iii) the award is patently illegal on the face of the award (not applicable to international commercial arbitrations).

The party applying to set aside the award must do so within three months of receiving the award. However, if the party proves sufficient cause for the delay, the court may extend this period for a further 30 days. A party aggrieved by an order under section 34 of the Act may appeal against the same under section 37 of the Act.

The 2015 amendment requires that an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Under Indian law, a domestic award is enforced under section 36 of the Act as if it were a decree of a court. Prior to the 2015 Amendment to the Arbitration and Conciliation Act 1996, an application for setting aside of an award led to an automatic stay on proceedings for execution of the award. However, by virtue of the 2015 Amendment a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award. For grant of such stay the courts have the power to order deposit of monies as a precondition in cases of money awards. The Supreme Court is currently seized of matters to decide whether this amendment is prospective or retrospective in nature.

The 2015 Amendment also inserted section 17(2) under which any order issued by the arbitral tribunal is now deemed to be an order of the court and enforceable in the same manner. The addition of section 17(2) should aid the enforcement of emergency awards for domestic-seated arbitration in India. However, there was no similar amendment made in Part II of the Act dealing with foreign-seated arbitrations, leaving any interim orders passed by a foreign-seated arbitral tribunal as non-enforceable in India. In August 2014, the Law Commission of India in its 246th Report sought to offer statutory recognition to emergency awards by broadening the definition of 'arbitral tribunal' under section 2(1)(d) of the Act to include emergency awards. Nonetheless, such statutory recognition is not reflected in the 2015 Amendments and this, along with the absence of a provision similar to section 17(2) in Part II of the Act, has caused uncertainty in India for both domestic and foreign-seated emergency awards. This issue has been substantially dealt with in the case of *Raffles Design International India Pvt Ltd & Anr v Educomp Professional Education Ltd & Ors* (O.M.P.(I) (COMM.) 23/2015) & CCP (O) 59/2016, IA Nos. 25949/2015 & 2179/2016.

Section 48 of the Act provides that a foreign award to which the New York Convention applies can be enforced in India if evidence as provided under section 47 of the Act is furnished to the court (ie, original award or copy thereof, duly authenticated; original agreement for arbitration or duly certified copy thereof; and such evidence as may be necessary to prove that the award is a foreign award) unless:

- a party furnishes proof that:
 - a party was under some incapacity;
 - the arbitration agreement was invalid according to the governing law or the law in force;
 - the appellant party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present his or her case;
 - the award deals with matters beyond the terms of the submission to arbitration. Where decisions on matters submitted to

Update and trends

With effect from 1 May 2016, Parliament passed the Real Estate (Regulation and Development) Act 2016 (RERA), aimed at greater transparency in real estate project-marketing and execution. RERA seeks to establish state-level real estate regulatory authorities to regulate transactions related to both residential and commercial projects and ensure their timely completion and handover. Under RERA, appellate tribunals are required to adjudicate cases in 60 days and regulatory authorities are required to dispose of complaints in 60 days. The RERA was notified and came into effect in some states on 1 May 2016, and the Act is likely to come into force in other states subsequently.

The amendment of the Arbitration and Conciliation Act, 1996 in 2015 has led to considerable controversy as to the type of proceedings to which the amendments will apply. The key dispute is whether the amendments will apply to applications and proceedings arising out of arbitral proceedings that commenced prior to the amendments coming into force. Different High Courts have expressed divergent views on the issue, which is now pending final hearing before the Supreme Court of India. The matter will decide the fate of numerous arbitration-related disputes pending in the country and will likely impact India's perception as an arbitration-unfriendly jurisdiction.

There is also an ongoing tussle between the judiciary and the executive in relation to the Aadhar Card. While the Apex Court has expressly held that the Aadhar Card is not compulsory, the executive is making the same mandatory for various purposes (for example, at the time of filing tax returns).

arbitration can be separated from those not submitted, only the part of the award dealing with matters not submitted may be set aside;

- the composition of the tribunal or the procedure followed was different from that agreed by the parties or the law of the country in which it was made;
- the award has not yet become binding on the parties, or 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; or
- the court finds that:
 - the subject matter of the dispute was incapable of resolution or settlement under Indian law; or
 - the award is in conflict with the public policy of India.

Section 57 of the Act provides that a foreign award to which the Geneva Convention applies can be enforced in India if evidence as provided under section 56 of the Act is furnished to the court (ie, original award or copy thereof, duly authenticated; evidence proving that the award has become final; etc) and the following conditions are complied with:

- the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- the subject matter of the award is capable of settlement by arbitration under the law of India;
- the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending; and
- the enforcement of the award is not contrary to the public policy or the law of India.

Section 57 further provides that even if the above conditions are fulfilled, enforcement of the award shall be refused if the court is satisfied that:

- the award has been annulled in the country in which it was made;
- the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him or her to present his case; or that, being under a legal incapacity, he or she was not properly represented; and
- the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it

contains decisions on matters beyond the scope of the submission to arbitration.

Where a foreign award is enforceable in India, the award shall be deemed to be a decree of a court.

In *Sakuma Exports Ltd v Louis Dreyfus Commodities Suisse SA* (2014 STPL Web 219 SC), the Supreme Court upheld the decision of the Bombay High Court and settled the position that a foreign arbitral award cannot be challenged in the Indian courts where Part I of the Act has been excluded by the arbitration agreement.

33 Costs

Can a successful party recover its costs?

Section 31A of the Act (introduced by the 2015 Amendment) provides for a regime for costs as follows:

- the court or arbitral tribunal, as the case may be, shall have discretion to determine (i) whether costs are payable by one party to another; (ii) the amount of such costs; and (iii) when such costs are to be paid;
- costs means (i) fees and expenses of the arbitrator, courts and witnesses; (ii) legal fees and expenses; and (iii) any other expenses incurred in connection with the arbitration or court proceedings and the arbitral award;
- the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; however, the court or arbitral tribunal can make a different order for reasons to be recorded in writing;
- in determining costs, the court or arbitral tribunal shall have regard to all the circumstances such as conduct of all the parties, whether a party has succeeded partly in the case, etc; and
- an agreement that has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Currently, there are no express rules as regards whether third-party funding costs are recoverable. The law regarding maintenance and champerty is not firm and whether or not such arrangements are valid will depend on the individual facts of each case, including whether they are considered to be against the public policy of India. In the case of *Lala Ram Swaroop v the Courts of Wards* ((1949) 42 BOMLR 307), the Bombay High Court held that the rules against champerty and maintenance do not apply in India.

Alternative dispute resolution

34 Types of ADR

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

Besides arbitration, mediation and conciliation are the other forms of ADR commonly used in India.

Of late, more private foreign companies are resorting to invoking the dispute resolution mechanisms in bilateral investment treaties (BITs) between the Indian government and the relevant foreign country. India has entered into several of such BITs with countries across the globe. These treaties subject host countries to litigation with investor corporations from the other country that is a signatory to the BIT. There was a rise in potential disputes under BITs in 2015, with several international companies threatening to invoke disputes under their respective BITs against the Indian government for reneging on international obligations.

35 Requirements for ADR

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?

Indian courts are empowered to direct litigants to consider engaging in an ADR process. However, courts do not have the power to compel the use of ADR; if the parties do not reach an amicable solution under an ADR process and wish to litigate, the court is bound to admit and rule on the dispute.

Further, under section 89 of the CPC, where it appears to the court that there exist elements of settlement that may be acceptable to parties of a dispute, the court may formulate the terms of the settlement and (after receiving the observation of the parties) may refer the same for arbitration; conciliation; judicial settlement, including settlement through *lok adalats* (see question 36); or mediation.

Parties who have agreed to submit disputes to arbitration cannot be compelled to consider or undergo an ADR process.

Miscellaneous

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

Lok adalats (people's courts) have also been set up under the Legal Services Authority Act 1987. The intention is to provide free and competent legal services to weaker sections of society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

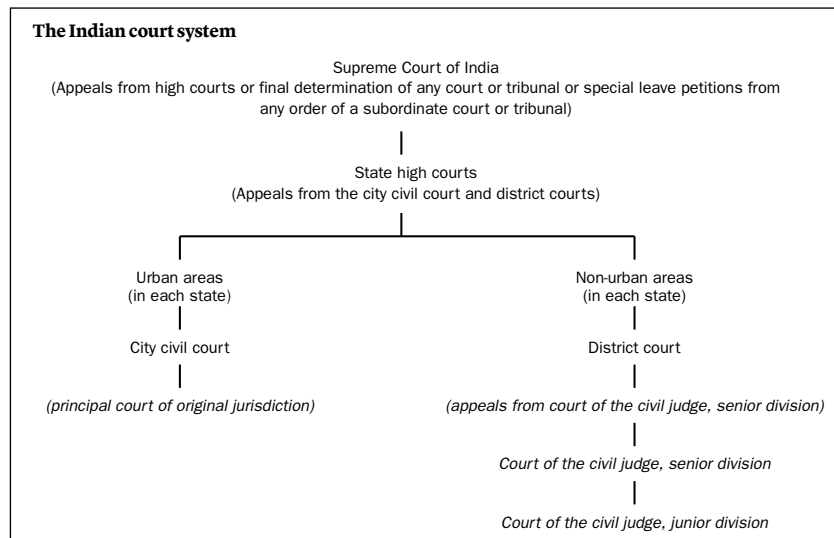
Lok adalats are held by the state authority, district authority, Supreme Court Legal Services Committee, High Court Legal Services

Committee, Legal Services Committee or Taluk (that is, sub-district) Legal Services Committee. The *lok adalat* is presided over by a sitting or retired judicial officer as the chairperson, with two other members, usually a lawyer and social worker. There is no court fee and no rigid procedural requirements, which makes the *lok adalats* expeditious.

A *lok adalat* has the jurisdiction to settle, by way of effecting a compromise between the parties, any matter that may be pending before any court, as well as matters at a pre-litigation stage (that is, disputes that have not been formally instituted in any court of law). Money claims, motor accident compensation claims, matrimonial disputes and other civil claims can be settled by *lok adalats*. However, matters relating to an offence not compoundable under any law cannot be decided by the *lok adalats* even if the parties involved agree to the same.

The award passed by a *lok adalat* shall be final and will have force as a decree of a civil court.

Recently, *lok adalats* have become a popular forum to resolve disputes. Illustratively, over 880,000 cases related to land acquisition, revenue and the National Rural Employment Guarantee Act, 2005, were settled, involving over 2 billion rupees at national *lok adalats* held across the country in the second week of March.



Vivek Vashi
Kanika Sharma
Hrushika Narvekar

vivek.vashi@bharucha.in
kanika.sharma@bharucha.in
hrushi.narvekar@bharucha.in

Cecil Court, 4th Floor
 MK Bhushan Marg, Colaba
 Mumbai 400 039
 India

Tel: +91 22 2289 9300
 Fax: +91 22 2282 3900
 www.bharucha.in

Israel

Jeremy Benjamin and Ido Pirkes*

Goldfarb Seligman & Co

Litigation

1 Court system

What is the structure of the civil court system?

There are three instances in the civil court system in Israel: magistrates' court, district court and the Supreme Court. Israel is divided into six judicial districts, each of which contain magistrates' courts and a district court: Tel Aviv, Jerusalem, Haifa, Northern District, Central District and Southern District.

The Supreme Court sits in Jerusalem. As of 1 May 2017, there were 15 Supreme Court judges, 182 district court judges, 447 magistrates' court judges and 87 registrars.

Civil proceedings in Israel are adjudicated by magistrates' courts and district courts, with jurisdiction split between the two courts depending on the claim amount and the nature of the claim. The limit for magistrates' court claims is 2.5 million shekels, but particular types of claim, such as certain real estate disputes, will be heard by the district court regardless of the claim amount. District courts have subject matter jurisdiction over insolvency proceedings and claims regarding companies law issues.

Magistrates' courts also contain municipal courts, rent courts, condominium courts, small claims courts and family courts.

There are also specialist courts such as administrative courts that sit within each district court, the Admiralty Court and the Water Court (both of which sit within Haifa District Court), the Antitrust Court and the Uniform Contracts Court (both of which sit within Jerusalem District Court), and the Economic Department of the Tel Aviv-Jaffa District Court with subject matter jurisdiction over certain types of claims regarding securities law, mutual funds law, investment advisors law and companies law. Legislation has been initiated to establish an Economic Department in the Haifa District Court.

The Supreme Court also sits in three-judge panels as the High Court of Justice as the court of first instance in certain types of administrative and constitutional cases against the state.

The Supreme Court also, on rare occasions, conducts rehearings of its own rulings before panels of five or seven judges (or on exceptional cases before larger panels).

2 Judges and juries

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

The Israeli legal system is adversarial and does not use juries.

Most civil cases are heard before a single judge in the court of first instance (magistrates' court or district court).

Appeals on magistrates' court judgments are heard before a three-judge district court panel.

Appeals on district court judgments are heard before three-judge panels of the Supreme Court; when the appeal involves a matter of great import (such as constitutional issues), the panel may be enlarged. A single Supreme Court judge hears applications for leave to appeal interim rulings of the district court and procedural motions and applications for interim relief to the Supreme Court.

The Supreme Court sitting as the High Court of Justice usually hears cases in three-judge panels as well.

Judges are appointed by a Judicial Appointments Committee composed of the Chief Justice of the Supreme Court and two additional

Supreme Court judges, the Minister of Justice and an additional minister, two members of parliament, and two representatives of the Israel Bar Association. Out of the 15 judges currently on the Supreme Court, four are women and two are Arab.

3 Limitation issues

What are the time limits for bringing civil claims?

Most limitations are set by the Limitations Law, 1958. The general rule for civil claims that do not concern real property is that the plaintiff has seven years to file a claim from the date that the cause of action occurred.

In the case of fraud, the period commences from the date on which the plaintiff became aware of the fraud. If the facts creating the cause of action were unknown to the plaintiff for reasons not under his or her control and could not have been reasonably discovered earlier, the period will commence when the facts first became known to the plaintiff.

The period will be suspended if the plaintiff's claim was delayed as a result of deliberate deception by the defendant regarding relevant facts, or if the delay was caused by the defendant using physical force or threats, or exploiting the plaintiff's distress. The period for claims concerning real property is 15 years and in some cases 25 years.

The limitations period may be lengthened in writing, and in the case of real property the limitations period may also be shortened in writing.

If the defendant admits the right claimed by the plaintiff in writing or before the court, the period will commence on the date of the admission. An act that constitutes partial performance of the right is deemed an admission of the right.

4 Pre-action behaviour

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

There are no rules in Israel regarding pre-action behaviour in regular civil litigation, nor is there any Supreme Precedent on the matter, though a district court has held that the good faith obligation requires a pre-action demand letter and a victorious plaintiff who failed to send one generally will not be entitled to an award for costs and legal fees.

According to some rulings, a class action plaintiff must send a pre-action demand letter, and the Supreme Court has found that failure to do so before suing a governmental entity may be grounds for dismissal of the certification motion.

Applications to internet service providers to disclose IP details of potential defendants are not common and granting of such applications is rare.

In 2010, the Supreme Court held that existing legislation does not provide the appropriate procedural mechanism for disclosing the IP of anonymous web surfers and that it is inappropriate for the courts to create such a mechanism.

Absent unusual circumstances, a court will not grant an order for pre-action discovery.

The exception to the rule is an order to a company to provide relevant documents to a shareholder who needs the documents in order

to explore the possibility of filing a derivative action and who is able to present a preliminary set of facts that satisfy the requirements for filing of a derivative action (such a discovery motion may also be filed after the motion for certification of the derivative action has been filed).

5 Starting proceedings

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?

Generally, proceedings commence with the filing of a statement of claim and service of the claim on the defendant. The Civil Procedure Regulations, 1984 (the CPR) require that the statement of claim include the name, ID number and address of the parties; the principal facts that constitute the cause of action and their date of occurrence; the facts that establish the jurisdiction of the court; and the relief requested. The plaintiff must attach to the statement of claim all of the documents mentioned therein that are in the plaintiff's possession or under his or her control.

The plaintiff must pay a court fee. For monetary claims this is 2.5 per cent of the claim amount up to 23,924,999 shekels (subject to adjustment in the future) and one per cent of any claim amount in excess of that amount, half of which is due upon filing and half of which is due no later than 20 days prior to the first evidentiary hearing. A motion to certify a claim as a class action is not subject to the court fee requirement.

In a regular civil claim, no affidavit is attached to the statement of claim; an affidavit must be attached to an opening motion (often filed when plaintiff seeks declaratory relief) and to an expedited procedure statement of claim (used when the claim amount is less than 75,000 shekels (subject to increase in the future)).

Israeli courts are overloaded and lack the capacity to handle their caseload. As described below, certain magistrates' courts participate in a pilot programme in which parties are referred to a mandatory preliminary meeting with a candidate to serve as mediator.

Judges often encourage parties to refer their disputes to arbitration or mediation.

6 Timetable

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

In a regular civil claim, the defendant has 30 days from service of the statement of claim to file a statement of defence and counterclaim or third-party notice.

The plaintiff may file an optional rebuttal within 15 days of service of the statement of defence.

If the defendant obtains an order for additional particulars, the deadline for filing a statement of defence will be extended accordingly.

Discovery in Israel includes document disclosure and interrogatories.

A party who seeks general document disclosure and a reply to interrogatories must serve its request on the other party no later than 30 days after the last statement of defence or rebuttal (as applicable) has been filed.

If the other party does not reply within 30 days, the requesting party must seek an order to compel within 15 days of the expiration of the deadline, as otherwise the court is authorised to deny the request.

It is common for parties to agree to extensions of the deadlines.

Specific document disclosure may be sought at any time. Some courts issue boilerplate discovery orders without regard to the CPR deadlines described above.

The file will be scheduled for one or more pretrial hearings after the last statement of defence (or rebuttal, if applicable) is filed. Pretrial judges are authorised to resolve discovery issues even if the deadlines have expired.

After discovery and other pretrial proceedings such as dispositive motions are concluded the file will be scheduled for submission of evidence and trial hearings.

There are no statutory timetables for concluding a case. Depending on the caseload in the court in question and the complexity of the claim, a regular civil claim will usually take two to five years for a judgment; opening motion claims and expedited procedure claims are usually adjudicated more quickly.

7 Case management

Can the parties control the procedure and the timetable?

In general, matters of procedure and deadlines are set out in the CPR or are determined by the court as the case develops. The parties may agree on these matters themselves, subject to approval of the court (unless the agreed changes shorten deadlines). In April 2014, the Chief Justice of the Supreme Court issued a new rule severely limiting hearing postponements.

8 Evidence – documents

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

As noted above:

- copies of all documents mentioned in the statement of claim must be attached to the statement of claim; and
- the parties are entitled to demand disclosure from one another of all documents relevant to the claim and they may apply for an order to compel discovery subject to the deadlines described under question 6.

A party may at any time seek disclosure of specific documents.

The court is not required to issue an order to compel discovery unless it believes that the order is necessary to ensure a fair trial or to save costs. A party who fails to comply with an order to compel discovery risks having its statement of claim or statement of defence stricken off by the court. A party who fails to disclose a document may not file the document as evidence at trial unless the party is able to convince the court that its omission was justified. There are no statutory rules that create a duty to preserve documents as of a certain date or event. If a party fails to produce a document that it would be expected to possess or control, the court will ordinarily presume that such document would have been adverse to that party had it been produced.

9 Evidence – privilege

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

The Evidence Ordinance [New Version], 1971 provides for relative and absolute privileges.

National security and public interest privileges are relative and may be lifted by the court after inspecting the document. Patient-client relations with a physician, psychologist and social worker are privileged unless the patient or client waives the privilege or the court concludes that the interests of justice warrant lifting of the privilege.

Attorney-client and clergy-parishioner relations are subject to an absolute privilege unless, in the case of attorney-client privilege, the client waives the privilege or in rare circumstances the court finds that there are grounds for limited disclosure, subject to confidentiality arrangements.

Attorney-client privilege applies to communications for the purpose of giving or receiving legal advice and applies to in-house lawyers, so long as they are serving in a legal capacity. Case law has not addressed the issue of foreign lawyers.

In LTA 1412/94 *Hadassah Medical Association Ein Kerem v Ofra Gilad* PD 58(2) 516, the Supreme Court clarified that the litigation privilege attaches to documents created after there was a tangible chance that legal proceedings would ensue, so long as the dominant or principal reason (but not necessarily the sole reason) for creating the document was to prepare for potential or existing litigation.

The litigation privilege extends to communications within the client and to communications between counsel or the client and third parties.

Settlement communications, while not privileged, are not admissible as evidence. Journalistic sources and, in certain circumstances, bank records have been deemed privileged.

Under the Privacy Law, 1981, evidence obtained via a breach of privacy is not admissible unless the person whose privacy was violated consents, the court permits its use or the person who breached the privacy right is a party to the proceeding and enjoys a statutory defence or exemption.

The Commercial Torts Law, 1999 authorises the courts to issue orders to protect trade secrets or, if such measures are unlikely to suffice, to order that such secrets will not be disclosed as evidence.

10 Evidence – pretrial

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

The pretrial judge is authorised to order a party to answer the court's questions at a pretrial hearing, but this power is rarely invoked.

Evidence is usually given via sworn affidavits that serve as the submitting party's evidence in chief and are filed prior to trial hearings.

Expert testimony in non-medical matters on behalf of a party is given via a written opinion that is usually filed along with the party's evidentiary affidavits. A court-appointed expert is usually required to file his or her opinion within 30 days of the appointment.

11 Evidence – trial

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

The witnesses or experts are cross-examined on their affidavits or opinions at trial (although in extraordinary circumstances the court may subpoena a non-party witness to testify during the pretrial phase of the case).

The court may permit a witness to deliver oral testimony on direct examination regarding specific matters, although this does not occur often.

Documents must be admitted into evidence via a sworn witness. If a witness called by the party who wishes to introduce the document has personal knowledge of the document, the document will usually have been referred to in, and attached to, that witness's evidence affidavit. When this is not feasible, the party who wishes to admit the document into evidence will seek to do so during its cross-examination of a witness who possesses knowledge of the document.

A party may apply to the court to subpoena a witness to testify orally. The applicant must explain why it did not seek an affidavit from the potential witness or if it did request an affidavit, why the potential witness refused to provide an affidavit. The subpoenaed witness may seek cancellation of the subpoena and may appeal the trial court's refusal to cancel the subpoena.

Failure of a witness to appear at trial will result in disqualification of the witness's affidavit. If the witness died before taking the stand, the affidavit will only be admitted into evidence if its contents are adverse to the interests of the witness; if the witness began cross-examination and died before completing the cross-examination, the court may at its discretion allow the affidavit to remain in evidence.

12 Interim remedies

What interim remedies are available?

The court may grant interim remedies including temporary injunctions, temporary attachments and seizures of assets in Israel, foreign travel bans, search orders, discovery orders and orders to provide security for costs. Israeli courts do, on occasion, issue worldwide freezing injunctions that apply to parties over whom the court has acquired personal jurisdiction. Israeli courts may, on rare occasions, provide interim relief in support of foreign proceedings even though the CPR require an underlying claim in Israel as a condition for interim relief.

13 Remedies

What substantive remedies are available?

Israeli courts award compensatory damages; the award of punitive damages is extremely rare in civil litigation. They may award exemplary damages under specific laws and some laws, such as privacy, libel and IP protection laws, provide for minimum statutory damages without proof of actual damages.

They may also provide declaratory relief; mandatory or prohibitive injunctions; specific performance; and relief in shareholder disputes and land partnership disputes including compulsory disposition of shares or land.

Interest is payable on monetary judgments.

14 Enforcement

What means of enforcement are available?

In Israel, enforcement is via the execution bureau, which can attach, seize and sell the judgment debtor's property, including the debtor's assets held by third parties.

Wages above a certain amount may be seized. Insolvency proceedings may also be used.

15 Public access

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

Court proceedings are open to the public, except when a 'closed doors' order is given such as in cases involving minors, national security, protection of trade secrets, etc.

Copies of orders and judgments are available to the public, including online. A non-party that wishes to examine pleadings and evidence on file with the court must apply for permission to do so and state the reasons for its request.

16 Costs

Does the court have power to order costs?

The court is authorised to award costs and legal fees to the prevailing party, taking into consideration inter alia the amount of the claim, the amount awarded and the manner in which each of the parties litigated the case.

The court may exercise discretion by reducing the amount awarded for items such as translations, travel and lodging for counsel and witnesses and so on.

The prevailing party must show that these expenses and the legal fees it seeks were necessary, reasonable and proportionate. Israeli courts usually make fee awards that cover only a fraction of actual legal fees paid.

Plaintiffs may be required to provide security for defendants' costs at trial and on appeal this is mandatory.

17 Funding arrangements

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 Israel Bar Association Rules (Professional Ethics), 1986 permit contingency fee arrangements and in business matters they permit payment in the form of shares or options held by the client. The Israel Bar Association Law, 1961 permits contingency fee arrangements in civil matters but authorises the Israel Bar Association (the IBA) to lower the fee when the fee charged was excessive.

The national council of the IBA is authorised to set maximum fees for types of service and has done so, for example with regard to automobile accidents and title registration.

There is no prohibition against third-party funding of litigation, though the attorney-client relationship and the related ethical obligations only apply to the client.

18 Insurance

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

Under the Insurance Policy Law, 1981, before the event liability policies (such as professional liability insurance and directors and officers coverage) cover reasonable litigation costs of the adverse party imposed by the court on the insured party, as well as the insured party's own litigation costs even if these are in excess of the insured amount. There do not appear to be any after the event policies on the Israeli market, perhaps because legal fees awarded against the losing party usually only represent a fraction of the prevailing party's legal fees.

19 Class action

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

The Class Actions Law, 2006 (the CAL) allows plaintiffs to seek class certification, inter alia, regarding: consumer protection; insurance; banking; antitrust; securities; environmental protection; equal access to products, services and businesses; employment and wage discrimination and rights of the handicapped; and municipal taxes, fees and fines.

A putative class representative must file a statement of claim and a motion for class certification, supported by a sworn affidavit. The respondent may file a third-party notice with the permission of the court during the certification phase. The court will certify the class after hearing the parties if it is convinced that:

- the claim raises substantive questions of fact or law common to all members of the class and there is a reasonable chance that they will be adjudicated in favour of the class;
- the class action is the most efficient and fairest way to resolve the dispute;
- it can reasonably be assumed that the applicant will properly represent the class (there is no right of appeal for the defendant or respondent on this condition); and
- it can reasonably be assumed that the applicant will represent the class in good faith.

If class certification is given, the court will determine the class and subclasses, the identity of the class representative and his or her counsel, the causes of action and questions of fact or law common to the class, and the potential remedies. The court may amend the statement of claim in its certification order. The CAL and its regulations govern inter alia the incentive compensation for the class representative and legal fees for class counsel, class member notification requirements and opt-out procedures, and approval of settlement agreements. For certain types of cases the court may adopt an opt-in regime.

Legislation is pending that would institute filing fees (which exist for regular civil claims) in class actions. The filing fee would range from 12,000 to 24,000 shekels and be payable in two instalments; as is the case with regular civil litigation, a successful class action plaintiff would recover the filing fee. Class actions against governmental bodies and class actions filed by public interest groups would be exempt from the filing fee and courts would be authorised to exempt indigent plaintiffs from the fee.

The courts have recognised the right of class action defendants to file third-party notices during the certification phase after obtaining permission from the court to do so.

The courts have held that discovery orders will not be given during the certification phase with regard to third parties that are unrelated to parties in the case.

20 Appeal

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

An unsuccessful party may appeal a magistrates' court judgment to the district court without seeking permission.

A magistrates' court procedural ruling, except for those types of rulings excluded by order of the Minister of Justice and certain other defined matters, may be appealed to the district court if it concludes that postponing the appeal on the ruling until a potential future appeal on the judgment will materially affect the parties' rights or cause a party tangible damage or result in a superfluous or erroneous proceeding taking place.

An unsuccessful party may appeal a district court judgment (given by the district court sitting as the court of first instance) to the Supreme Court without seeking permission.

A district court procedural ruling, except for those types of rulings excluded by order of the Minister of Justice and certain other defined matters, may be appealed to the Supreme Court if leave to appeal is given per the grounds mentioned above.

A district court appellate judgment on a magistrates' court judgment or ruling may be appealed to the Supreme Court if leave to appeal is given by the Supreme Court or by the district court in its judgment.

A judgment issued by a registrar is subject to automatic right of appeal to the appellate court; a ruling issued by a registrar is subject to automatic right of appeal before a judge of the same court in which the registrar sits. Senior registrars are deemed judges for the purposes of appeal. Magistrates' court and district court appellate judgments on decisions of a registrar may be appealed before the appellate court if leave to appeal is given.

The appellate court will generally not revisit the trial court's findings of fact and will usually only grant an appeal if it finds that the lower court made an error on the law or that a serious procedural error or other irregularity may have resulted in a manifestly unjust outcome.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Laws allow for the enforcement of judgments of Israeli courts, as long as such judgments are not contrary to Israeli public policy and their enforcement is not likely to impair the security or sovereignty of Israel. The enforcement of such judgments is also conditional upon:

- adequate service of process being effected and the defendant having had a reasonable opportunity to be heard and present evidence;
- such judgment having been obtained from a court of competent jurisdiction according to the laws of the state in which the judgment was given and the rules of private international law prevailing in Israel;
- such judgment not being in conflict with another valid judgment in the same matter between the same parties;
- such judgment not having been obtained by fraud;
- an action between the same parties in the same matter not pending in any Israeli court at the time the lawsuit was instituted in the foreign court;
- such judgment being enforceable according to the laws of Israel and according to the law of the state in which the judgment was given; and
- the enforcement application having been filed in Israel no later than five years after the judgment was given.

Direct recognition of a foreign judgment is only possible if it is subject to a treaty in which Israel undertook to recognise foreign judgments and if the foreign judgment meets the conditions for enforcement and the terms of the treaty.

Israel has treaties with each of Austria, Germany, Spain and the United Kingdom. Indirect recognition of a foreign judgment is possible even if the aforesaid conditions are not met.

22 Foreign proceedings

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

Israel is a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970) (the Hague Evidence Convention) and has enacted Regulations for Implementing the Hague Convention 1970 (Taking of Evidence), 1977 (the Hague Implementation Regulations).

The Legal Assistance Between Countries Law, 1998 (the Legal Assistance Law) and the Legal Assistance Between Countries Regulations, 1999 (the Legal Assistance Regulations) also set forth procedures for the collection of written and oral evidence in Israel for use in another jurisdiction.

A discovery request must be in the form of a letter of request and should be transmitted directly from the requesting court or person to the Israel Central Authority (the Ministry of Justice, which has designated the Directorate of Courts), which will then usually forward the request to a magistrates' court.

Israel is also a party to the Hague Convention on Civil Procedure (1954) and the Convention between the United Kingdom and Israel regarding Legal Proceedings in Civil and Commercial Matters (1966).

The Central Authority may refuse to transfer a letter of request to the court if the request does not, in its opinion, comply with the guidelines of the Hague Evidence Convention or if carrying out the request is not within the jurisdiction of any Israeli governing body or is likely to harm Israel's sovereignty or security.

Update and trends

The courts have adopted the business judgement rule in cases against directors and officers.

The Central Authority may refuse to execute a request for production pursuant to the Legal Assistance Law if inter alia the request could harm Israel's sovereignty, security or public order; relates to a political, military or fiscal offence; is made in connection with a proceeding aimed at political, religious, racial or national affiliation; or the requesting state does not honour similar requests from Israel.

The production of evidence is subject to the same rules that would apply to local proceedings, including privileges under Israeli law, and may, depending on the nature of the information requested, be subject to requirements of the Privacy Protection Law (1981) or the Privacy Protection Regulations (Transfer of Data to Databases Abroad) (2001).

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

The Arbitration Law, 1968 (the Arbitration Law) is not based on the UNCITRAL Model Law.

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

Under the Arbitration Law, there must be an agreement in writing to submit present or future disputes to arbitration. The agreement may take the form of written correspondence.

The arbitration agreement is generally separable from the contract of which it is part and will remain in effect after the expiration or termination of the contract or where a party alleges that the contract is voidable.

Israel is a party to the New York Convention of 1958 (as well as to the Geneva Convention of 1927 and the Washington Convention of 1966) and its courts will generally stay litigation proceedings in favour of international arbitration or in favour of domestic arbitration.

25 Choice of 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 arbitration agreement or applicable rules are silent on the matter, the tribunal shall consist of a sole arbitrator. In arbitration before an even number of arbitrators, the arbitrators will appoint an additional arbitrator upon demand of one of the arbitrators and he or she will serve as chair of the tribunal.

If the parties are unable to agree on the identity of the arbitrator, a party may demand in writing that the other party agree to the appointment of an arbitrator, or, if the arbitration agreement states that each party will appoint an arbitrator, the requesting party will state the name of the arbitrator it appointed and demand that the other party appoint its arbitrator.

If the other party fails to respond within seven days, the requesting party may petition the district court to appoint the requesting party's arbitrator or another person as sole arbitrator.

The district court may remove an arbitrator if the arbitrator is not worthy of the parties' trust, the arbitrator's conduct has caused a miscarriage of justice or the arbitrator is unable to perform his or her duties.

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

Ad hoc arbitration is common in Israel alongside institutional arbitration administered by various arbitration organisations including organisations established by the Israel Bar Association and the Israeli Chamber of Commerce.

Many retired judges and leading commercial litigators serve as arbitrators.

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

If the arbitration agreement does not specify rules of procedure and evidence or adopt a set of arbitration rules, the provisions of the Supplement to the Arbitration Law (the Supplement) will apply by default, including authorisation of the tribunal to make discovery orders and other procedural orders that a court is competent to make; the provisions also allow the release of the tribunal from substantive law and the rules of evidence and procedure applicable to courts.

28 Court intervention**On what grounds can the court intervene during an arbitration?**

The district court's role is supportive during the arbitration.

The tribunal may apply to the court for guidance on questions such as the breadth of its jurisdiction, but the parties are free to derogate from this right.

The district court is authorised to assist the arbitration by issuing subpoenas of witnesses, contempt orders against witnesses who fail to comply with subpoenas issued by the arbitrator or by the court, orders for the taking of evidence immediately or outside the jurisdiction and for service of process to parties, and interim relief orders.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

In accordance with the Supplement, unless the parties stipulate otherwise, the arbitrator is authorised to issue any order, including for interim relief, that a court is authorised to issue, as well as to issue a provisional or partial interim award.

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

Under the Arbitration Law, the arbitral award must be in writing and must be signed and dated by the arbitrator or, in the case of a multi-arbitrator tribunal, by a majority of the arbitrators. Per the Supplement, unless the parties stipulate otherwise, the tribunal's reasoned award must be rendered within three months of the commencement of the arbitration, though this deadline may be extended and often is.

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

A 2008 amendment to the Arbitration Law allows the parties to stipulate in their arbitration agreement one of two alternative appeal options:

- appeal before the district court if leave to appeal is given by the court, if the arbitrator was required to rule according to substantive law and made a fundamental error in applying the law resulting in a miscarriage of justice (the agreement must clearly state the obligation to apply the substantive law and require transcription of the arbitration hearings and a reasoned award); or
- appeal before an additional tribunal.

The Arbitration Law provides for nullification of an award inter alia in the following circumstances: in the absence of a valid arbitration agreement; the arbitrator was not lawfully appointed or exceeded his or her authority under the arbitration agreement; a party was denied due process; the arbitrator failed to rule on one of the matters submitted to the arbitration; the arbitrator was required to provide the reasons for his or her award and failed to do so; the arbitrator was required to rule according to the substantive law and failed to do so; the award is contrary to public policy; or grounds exist in which a court would void a final judgment.

When the award is appealable before an additional tribunal, a motion to void the award may only be filed on the basis of the last two

grounds mentioned in the previous sentence, whereas nullification claims may be brought as part of the appeal before the district court.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The district court is authorised to confirm an arbitral award, thereby rendering it enforceable as if it were a court judgment. The losing party may object to confirmation by seeking to nullify per the grounds listed for question 31. The district court's ruling to confirm or nullify the award may be appealed to the Supreme Court if leave to appeal is granted. An award made in a contracting state to the New York Convention will be enforced or recognised by the district court subject to the limited exceptions set out in the convention and regulations promulgated in Israel pursuant to the convention. Awards made in other countries (such as signatories to the Geneva Convention) will be enforced and recognised in accordance with the Arbitration Law.

33 Costs

Can a successful party recover its costs?

Per the Supplement and unless the arbitration agreement stipulates otherwise, the arbitrator is authorised to issue an order for costs, arbitration fees and legal fees and to compel security for their payment.

Alternative dispute resolution

34 Types of ADR

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

Mediation is popular in Israel and is recognised under the Courts Law [Consolidated Version], 1984 (the Courts Law). Information and documents provided during mediation will not be admissible as evidence in a judicial proceeding and the mediator cannot be subpoenaed to testify. The mediator is permitted to meet with the parties *ex parte*.

Mediated settlements may be filed with the court and given the force of a judgment.

Expert determination is chosen occasionally by parties in Israel, usually in cases where a technical determination, such as on accounting

issues, is necessary. The expert does not act as a judge or arbitrator. The parties may agree that the expert's determination will be contractually binding without any right of appeal. Early neutral evaluation is sometimes selected by parties in Israel. The Courts Law authorises a judge, after receiving consent of the parties, to issue a 'judgment by way of settlement' in which he or she rules based on the contents of the court file as is and does not write a reasoned judgment. The parties may agree on a monetary range that binds the judge. It is very difficult to appeal such a judgment.

35 Requirement for ADR

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 a pilot programme, certain magistrates' courts refer the parties to a mandatory meeting with a potential mediator. This programme may be expanded to all magistrates' and district courts in the future.

Under this pilot programme, the court will not hold a pretrial hearing until after the mandatory meeting with the potential mediator has been held. The purpose of the meeting is for the potential mediator to explain to the parties how mediation works and for the parties to discuss with the mediator whether they are willing to mediate. The parties may, if they wish, send the potential mediator documents such as court pleadings prior to the meeting. There is no charge for the meeting and it generally will not last more than an hour or two. The contents of the meeting are not admissible as evidence and the potential mediator is not allowed to provide any observations to the court if the meeting does not succeed.

Miscellaneous

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

No.

* *The authors would like to thank Nurit Heinrich-Asher for her assistance in drafting previous versions of this chapter when she was a senior associate at the firm.*



Goldfarb Seligman
Law Offices | Established 1930

Jeremy Benjamin
Ido Pirkes

jeremy.benjamin@goldfarb.com
ido.pirkes@goldfarb.com

98 Yigal Alon Street
Tel Aviv 6789141
Israel

Tel: +972 3 608 9999
Fax: +972 3 608 9909
www.goldfarb.com

Italy

Stefania De Michele
Carnelutti Law Firm

Litigation

1 Court system

What is the structure of the civil court system?

Italy's civil court system is divided into three levels: the tribunals, the courts of appeal and the Supreme Court of Cassation.

There are 140 tribunals, 26 courts of appeal (one per region with some regions having more) and one supreme court.

Tribunals

Each tribunal hears cases in its geographical catchment area, usually where the defendant resides. Cases include monetary claims valued at more than €5,000 (claims of less than €5,000 are heard by justices of the peace) and claims with an undetermined value.

Tribunals have exclusive jurisdiction for claims of enforcement, false or fraudulent lawsuits, status and capacity of people, honorary rights and some tax matters.

The tribunal's jurisdiction is governed by article 9 of the Italian Code of Civil Procedure (CPC) and it has divisions specialising in family law, bankruptcy, labour and enforcement proceedings.

In 2012, more than 20 specialised 'companies court' tribunals were set up to handle claims related to commercial and corporate disputes.

They have jurisdiction over matters including intellectual property, copyright, and disputes and compensation related to EU anti-trust rules.

Companies courts also have general jurisdiction over disputes involving limited companies, cooperative companies, European companies and branches of foreign companies with a permanent establishment in Italy.

The companies courts are composed of judges with the appropriate expertise to ensure timely proceedings.

Courts of appeal

The civil division of the courts of appeal hears appeals from the 140 tribunals. Each court of appeal is divided into different divisions, each of which has at least five judges and handles claims on specific disputes (family matters, labour matters, corporate and commercial matters, etc). Cases are assigned to a panel composed of three judges who decide on grounds of merit and law. In some specific cases, the court of appeal hears the case as a judge of first instance (appeals against awards, exequatur of foreign judgments and other specific cases).

The Supreme Court of Cassation

Italy's Supreme Court is the highest court in the civil system. It hears appeals from the appeal courts and, in limited cases, may hear appeals directly from the tribunals.

Unlike the lower courts, the Supreme Court does not rule on the merits of the case. It is, for that reason, known as the 'judge of the legitimacy' (ie, it decides on points of law rather than the merits). Cases are assigned to a panel composed of five judges and the Public Prosecutor is also involved when provided by the law.

In order to reduce the number of appeals to the Supreme Court, the sixth division of the Supreme Court has been appointed specifically to filter appeals and reject those that do not comply with the rigid rules. Hearings are generally held in private, without oral discussions, but in limited cases the Supreme Court may decide to hold a public hearing.

2 Judges and juries

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

The role of the judge is generally passive rather than inquisitive. Judges can order litigants to file specific documents or they can appoint an expert if cases require technical, medical or scientific input.

Juries are not involved in civil actions.

The tribunal's civil cases are generally heard by a single judge, but in specific cases they must be heard by three judges: the president, the reporting judge and the assistant judge. These cases are ruled by article 50-bis of the CPC and may apply when the public prosecutor is involved, in most companies court proceedings, in some bankruptcy claims and in a few other cases.

The judges are selected by a public, competitive examination.

3 Limitation issues

What are the time limits for bringing civil claims?

The limitation periods are laid down by the Italian Civil Code (article 2934 et seq). Generally, the limitation period is 10 years from the day on which the right of claim can be enforced. In tort law, the claimant has five years from the day the event occurred to claim its rights.

There are limitation periods of five years or less for company matters, broker rights and other specific matters.

Parties cannot agree to suspend the time limits. The Civil Code rules the only specific case of suspension admitted by law (article 2941, 2942 et seq of the Civil Code).

Nevertheless, the time limits can be interrupted as ruled by article 2943 of the Civil Code.

Article 2943 of the Civil Code states:

Prescription is interrupted (1073(6), 1310(1)) by service of the paper by which judicial proceedings are commenced, whether on the merits or for conservation or enforcement.

It is also interrupted by actions instituted in the course of judicial proceedings (2945(2)).

Interruption is effective even if the court to whom the action is submitted lacks jurisdiction.

Prescription is interrupted by any other act capable of placing the debtor in default (1219, 1957(4)) and by a duly served document whereby a party, in the presence of an agreement to arbitrate or an arbitration clause, declares to the other party his intention to institute arbitration proceedings, lays down his claim and proceeds, in his own behalf, with the appointment of the arbitrators.

The prescription is interrupted also by the acknowledgment of the right by the person against whom such right can be enforced (article 2944 of the Civil Code).

As result of interruption a new time limits period begins. Furthermore, according to article 2945 of the Civil Code:

If interruption has occurred by reason of one of the acts indicated in the first two paragraphs of Article 2943, prescription does not begin to run until the judgement in the action becomes final.

If the proceedings are ended by discontinuance, the interruption is unaffected, and the new time limit of prescription begins to run from the date of the act which caused the interruption. In the case of arbitration, prescription does not run from the time when the document containing the request of arbitration is served up to the time when the award settling the dispute is no longer subject to appeal or the decision rendered on the appeal becomes res iudicata.

Prescription is also interrupted by service of the paper by which the assisted negotiation and the mediation are commenced.

Unavailable rights are not subject to prescription (article 2934, second paragraph, cc).

4 Pre-action behaviour

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

There are no pre-action exchanges of documents or pre-action orders. Nonetheless, in some specific cases, it is mandatory to introduce an assisted negotiation or a mediation before issuing proceedings, otherwise the action before the court cannot commence. In other words, lawyers must advise the parties that it may be possible to solve the matter through an alternative dispute resolution (ADR) mechanism.

5 Starting proceedings

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 are generally commenced through the notification of a writ of summons or the statement of claim. Notification can be through the bailiff or by certified email to subjects with a specific, certified mailbox. (It is mandatory for companies and lawyers to have a certified mailbox.)

Within 10 days of the notification, the claimant must register the proceedings with the court, obtain a number identifying the proceedings, and serve all documents attached to the writ of summons.

Labour and family law

Labour law, family law proceedings and interim remedies are normally commenced by the filing of the writ of summons and attached documents to the court. A judge will then set a hearing date by decree. The claimant must notify the defendant (within the time frame assigned by the judge) with the issued writ of summons and the judge's decree.

Efficiency

In recent years, the courts have improved their handling of caseloads.

In particular, Turin has been so successful that the Ministry of Justice is hoping to apply the model to all courts. The former president of the Court of Turin is working with the Ministry on a system to ease capacity issues and allow judges to pronounce sentences in a timely manner.

Mandatory assisted negotiation and mediation have also been introduced to try to reduce the number of proceedings brought before the courts.

6 Timetable

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

Claimants

Civil proceedings are begun by notifying the counterparty of the judicial citation act. After notification, the claimant must register within 10 days by filing with the Registrar of the court of first instance. The file must contain the document served with a litigation proxy and other required documents.

The judicial citation act must include, inter alia, the summons to the party to appear at a set hearing and the warning to the defendant to join the case at least 20 days before the hearing to avoid failing to comply with the provisions of law. It must propose procedural and

substantive objections that are not ascertainable by the judge, and it must put forward counterclaims and call upon third parties.

From the day of the notification of the citation act and the first appearance at a hearing, no less than 90 free days must pass if the place of the notification is in Italy and 150 free days if one is abroad.

In urgent cases, the claimant may request that the president of the court cut the time frame in half.

Defendants

The defendant, upon receipt of the notification of the citation act, must appear before the court at least 20 days before the initial hearing on the date set by the summons. The defendant must register a file at the Chancery, containing the act of appearance in court and response, with the copy of the notified summons. The defendant must propose the procedural objections and merits, claims and counterclaims, and supply documents relating to the case, or the intention to sue a third party.

If the defendant has to pursue only mere defences (ie, does not have to propose procedural and substantive objections that are not ascertainable by the judge, put forward a counterclaim or sue a third party), he or she may appear directly at the hearing.

At the first hearing, the judge will verify the regularity of the right to response and, if requested, may give the parties an additional 30 days to file pleadings for the clarification and/or amendments of the applications, a further 30 days to respond to questions or produce documents, and another 20 days for additional evidence.

The judgment

The judge will then decide whether to conduct a preliminary investigation or fix a hearing date for the final clarification of the questions. At the outcome of this hearing, the case is held in the decision, and parties will be assigned deadlines (60 + 20 days) for filing the final acts.

The term to file the decision is 30 days if the Tribunal's decision must be filed by only one judge, 60 if the panel is of three. For labour proceedings the term is 15 days. In any case these terms are not peremptory.

Ideally, the first instance judgment should be available within two years.

7 Case management

Can the parties control the procedure and the timetable?

The parties have to comply with the procedure and timetable provided by the CPC, but they cannot control the timetable. Regarding case management, the decision is left to the court unless compulsory terms are provided by the CPC.

8 Evidence – documents

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

Pending trial, documents served with the defence are held by the court and remain with the court until the judgment. If the complete file is not available in the court when the final decision is made, the claim is declared inadmissible.

The lawyers, the courts and the arbitrators must preserve all legal documents for three years after the decision has been issued or the matter has ended, pursuant to article 2961 of the Civil Code.

9 Evidence – privilege

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

Declarations or certification released by a public official are considered privileged evidence if they are not declared false after a special proceeding.

Opinions issued by in-house lawyers or third parties can be shown in court but not admitted as evidence.

Legal exchange of correspondence regarding a settlement agreement and correspondence between legal entities expressly referred to as confidential cannot be shown in court. This is sanctioned by article 28, first paragraph of the Forensic Code of Law 2014 (the Code of Conduct for Italian Lawyers), which has been in force since 16 December 2014.

10 Evidence – pretrial**Do parties exchange written evidence from witnesses and experts prior to trial?**

Prior to trial, the parties do not exchange any documents.

In exceptional cases of urgency (for example, if there is a well-founded fear that a witness may be about to die) parties may request that evidence be taken before the trial begins, or request to verify the status of the sites or the quality or condition of things, and may require a prior technical assessment or judicial inspection.

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

Normally, witnesses give oral evidence only. In rare cases, and only if the parties agree, the judge can ask the witness to give written evidence, answering a series of questions posed by the parties and admitted by the judge. The legislature has expressed a wish to introduce compulsory written evidence to try to speed up the proceedings, but to date has not succeeded.

Experts appointed by the parties or by the judge give written evidence and, if necessary, the judge can ask the appointed expert for oral clarification on issues.

12 Interim remedies**What interim remedies are available?**

Specific interim remedies available include the conservative or preventive seizure of assets and the judicial seizure, as stated in articles 670 and 671 of the CPC.

The conservative remedy is similar to a freezing injunction used to freeze the assets of the defendant, if specific conditions are recurring. The judicial seizure can be used to freeze assets where possession or ownership is controversial on trial. It is used when both claimant and defendant assume to have rights (possession or ownership) over the assets disputed.

Furthermore, interim remedies (such as a prohibitory injunction) are available in cases where, pursuant to article 700 CPC, the case is *prima facie* strong and there are reasonable grounds to believe there is a real risk of impending and irreparable damage in a manner that the rights disputed could be prejudiced by the time necessary for the proceedings to be completed.

All of the interim remedies can be requested before proceedings begin or while they are under way.

Remedies are available in foreign proceedings if the remedies need to be enforced in Italy.

Search orders cannot be granted by the civil courts, as the remedy is available only in criminal proceedings.

However, if there is an urgent need to admit evidence before the judgment, it is possible to resort to the preventive measures specified in question 10.

13 Remedies**What substantive remedies are available?**

Punitive remedies are not available, but the Supreme Court, in examining a case on the recognition of foreign judgments involving punitive damages, has considered the issue of particular importance. The Supreme Court has asked the Sezioni Unite (the enlarged board of the Supreme Court of Cassation) to determine whether foreign judgments involving punitive damages are in conflict with the principle of public policy (Cass., 16 May 2016, No. 9978).

The pronouncement of the Sezioni Unite will be of particular interest because the institution of punitive damages is not provided for in Italian law.

In the ruling that brought the decision to the Sezioni Unite, the judges questioned the need to assess Italian values in the light of those of the international community.

Interest is always due when the original debt is a sum of money (currency debt); if the pecuniary obligation represents the equivalent of a different bond, in addition to the interest, it is also due an extra monetary amount established through a special liquidation operation, to reinstate the real value of the loss.

14 Enforcement**What means of enforcement are available?**

The main enforcement means are:

- forced seizure of moveable property, which can be executed through a court officer by directly assigning the debtor's assets which will subsequently be disposed of, or through the attachment to a third party (ie, by notifying the bank at which the debtor has an active account or securities deposited, or with the employer of the creditor or any other person who is liable to the debtor);
- forced seizure of real estate, which occurs through the registration of seizure on real estate being executed and the subsequent sale of the assets carried out by a person delegated by the judge;
- insolvency procedures; and
- a court order to carry out obligations or the destruction of that which was done in violation of an obligation not to do something (article 614 CPC).

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

All hearings to discuss the case are held in public under penalty of invalidity, but in particular circumstances the judge may arrange for an in-camera hearing.

After the recent reform introduced for the proceedings before the Supreme Court the rule now is that all the hearings are held in camera, except when a relevant case of law must be decided and other few cases.

All the hearings held in camera can only be attended by the lawyers and the parties involved.

Trial documents are not accessible to the public. The judgments and decisions defining the judgment are made public by filing with the tribunal's chancellery.

16 Costs**Does the court have power to order costs?**

The law provides that the judge shall penalise the party who has been unsuccessful in recovering litigation costs under article 91 of the CPC.

In the event of a mutual loss, or in the event of a new aspect of the matter or a change of case law in relation to matters of concern, the costs may be partially or wholly offset (article 92 of the CPC).

When questions are set out, the party must always request that the other party pay the compensation and bear the costs of litigation.

At the outcome of the trial, the parties are required to file their expenses by quantifying the fees and indicating the costs incurred, but the judge is not bound by the quantification.

To clear the expenditure, the judge applies the forensic parameters established by a special ministerial decree, which varies according to the type of dispute and the value.

17 Funding arrangements**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 only admissible agreements regarding the payment of fees between a lawyer and his client are those provided for in article 25 of the Forensic Code of Law 2014 (the Code of Conduct for Italian Lawyers).

The legal fees agreement is free and may be based on:

- time rates;
- flat rates;
- agreements on one or more businesses;
- fulfilment and time of the activity execution;
- single stages or performances or the entire activity;
- percent basis on the value of the business; and
- how much the receiver of the performance can benefit and not only on a strict asset basis.

Litigation financing practices by a third party are not forbidden, even though there are some limitations in law such as the prohibition of a contingency fee between a lawyer and his client.

Litigation financing practices in Italy were not widespread in 2017.

18 Insurance

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

Yes, insurance coverage is available to cover the legal costs of the insured party and the opponent's costs as decided by the judge.

It is also possible to stipulate an agreement on management of the litigation. In such a case, the insurer assumes the right and the obligation to conduct the dispute or settle it.

19 Class action

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

Class action was introduced with Italy's Consumer Code (Law No. 99/2009), which has been in force since 1 January 2010.

Class action can be introduced to protect the following rights:

- contractual rights of consumers and users who pay for the same undertaking in a homogeneous situation, including contracts signed by standard forms or templates;
- homogeneous rights concerning those of end users of a product, irrespective of the signing of a contract; and
- rights resulting from incorrect commercial practices or anticompetitive behaviour.

This action is intended to ascertain the responsibility of the firm, producer or supplier and, consequently, to obtain the compensation of damages or refunds.

The action can be introduced by single or multiple rights holders represented by a consumer association or a committee. Those interested in joining an existing class action can file a formal act of adherence, according to the opt-in system, without having to give a mandate to their own lawyer.

Once the action is proposed, the judge will evaluate the admissibility.

20 Appeal

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

Grounds and circumstances of appeals

Judgments issued by the tribunals may be appealed in front of the competent territorial jurisdiction of the courts of appeal.

However, for the appeal to be admissible it must have specific form requirements.

Judgment of the first instance courts can be appealed by means of the notification of the citation act, in which the grounds of the appeal must (in the name of inadmissibility) be specific, as provided for by article 342 and 434 of the CPC.

In particular, the appeal must contain, under the threat of inadmissibility:

- the indication of the parties who intend to appeal and the amendments required for the reconstruction of the fact(s) made by the court of first instance; and
- the indication of the circumstances in which the breach of the law and its relevance are attributable to the contested decision.

Further appeals

Italy's new rules of appeal did not have unanimous application by the merit judges and those of legitimacy, however. With Order No. 8845, published on 5 April 2017, the third chamber of the Court of Cassation requested that the matter be referred to the Sezioni Unite to clarify whether the notion of specificity of the grounds of appeal (punishable by inadmissibility) imposes on the appellant a burden of specifying a different content of the first-instance ruling, if not an alternative judgment or reasoning, or simply a full challenge of well-identified passages of the judgment under appeal and the arguments in fact and law that support it.

The Sezioni Unite decision will clarify how the act of appeal must be drawn up.

New legislation has also introduced another filter to the appeal provided by article 348 of the CPC. The provision requires that, except where the appeal is declared inadmissible or improper by a judgment, it may be declared inadmissible by an order when it is 'not reasonably likely to be accepted'.

Appeals may be appealed, within certain limits, to the Supreme Court of Cassation for reasons of legitimacy, not merit.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

In civil and commercial matters, foreign judgments are recognised in Italy without the need for any proceedings, provided that certain requirements are met by the law (article 64 of Law 218/1995 on the Reform of the Italian System of Private International Law).

However, in the case of non-compliance with the measure or challenge of the recognition of a foreign measure or of a voluntary act of jurisdiction, or when it is necessary to enforce execution, the party who has interest may apply for recognition of the requirements to the judicial authority for a 'judgment of enforcement'.

Some of these requirements and formalities may not be necessary in the presence of international agreements with foreign states or European Union countries.

22 Foreign proceedings

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

It is possible to admit evidence of a measure issued by a foreign judge that is executed by a decree, issued by the territorial jurisdiction of the appeal court.

It is also possible to admit evidence that is not foreseen by Italian law, provided that it does not conflict with the principles of the law.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The arbitration discipline is not based on the UNCITRAL Model Law, but some institutions, such as the Milan Chamber of Arbitration, may provide arbitration services based on the UNCITRAL model at the parties' request.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing and set out the matter of the dispute. For the arbitration clause and the non-contractual arbitration agreement the written form is not required for the validity of the act, but only for the purposes of evidence.

25 Choice of 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 arbitration agreement contains no information about the number or choice of arbitrators, the party summoning may, by means of an appeal, request that the president of the competent court appoint three arbitrators.

An objection may also be made by appeal to the president of the tribunal (article 815 of the CPC).

Update and trends

The Italian government is striving to speed up civil proceedings. To reach this goal, Italy is trying to increase the number of cases settled through ADR and partially reform the civil court system.

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

Parties may choose arbitrators but the number must always be odd. So, if the parties have indicated two arbitrators, a third arbitrator must be appointed by means of appeal to the president of the tribunal, or the parties may agree on the manner of indicating the third arbitrator.

There is, however, a special, mandatory discipline for appointing corporate arbitrators. In most cases the arbitration clause in the companies' articles of association must provide that the appointment of the arbitrators be carried out by a third party, external to the company. If this provision is not fulfilled the arbitration clause is null and void.

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

The law provides that the parties may establish procedures in the arbitration agreement, or by a separate act, before the start of arbitration. The procedures must include the rules and language that arbitrators must follow. In the absence of such an indication, the arbitrators may regulate the conduct of the judgment in the manner they consider most appropriate, without violating the rigorous respect of the principle of the right to be heard between the parties, namely 'giving reasonable and equivalent defence possibilities to the parties' (article 816 of the CPC).

The arbitrators must comply with basic requirements laid down in individual rules of the arbitration proceedings, such as the rule governing the requirements of the award or the prohibition on issuing precautionary measures outside the cases provided for by law.

28 Court intervention**On what grounds can the court intervene during an arbitration?**

An ordinary judge does not have the power to intervene in proceedings. If any issues arise that cannot be dealt with or decided in the arbitration proceedings, a judge will address the matter.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

Arbitrators cannot issue seizures or other precautionary measures. Equally, the prevailing opinion is that arbitrators are excluded from issuing preventive measures.

The only exception to this rule is allowed in corporate arbitration, where arbitrators have the power to suspend the shareholders' resolutions. There is only one exception – if the claim is for a resolution regarding a false balance-sheet, only the tribunal can suspend it, according to the Supreme Court to date.

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

If the parties to the arbitration agreement, or prior agreement to the acceptance of the arbitrators, have not set a deadline for the award, the arbitrators must render the award within 240 days of the acceptance of the appointment. That period may be extended by the parties, by written declaration or by the president of the court, at the request of the parties or the arbitrators. Unless otherwise agreed by the parties, the term is extended by 180 days and for no more than once in certain specific cases, for example, if evidence must be admitted.

The award is passed by a majority of the votes with the participation of all the arbitrators and is drawn up in writing. The content of the award is governed by article 823 of the CPC.

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

The award may be challenged before the courts of appeal on formal aspects of the award and of the proceedings, but the objection on the grounds of law can only be admitted if the parties expressly provided for it in the arbitration agreement. Knowledge of this rule is fundamental and should be borne in mind when the arbitration agreement is concluded. If the agreement does not include the possibility of challenging the award on grounds of law (where, for example, the breach of a substantive rule occurred) the award would not be open to challenge on those grounds.

The court of appeal judgment can be upheld before Italy's Supreme Court of Cassation. It may also be overturned by the Supreme Court on grounds of law.

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

In order to execute the award in the territory of the republic, it must be declared enforceable by a decree issued by the tribunal in which the seat of the arbitration is based.

Before issuing the decree, the tribunal merely confines itself to establishing the formality of the award.

In order to effectively declare a foreign lawsuit in Italy, however, it is necessary to obtain a decree of the appeal court in which the other party resides. The president of the appeal court has established the formality of the award or declares by decree its effectiveness in the territory of the republic, with an exception in cases where the subject matter of the award cannot be the subject of arbitration according to Italian law, or if the award contains provisions contrary to public law.

33 Costs**Can a successful party recover its costs?**

The parties may decide that they do not require the arbitrators to rule on the allocation of costs among the parties and that they will either divide the expenses and remuneration of the arbitrators or that one party will bear the costs.

Alternatively, litigants may request that the arbitrators decide on how the costs must be allocated among the parties, which will be decisive and may only be challenged on appeal.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

In order to reduce litigation, two different procedures for out-of-court settlements of disputes have been introduced: mediation and assisted negotiation, the application of which in some cases is mandatory before bringing the matter before the judge.

In any case, before commencing a proceeding, lawyers must advise parties of the possibility of solving the matter by ADR.

35 Requirements for ADR**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, carried out by an impartial third party, is designed to reach an amicable settlement.

It may be optional or set out by the judge, in which case it becomes mandatory before the commencement of proceedings.

Assisted negotiation, on the other hand, is an agreement by which parties agree to resolve the dispute amicably with the assistance of the lawyers.

Assisted negotiation may be compulsory (and, in this case, it becomes a condition for action) or optional.

It is compulsory for damages arising from the movement of vehicles and boats; in applications for payment of any sum less than €50,000; and in respect of transport contracts.

Miscellaneous

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

In the last few years, the Ministry of Justice has introduced the online civil trial process. This system fully operates in the tribunals, appeal courts and Supreme Court, enabling lawyers, experts and witnesses to:

- create a digital signature and file their own legal actions or reports with the relevant court;

- receive notifications from the court at their certified email addresses; and
- obtain full access to information and electronic acts regarding their own civil cases.

At the same time, judges and their staff can manage and plan duties, activities and documents related to assigned proceedings. They can also create digital signatures and file their decisions, building up a local jurisprudence database.

The goal of the system is to save time and money, improve case management and increase transparency and workload monitoring.

Moreover, citizens and private companies can access local jurisprudence while financial institutions and banks can obtain insolvency status information easily.



Stefania De Michele

sdemichele@carnelutti.com

Via Principe Amedeo, 3
Milan 20121
Italy

Tel: +39 02 655851
Fax: +39 02 65585585
carnelutti.com

Japan

Tetsuro Motoyoshi and Akira Tanaka

Anderson Mōri & Tomotsune

Litigation

1 Court system

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 on 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 has 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 not an independent district court that has been established or formed exclusively by a special law.

2 Judges and juries

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).

3 Limitation issues

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 years from the occurrence of the event giving rise to the claim. For tort claims, a separate limitation period of three years applies from the time of knowledge of the damage and of the identity of the party responsible for said damage. The shorter of these limits applies to tort claims. In addition, there are various shorter limitation periods under the Japanese Civil Code, such as two years in the case of accounts receivable related to moveable assets.

Time limits can be suspended by a court action, attachment and provisional attachment or provisional disposition as well as by acknowledgement. Following suspension, the above-mentioned limitation periods will start to run anew from the time when the cause of such interruption ceases to exist.

In cases of a private claim (eg, in order to obtain payment), the limitation period will only be suspended if court action is taken within six months from demand for payment.

An amendment bill to the Civil Code, which includes amendments to provisions concerning the statute of limitations, was presented before the Diet on 31 March 2015. An outline of the amendments 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 moveable 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 agreement is made will be allowed. If such agreements are repeatedly made, suspension can be extended; however, such extension is limited to five years from the original time limit.

Please see 'Update and trends' for the current status of the amendment bill to the Civil Code.

4 Pre-action behaviour

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 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 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 that is easily falsified is typically submitted to the court (eg, a medical malpractice lawsuit in which medical records are typically submitted to the court as evidence), such party often files a petition and courts also often accept such petition and 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 asks for 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).

5 Starting proceedings

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 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 such proposal, although the Act on the Expediting of Trials provides that the expediting of trials shall be achieved by enhancing the human resources of the courts and that the government must take financial measures required to promote the expediting of trials.

6 Timetable

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 has to 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 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.

7 Case management

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.

8 Evidence – documents

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 disposition of valuable documents for pending or foreseeable litigation may lead the judge to find the facts unfavourable to the disposing party.

9 Evidence – privilege

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.

10 Evidence – pretrial

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.

11 Evidence – trial

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 preparatory hearing to be held once a month or once every few months.

12 Interim remedies

What interim remedies are available?

In addition to the interlocutory measures mentioned in question 4, 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 render an interim judgment, except to admit international jurisdiction over the claims.

13 Remedies

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 money 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.

An amendment bill to the Civil Code, which includes amendments to provisions concerning the default interest rate, was presented before the Diet on 31 March 2015.

Under the amendments, 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 which restrict excessive interest rates (eg, the Interest Rate Restriction Act).

Please see 'Update and trends' for the current status of the amendment bill to the Civil Code.

14 Enforcement

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 moveable 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.

15 Public access

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.

16 Costs

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.

17 Funding arrangements

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. 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.

18 Insurance

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.

19 Class action

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 a plaintiff, although there was no restriction on the number of the plaintiffs named in one complaint. In practice it sometimes happened, for example, that hundreds of plaintiffs would 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 will introduce a new class action system (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 existing between a business operator and the relevant class of aggrieved consumers (namely, whether the business operator is obligated to make payment to consumers). This first-stage procedure can only be filed by a 'specified qualified consumer organisation' (SQCO), and can 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 a defendant 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 court determines the existence and amount of the individual claims through a prompt and simple procedure. It should be noted that the 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.

20 Appeal

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 rules, such as an error in

Update and trends

An amendment bill to the Civil Code

On 26 May 2017, an amendment bill to the Civil Code that was presented before the Diet on 31 March 2015 was finally passed by the Diet and enacted into law. It is expected that the new law will come into force in 2020. An outline of the amendments to some of the key provisions of the Civil Code (statute of limitations and default interest rates) is discussed in questions 3 and 13.

The revised Consumer Contract Act

The revised Consumer Contract Act came into force on 3 June 2017. The purpose of revisions to the Consumer Contract Act is to provide consumers with more protection, considering the changes to social and economic situations after 2001 in which the Consumer Contract Act came into effect. An outline of the revised Consumer Contract Act is as follows:

- expansion of the scope of revocable contracts (introducing a right to revoke contracts for the purchase of excessive quantities and expanding the scope of 'substantial matters' related to misrepresentation by business operators);
- extension of the period when the right to revoke may be exercised; and
- expansion of the scope of contractual terms and conditions treated as invalid (invalidating any provision that waives cancellation in the event that the business operator defaults).

In relation to injunctions under 'consumer organisation proceedings' noted in question 19, the scope of cases where qualified consumer unions and non-profit organisations may seek injunctions has also expanded, considering the expansion of the scope of revocable contracts as noted above.

A recent court precedent concerning illegally collected evidence

The issue of competency of illegally collected evidence (ie, whether the court is allowed to take into account illegally collected evidence when judging a case) has long been one of the important and controversial issues in Japanese civil proceedings. In this respect, the Tokyo High Court judgment dated 19 May 2016 denied the competency of illegally collected evidence in the case where conversations during a hearing conducted by a committee of prevention of sexual harassment in a university were recorded by an attendee without authorisation of other attendees and submitted as evidence. The court held that competency of evidence is not necessarily denied solely because such evidence was collected illegally and that competency of evidence may be denied taking into account various facts and circumstances such as (i) the measures taken to collect the evidence; (ii) the need for protection of rights from the illegal collection of evidence; and (iii) the importance of the evidence. This new judgment will likely be an important court precedent, since there have been few published court precedents (recently in particular) on this issue and this judgment clearly ruled that various facts and circumstances are taken into account in determining whether competency of illegally collected evidence is denied.

jurisdiction, lack of reasoning, etc, will also give rise to a right of appeal to the Supreme Court. 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.

21 Foreign judgments

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 proceeding at such court is 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.

22 Foreign proceedings

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 letters rogatory received from a foreign court through the Minister of Foreign Affairs. The other 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

23 UNCITRAL Model Law

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 (an English language version of the Arbitration Law is available at www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf).

24 Arbitration agreements

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.

25 Choice of 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?

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.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Most of the commercial arbitration institutions in Japan have a candidate list which 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, it is generally sufficient to meet the various qualifications and needs of complex arbitration matters.

27 Arbitral procedure**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.

28 Court intervention**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.

29 Interim relief**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.

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

As stipulated in the UNCITRAL Model Law, the arbitral tribunal has to render a reasoned award signed by the arbitrators. A copy signed by the arbitrators must be delivered to each party after the award date.

31 Appeal**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 parties could not find causes for the setting aside of an award other than those contained in the Arbitration Law.

32 Enforcement**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 procedure, the Arbitration Law uses a decision procedure in which the court can discretionally hold an oral argument. In Japan, enforcement procedures have not generally been affected by changes in the political landscape.

33 Costs**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 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. It should be noted that, 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**34 Types of ADR****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 ADR, although many Japanese parties still prefer to go to state court (eg, Tokyo District Court). For domestic disputes, the preference of 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

ANDERSON MŌRI & TOMOTSUNE

Tetsuro Motoyoshi
Akira Tanaka

tetsuro.motoyoshi@amt-law.com
akira.tanaka@amt-law.com

Akasaka K-Tower
1-2-7 Motoakasaka 1-chome
Minato-ku
107-0051 Tokyo
Japan

Tel: +81 3 6888 1140
Fax: +81 3 6888 3140
www.amt-law.com/en

creditors is not required. It should be noted that 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.

35 Requirements for ADR

**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, 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 like 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

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 has 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.

Liechtenstein

Stefan Wenaweser and Christian Ritzberger

Marxer & Partner Attorneys-at-Law

Litigation

1 Court system

What is the structure of the civil court system?

Liechtenstein is a civil law jurisdiction. The laws relating to dispute resolution are the Civil Procedure Act (ZPO), the Jurisdiction Act (JN) and the Enforcement Act (EO). Non-contentious proceedings are governed by the Non-Contentious Matters Act. The organisation of the ordinary courts is governed by the Court Organisation Act.

The Liechtenstein courts are all located in Vaduz, the capital of the country. There are no specialist courts or juries adjudicating in civil, commercial or financial law matters. The Liechtenstein civil court system consists of three layers of instances:

- the Princely Court of Justice (LG) in the first instance;
- the Princely Court of Appeal (OG) in the second instance; and
- the Princely Supreme Court (OGH) in the third instance.

Apart from these three ordinary instances there is the Constitutional Court (StGH) acting as an extraordinary court of appeal.

While each of the 14 judges of the LG function as a single judge, the OG and the OGH are composed of several judges (collegial courts). The OG is divided into three chambers; the OGH consists of two chambers. The OG passes judgments in the composition of the president of a chamber, an associated judge, and an appellate judge. The OGH adjudicates in the composition of the president of the chamber and four Supreme Court judges.

2 Judges and juries

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

There are a number of general principles that govern the relationship between the court and the parties and define their respective duties (eg, the principle of party disposition, the principle of party presentation, the principle of ex officio proceedings and the duty of instruction).

Pursuant to the principle of party disposition, the parties are largely in control of the lawsuit. First of all, it is up to the parties to decide whether, when and to what extent civil proceedings shall be initiated. Accordingly, the parties have the power to determine the subject matter of the proceedings and the topic on which evidence is to be produced. The parties may also decide to end the proceedings at any point (eg, by withdrawal of the action or settlement of the case). Consequently, the judge is bound by the motions filed by the parties and cannot render a judgment that goes beyond the plaintiff's claim.

According to the principle of party presentation, it is up to the parties to prove their respective claims and defences. Therefore, the judge has no general duty to ascertain the facts ex officio. The judge must, however, ascertain the truth. To that end, provided that the corresponding facts have been alleged by a party, the judge may collect additional evidence that has not been requested by the parties. Yet, the taking of documents and the hearing of witnesses is not permitted if both parties object to the taking of such evidence.

The principle of ex officio proceedings means that once civil proceedings have been initiated, the judge will undertake the necessary steps to move the case along (eg, service of the lawsuit and the claim documents on the defendant, setting the dates for the examination of witnesses and experts and generally the production of evidence, etc).

The duty of instruction requires the judge to provide instruction if the pleadings of the parties are unclear, incomplete or lack precision, and not to surprise the parties with a decision that is based on a legal view that the court has not discussed with the parties before rendering the judgment (prohibition on surprise decisions).

Overall, in Liechtenstein civil proceedings the judge has rather an inquisitorial role than a passive role.

Judges are selected by the Judges Selection Committee, which is presided over by the Prince of Liechtenstein and candidates proposed by the committee have to be appointed by the Liechtenstein parliament. Generally, candidates must have passed the bar exam and meet further criteria.

3 Limitation issues

What are the time limits for bringing civil claims?

Liechtenstein law treats limitation periods as a substantive law issue. The general limitation period is 30 years after the emergence of a claim. However, for certain types of contractual claims the limitation period is five years (eg, claims for delivery of assets or performance of works or other services in a trade, commercial or other business; claims for rent; claims of employees for remuneration and reimbursement of expenses in connection with employment contracts) or less (eg, three years for the right to challenge a declaration of last will, to claim the legal share or its increase or to revoke a donation due to ingratitude of the donee).

Claims for damages lapse within three years after the damaged party obtained knowledge of the damage, of the damaging party and of the causal connection. If such claims are related to a financial service business conducted by a financial intermediary, the absolute time limit is 10 years. In all other cases, the absolute statute of limitation is 30 years after the occurrence of the damaging event. If, however, the damage is caused by a criminal action subject to imprisonment of more than three years, the statute of limitation always is 30 years.

The lapse of time is not to be considered ex officio without objection of the parties. Hence, it is generally possible for the parties to waive the statute of limitation defence or to agree to suspend such time limits.

4 Pre-action behaviour

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

Until 30 June 2015, an action could only be filed after compulsory conciliation proceedings before the Conciliation Office. Meanwhile, however, the Law regarding the Conciliation Offices was repealed and sections 227 to 231 ZPO governing conciliation attempts by the court has become applicable again. Pursuant to these provisions, a party may apply for a conciliation attempt and the summons of the opponent for this purpose. Yet, this is only possible where it is voluntary and the opponent resides in Liechtenstein. The non-appearance of the opponent has no consequences.

As a general rule, there is no pretrial discovery in Liechtenstein. Yet, in specific and narrowly defined circumstances, the taking of evidence as a form of precautionary measure prior to trial is possible.

5 Starting proceedings

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 statement of claim with the LG. In the legal action, the plaintiff has to set out the facts on which he or she bases his or her claim and the evidence with which he or she intends to prove the asserted facts. If the court accepts that it has jurisdiction, it serves the legal action with the claim documents on the defendant and at the same time sets a date for the first hearing.

If the defendant is not resident in Liechtenstein, service of the legal action and the claim documents is regularly effected via letters rogatory to the competent court where the defendant resides. In the absence of any international treaties, service has to be effected in the way provided for by the laws or other legal provisions of the country in which the documents have to be served, or alternatively, as permitted by international custom, or where necessary via the diplomatic route. The LG will request the foreign court to which the letter rogatory is addressed to provide a confirmation of service. The rules of service for natural and legal persons do not differ.

The Liechtenstein courts have proven to be highly efficient and able to handle their caseload for decades.

6 Timetable

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

If, after receipt of the legal action, the court accepts that it has jurisdiction, it serves the legal action with the claim documents on the defendant and at the same time sets a date for the first hearing. At the first hearing, the defendant may invoke formal objections (such as the lack of jurisdiction, for example) and apply for the order of a security for costs, if the prerequisites are given. In cases where the claimant is ordered by the court to deposit a security for costs, the defendant is invited by the court to submit a reply to the statement of claim, if such a security for costs is deposited in time. Thereafter, depending on the complexity of the case, the court usually sets a hearing to decide on the evidence that will be taken. The matter is then heard in one or more oral hearings where the parties may plead their case, witnesses are examined, etc. Once the judge is satisfied and finds that the factual basis of the case is duly presented and the matter ready for taking a decision, he or she will close the hearing and then deliver the written judgment. As a general rule, further factual pleadings and new evidence may be put forward or offered by the parties to support their pleadings until the closure of the oral hearing.

The duration of proceedings before the first instance obviously depends on the subject matter and complexity of the case at hand. If extensive evidence has to be taken, for example, by hearing a large number of witnesses, or if the court needs to appoint an expert witness for special questions of fact or if a witness needs to be heard abroad via letters rogatory, the duration of the proceedings before the LG may take up to one year and in complex cases even longer. As a general rule, a decision of the LG may be expected within one year. A final decision that may only be obtained from the OGH can take up to three years. If a matter is of great complexity and if decisions of the lower instances are lifted and the matter handed down to the lower instance for a new decision or if the StGH is involved, proceedings may also take considerably longer.

7 Case management

Can the parties control the procedure and the timetable?

The control of the proceedings and the timetable is exercised by the judge who opens, directs and closes the oral hearing (section 180 ZPO). The judge may order the parties to submit written pleadings and sets the dates for the examination of witnesses and experts and the production of evidence.

8 Evidence – documents

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, the parties may request the production of documents that are in the possession of the opposing party or a third party. While third parties or authorities must produce relevant documents in their possession, unless they have a right to refuse to testify under Liechtenstein law, the parties themselves generally do not have an obligation to produce documents or any other evidence that might be adverse to their interests. There are, however, several exceptions to this rule. A party must, for example, not refuse to submit a document if it is obliged by law to release it or if the document was mutually produced.

Yet, even in relation to documents the production of which has been ordered by the court, a party cannot be forced effectively to produce such documents. If a party refuses to present the documents, the court may only take this into consideration in the weighing of evidence.

9 Evidence – privilege

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

The procedural laws contain provisions allowing the lawyer to preserve secrecy. In particular, section 321(1)(4) ZPO provides that the lawyer is entitled to refuse to testify as a witness regarding information entrusted to him or her by his or her client. This privilege must not be circumvented by other means, for example, the examination of employees of the lawyer (article 15(2) of the Lawyers Act (RAG)). The legal privilege extends, in particular, to correspondence between the lawyer and his or her client, irrespective of where and in whose possession this correspondence covered by the professional secrecy protection is (article 15(3) RAG).

In-house lawyers are not protected because they are not lawyers in the sense of the RAG. Lawyers who are admitted to a foreign bar may invoke professional secrecy obligations like Liechtenstein lawyers, and therefore the same level of legal privilege applies to such lawyers.

10 Evidence – pretrial

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

Parties do not usually exchange written evidence from witnesses and experts prior to trial. As a general rule, there is no pretrial discovery in Liechtenstein. Yet, in specific and narrowly defined circumstances, the taking of evidence as a form of precautionary measure prior to trial is possible.

11 Evidence – trial

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

Pursuant to the principle of immediacy and orality of proceedings, judges must obtain an immediate impression of the case. That means that only what has been brought forward in an oral hearing may form the basis of adjudication. Therefore, both witnesses and experts have to testify orally and will be questioned by the court. The parties have the right to ask for explanations or submit additional questions.

If a witness cannot appear before a court in Liechtenstein, the court will either adjourn the hearing or, if it is unlikely that the witness will obey a summons, ask the competent court where the witness resides via letters rogatory to take the testimony. The same applies with regard to experts.

12 Interim remedies

What interim remedies are available?

Both prior to the opening of a lawsuit and during litigation, and even during the enforcement proceedings, interim injunctions may be issued (article 270 EO). They serve to secure the right of the party complainant if, in the absence of a protective injunction, there is the risk that a future enforcement will be prevented or made difficult; for instance, if a claim has to be enforced outside Liechtenstein. Interim

injunctions may take the form of a protective order to secure money claims, or of an official order to secure other claims. The applicant must furnish prima facie evidence both of his or her claim and of the risk that may render future enforcement more difficult. Therefore, the only effect of the interim injunction is that it temporarily maintains the status quo (protective injunction).

An interim injunction is normally issued ex parte within two to three days. It is up to the court to decide if the defendant shall be heard prior to the passing of the interim injunction. Under Liechtenstein law, it is not possible to obtain a free-standing injunction. The term 'free-standing injunction' refers to an injunction granted by a court pending the resolution of a dispute before a foreign court. This is because in all cases where an interim injunction is granted, the court will set a time limit for the claimant to file a statement of claim and commence ordinary civil proceedings. If that time limit is not adhered to, the injunction will be lifted (article 284(4) EO).

The court may order the provision of a security if, for example, it does not consider the prima facie evidence for the alleged claim to be sufficient (article 283 EO). According to article 287 EO, the applicant has to reimburse any pecuniary loss suffered by the defendant if, for example, the applicant loses the main proceedings.

Search orders are only available in the context of criminal proceedings.

13 Remedies

What substantive remedies are available?

Punitive damages are not available in Liechtenstein. Yet, if a money judgment is final and binding and the judgment debtor does not comply with his or her payment obligation within the performance period, the judgment creditor is entitled to claim legal interest in the amount of 5 per cent per year in addition to the amount due under the judgment.

14 Enforcement

What means of enforcement are available?

To maintain order during court hearings, the judge may forbid any person who disrupts the hearing to make further statements. After unsuccessful warning, the court may also exclude the person from the hearing. A party to the proceedings being excluded from the hearing risks procedural disadvantages, such as a default judgment, provided, however, the party is informed of this possibility beforehand. Moreover, if a person during court hearings repeats the disobedience or opposes the court's order the court may also impose fines and short detention sentences (up to three days).

If a final and enforceable court decision rules for an obligation of a party for a personal act or omission for the benefit of another party, such order may be enforced by the entitled party in enforcement proceedings. If the act ordered by the court demands for personal action of the obligor that cannot be taken by a third person, the court may enforce the title by threat of penalty payments or imprisonment of up to six months. If the act can also be performed by a third party, it will be taken by such third party at the costs of the obligor.

15 Public access

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

As a rule, court hearings in civil cases are open to the public. However, in specific cases, where the public interest or the protected interests of a person are directly affected, the public may be excluded. Written submissions in civil proceedings are not made available to the public. Therefore, non-parties are not granted access to the court file, unless the parties of the lawsuit agree to grant information to the third party or such third party can prove some legal interest (eg, if the information is required for a lawsuit) and is granted access through a court decision. Judgments may be requested by anyone, but are only available in anonymised form.

16 Costs

Does the court have power to order costs?

As a rule, the losing party must reimburse the costs of the successful party according to the Lawyers' Tariffs Law (RATG) and pay the court's

fees. In this respect, little discretion is given to the court. If a plaintiff is only partially successful, then the court adjudicates the costs of the proceedings in proportion to the success. There are, however, several exceptions and special rules.

The RATG defines costs of lawyers in accordance with the value in dispute and not depending on hourly rates. Court fees are determined according to the Court Fees Act.

As a rule, persons who have no residence in Liechtenstein or lose such during the legal proceedings and are plaintiffs or appellants in a Liechtenstein court are, upon request of the opponent, obliged to furnish the defendant or respondent with a security for the costs of the proceedings. Likewise, legal entities that do not have sufficient domestic property on which execution can be levied may also be required to furnish a security for the costs of the proceedings. Yet, natural persons who are not able to bear the costs of litigation without detriment to the necessary maintenance may apply for legal aid in civil matters with the LG. Likewise, legal persons may apply for legal aid if the means necessary to cover the costs of litigation cannot be borne by the legal person itself or its beneficial owners. Legal aid is only granted if the litigation is not considered vexatious or futile (section 63 ZPO). If legal aid is granted, the party may also be (and in general is) relieved from the payment of court fees and from the provision of a security for costs (section 64 ZPO).

17 Funding arrangements

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 regards the relationship between lawyers and their clients, the RAG provides that neither quota litis agreements nor the assignment or pledging of the disputed claim or object are permitted. Therefore, 'no win, no fee' agreements or other types of contingency fees are generally not permissible under Liechtenstein law. Yet, it is possible to agree, in addition to the basic fee, on an appropriate additional fee which shall depend on the success of the lawyer's efforts. The preconditions and the exact amount of such additional fee must be precisely defined in advance.

There are no rules in Liechtenstein regarding litigation funding by disinterested third parties. Apart from the above, it is up to the litigating parties how they fund their litigation. Therefore, it is generally possible for parties to bring proceedings using third-party funding in order to reduce their risks. Such third parties may take a share of any proceeds of the claim. A party to litigation may also share its risk with a third party (eg, by selling some proportion of any recovery to investors in return for a fixed upfront payment, or by paying a fixed sum to offset a proportion of any liability). Litigation funding usually occurs in large arbitration and litigation disputes or when a number of people suffer losses with a common cause (so that in aggregate, losses are significant).

18 Insurance

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

There are a number of insurance companies that offer legal protection insurance. Depending on the policy chosen, the relevant branches of law and the amount in dispute, it is possible to obtain full insurance coverage of legal and financial risks arising from a legal dispute. Yet, it should be noted that insurance policies generally contain cover restrictions (eg, the insured sum is normally capped per legal case) which might be applicable in the individual case.

19 Class action

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

Generally, class actions are unknown to Liechtenstein procedural laws. However, section 11 et seq ZPO contain provisions regarding the joinder of parties (either as joined plaintiffs or joined defendants).

Pursuant to these provisions, several persons may act as joint claimants or joint defendants if their rights are based on the same legal or factual grounds. Furthermore, the Liechtenstein Consumer Protection Act (KSchG) enables certain consumer protection organisations to claim on behalf of several individuals, for example, against terms and conditions of businesses that are disadvantageous to consumers (article 41 et seq KSchG). However, these are not class actions in the strict sense.

20 Appeal

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

Each decision passed by the LG may be appealed to the OG within either 14 days, if an order is concerned, or within four weeks, if a judgment is concerned. In appellate proceedings, the OG, after having conducted an oral hearing on the appeal, gives its decision either by confirming the judgment of the LG or by setting it aside and referring the matter back to the LG, or by itself amending the contents of the judgment. As a general rule, to specify the grounds for avoidance, new facts and evidence may be submitted as long as the claim remains identical (novation is not prohibited before the second instance court). Moreover, the parties may also contest procedural errors or the LG's factual and legal findings. Most orders by the LG, such as the order to lodge a security deposit for costs and fees or the refusal to accept jurisdiction, may be appealed to the OG within two weeks.

Decisions by the OG may be appealed to the OGH as follows: an order overturning the decision of the LG may be appealed to the OGH within 14 days. Where an order of the OG confirms an order of the LG, no further appeal to the OGH is possible. Judgments of the OG may, apart from one exception that applies to small claims proceedings (values in dispute up to 1,000 Swiss francs; section 471 ZPO) where the judgment of the OG is final, in any event, be appealed to the OGH within four weeks. The OGH conducts a non-public hearing and is solely concerned with legal errors; fact-finding by the lower level courts can, therefore, no longer be contested (novation is prohibited). Accordingly, the parties may only raise points of law on material or procedural issues, but new evidence or pleadings are not allowed.

Besides the three instances mentioned above, there is the StGH acting as an extraordinary court of appeal. A party may have recourse to the StGH against final decisions that ultimately determine a matter (ie, which are, for example, not merely referring a matter back to the lower instance) for alleged violations of constitutional rights or rights granted by international conventions such as the European Convention on Human Rights within four weeks. The StGH can only quash the challenged order or judgment; it cannot pass a new decision on the merits. The ordinary courts are, however, bound to the legal considerations of the StGH and have to revise the quashed decision accordingly.

An appeal against a judgment to the OG or to the OGH has suspensive effect, which means that the appealed decision has no res judicata effect and cannot be enforced (section 436 ZPO). In contrast, an appeal against a court order does not, in principle, have suspensive effect (section 492(1) ZPO). Upon application of the appealing party, the court may, however, grant suspensive effect to the appeal (section 492(2) ZPO). An appeal to the StGH does not have the effect of staying the judgment, unless such stay is – upon application of the appealing party – specifically granted by the StGH acting through its president.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The levying of execution or the performance of individual acts of execution on the basis of a foreign judgment (or other foreign enforceable instruments) is possible in Liechtenstein according to article 52 et seq. EO only if this is provided for in treaties or if reciprocity is guaranteed to the government by treaties or government policy statements. There have not been any such statements guaranteeing reciprocity so far.

Liechtenstein has only concluded bilateral treaties on the recognition and enforcement of court decisions in civil law matters with Switzerland and Austria. Both treaties require all of the following conditions to be met in order to recognise a judgment:

- a recognition of the judgment must not be contrary to public policy of the state in which the judgment is asserted and a plea of *res judicata* must not be possible;
- the judgment must have been passed by a court with jurisdiction relating to the subject matter according to the principles set out in the treaty;
- the judgment must have entered into legal force according to the law of the state where it has been passed; and
- in case of a default judgment, the writ of summons, by which proceedings are instituted, must have been served on the party in default personally or on a proper representative.

Moreover, Liechtenstein has ratified the Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. Furthermore, Liechtenstein ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) on 5 October 2011. Liechtenstein has not signed or become a party to any other multilateral treaty or instrument. In particular, it is not a party to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988/2007 or 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).

It follows from the above that in general foreign judgments cannot be enforced in Liechtenstein. Consequently, a judgment creditor must obtain a Liechtenstein enforceable instrument against the judgment debtor, before he or she can successfully levy execution in Liechtenstein. A foreign judgment is sufficient to be granted what is called '*Rechtsöffnung*', in other words, simplified proceedings to obtain a Liechtenstein enforceable instrument. On account of the *Rechtsöffnung*, the creditor who has obtained a default summons or other decision within summary proceedings may have the debtor's opposition or legal proposal annulled by the court, if the claim he or she has put forward is based on a Liechtenstein or foreign public instrument. The respondent in such proceedings can avoid an enforceable instrument only by bringing an action for denial. Once an action for denial has been brought, the merits of the case are decided upon in contentious proceedings before a court of law. In practice, this means that if the opponent does not want a foreign judgment to be validated by *Rechtsöffnung*, the whole case has to be re-tried on the merits before the Liechtenstein courts.

22 Foreign proceedings

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

The provisions of section 17 et seq JN provide assistance to foreign courts. Pursuant to section 27 JN, the LG has to grant legal assistance unless the requested act does not fall within the competence of the LG or if an act is requested that is prohibited by Liechtenstein law or if reciprocity is not given. Where the LG doubts the existence of reciprocity, it has to obtain a binding declaration from the OG in this respect.

The most common cases of legal assistance for a foreign court in civil proceedings are the service of documents and the examination of witnesses. The court has to provide legal assistance in accordance with the Liechtenstein procedural laws pursuant to section 28(1) JN.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Liechtenstein arbitration legislation generally follows the Austrian model, which again is based upon the Model Law on International Arbitration (the UNCITRAL Model Law). However, Liechtenstein arbitration law departs in certain aspects from the model to make it more attractive and effective. It permits the submission of practically all types of disputes in relation to trusts, foundations or companies to arbitration, including in particular:

- the removal of trustees (or foundation council members);

Update and trends

Generally, no substantive changes to the legislation governing dispute resolution in Liechtenstein are envisaged in the near future. In November 2016, the Liechtenstein parliament passed the Law regarding Alternative Dispute Resolution in Consumer Matters (ASTG), which is an implementation of the Directive on Consumer ADR (Directive 2013/11/EU). The ASTG will enter into force at the same time as the decision of the EEA Joint Committee No. 194/2016 of 23 September 2016 amending Annex XIX (Consumer protection) to the EEA Agreement becomes effective. Since participation in such procedures is voluntary, the ASTG will likely not be of great practical importance.

In its judgment of 2 December 2016, 9 CG.2016.2, the OGH decided that whenever a party already realises in the first instance that a certain piece of evidence can be of importance, it has to offer this evidence in the first instance, unless there are certain reasons for not doing so. If, in such circumstances, an offer of proof is omitted in the first instance and then presented in the appeal, it must be assumed that the party already knew in the first instance that this evidence would be essential, but considered raising it in the appeal only if the outcome was negative, and thus, as a consequence, also considered a delay of the proceedings. In such circumstances, the OG may declare new facts and evidence inadmissible in the appeal proceedings, despite the general permission of novation.

By a judgment of 2 December 2016, 5 CG.2014.346, the OGH decided that, if the damage and the person responsible for the damage or the person to be held liable is known to the bearer of the founders' rights of an establishment fully authorised to represent the establishment, this knowledge has to be attributed to the establishment with regard to the beginning of the statute of limitations regarding liability claims.

By its decision of 1 February 2017, 4 CG.2016.249, the OGH decided that section 39 JN constitutes an exclusive court of jurisdiction. Accordingly, even if the defendant is generally subject to jurisdiction in Liechtenstein, the courts of Liechtenstein are competent in matters of international property protection only if the deprivation of or interference with possessions has been carried out in Liechtenstein. This also applies to a claim for damages connected with a property protection action and derived from interference with or deprivation of possessions.

Due to the liberal legislation relating to companies, foundations and trusts, cases involving foundations and trusts play an important role, in general, as do commercial and company law cases in Liechtenstein. The new and attractive arbitration law in combination with the New York Convention makes Liechtenstein an attractive place for arbitration.

- the challenging of resolutions of trustees (or the foundation council); and
- the appointment of extraordinary auditors.

Excepted from arbitration are matters falling within the public supervision of foundations and generally proceedings that are initiated ex officio or by a public authority (ie, the LG, the Foundation Supervision Authority or the Attorney General) based on mandatory law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement needs to 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, which provide a record of the agreement. The reference in a contract complying with these formal requirements to a document containing an arbitration agreement (eg, in general terms and conditions) constitutes an arbitration agreement, provided that the reference is such as to make that arbitration agreement part of the contract.

25 Choice of 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?

Unless otherwise provided in the arbitration agreement, the number of arbitrators shall be three (section 603(2) ZPO). Each party shall appoint one arbitrator. The two arbitrators so appointed shall appoint a third arbitrator, acting as chair of the arbitral tribunal. If a party fails to appoint an arbitrator within four weeks of receipt of a written request to do so from the other party or if the parties do not receive notification by the arbitrators regarding the arbitrator to be appointed by them within four weeks of their appointment, the arbitrator shall, upon request by either party, be appointed by the court.

The appointment of an arbitrator can 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 (section 605(2) ZPO).

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

With the exception that judges of the Liechtenstein courts may not become arbitrators during their tenure of office, the parties may freely

determine the composition of the arbitral tribunal and the appointment of its members. This means that the parties are free to agree on the number of arbitrators and to define the procedure for appointing the arbitrators. If the parties have, however, agreed on an even number of arbitrators, then these have to appoint a further person as chair.

A person being approached in connection with a possible appointment as arbitrator must disclose any circumstances that may likely give rise to doubts as to his or her impartiality or independence, or which are in conflict with the agreement of the parties. After being appointed and throughout the arbitral proceedings, an arbitrator has to disclose any such circumstances to the parties without delay, unless they have already been informed of them by him or her and consented to the continuation of his or her mandate as arbitrator.

When choosing an arbitrator, parties should select a candidate with the requisite legal and professional expertise that mirrors the nature of the specific dispute who shall also have sufficient management skills to deal with people and handle the process. In Liechtenstein practice, there is a tendency to choose lawyers as arbitrators. A formal legal education is, however, not required in order to be eligible as arbitrator. A large number of Liechtenstein lawyers are members of the Liechtenstein Arbitration Association (www.lis.li), which provides a large pool of candidates who are able to meet the needs of complex arbitration.

27 Arbitral procedure

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 rules of law as agreed upon by the parties. Unless the parties have expressly agreed otherwise, any agreement as to the law or the legal system of a given state shall be construed as directly referring to the substantive law of that state and not to its conflict of laws rules. In the absence of a choice of law, the arbitral tribunal will apply the statutory provisions or rules of law it considers appropriate; that is, the provisions that have the closest connection to the dispute.

Subject to the mandatory provisions of section 611 et seq ZPO, the parties are free to agree on the rules of procedure. 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.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court may only intervene in arbitral proceedings if this is so provided in section 594 et seq ZPO.

If a court is approached with an action that is subject to an arbitration agreement, it must reject such claim, provided the defendant does not submit a pleading in the matter or does not orally plead before the court without making a notification of objection in this respect. Yet, this does not apply if the court establishes that the arbitration agreement does not exist or is incapable of being performed. In this case, the court may continue its proceedings. Nevertheless, even while such proceedings are pending, arbitral proceedings may be commenced or continued and an award rendered.

As a rule, during arbitral proceedings no further action may be brought before a court or an arbitral tribunal concerning the asserted claim. Any action filed on the grounds of the same claim must be rejected. This, however, does not apply if an objection to jurisdiction of the arbitral tribunal was raised with the arbitral tribunal, at the latest, when entering into an argument on the substance of the dispute and a decision of the arbitral tribunal thereon cannot be obtained within a reasonable period of time.

Apart from the above, the court cannot intervene during arbitration.

29 Interim relief

Do arbitrators have powers to grant interim relief?

If the parties have not agreed otherwise, the arbitral tribunal may, upon request of a party and after hearing the other party, order any interim or protective measures it deems necessary in respect of the subject matter in dispute, if it considers the enforcement of the claim were otherwise frustrated or significantly impeded, or there was a risk of irreparable harm. Before imposing such measure, the arbitral tribunal may request any party to provide appropriate security in connection with such measure.

Yet, it is important to note that an interim relief granted by arbitrators can only be enforced by the LG.

30 Award

When and in what form must the award be delivered?

Once the arbitral tribunal is satisfied and finds that the factual basis of the case is duly presented and the matter ready for taking a decision, it will close the proceedings and render the arbitral award.

The award has to be made in writing and must be signed by the arbitrator or arbitrators. Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffice, provided, however, that the reason for any omitted signature is stated on the arbitral award. If the parties have not agreed otherwise, the award needs to give the reasons that form the basis of the decision. Furthermore, the award must state the date on which it was rendered and the seat of the arbitral tribunal as determined in section 612(1) ZPO.

A signed copy of the award needs to be served to each party. The award and the documentation on its service are joint documents of the parties and the arbitrators. The arbitral tribunal has to discuss possible safekeeping of the award and the documentation of its service with the

parties. Upon request of a party, the chairperson or, in the event of his or her inability to do so, another arbitrator is obliged to confirm the res judicata effect and the enforceability of the award.

31 Appeal

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

An appeal to a court against an arbitral award (including arbitral awards by which the arbitral tribunal has ruled on its own jurisdiction) may only be made in the form of an action for setting aside pursuant to section 628 ZPO. Such action has to be brought to the OG within four weeks. The time period begins from the day on which the claimant receives the award.

For actions for setting aside arbitral awards, the OG has jurisdiction as first and last instance, notwithstanding, however, the possibility of an extraordinary appeal to the StGH for alleged violation of constitutional rights.

The grounds for setting aside an arbitral award are:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was incapable of concluding a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case;
- the award deals with a dispute not covered by the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement or the plea of the parties for legal protection; if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of section 594 et seq ZPO or with an admissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of Liechtenstein public policy;
- the requirements according to which a court judgment can be appealed by an action for revision under section 498(1) numbers 1 to 5 ZPO have been met;
- the subject matter of the dispute is not arbitrable under Liechtenstein law; or
- the arbitral award conflicts with the fundamental values of Liechtenstein public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Since Liechtenstein adopted the New York Convention, arbitral awards that have been obtained before arbitration panels and in proceedings in accordance with the New York Convention constitute executory titles and can be enforced in Liechtenstein without re-examination of the merits of the case.

MARXER & PARTNER

RECHTSANWÄLTE

Stefan Wenaweser
Christian Ritzberger

stefan.wenaweser@marxerpartner.com
christian.ritzberger@marxerpartner.com

Heiligkreuz 6
PO Box 484
9490 Vaduz
Liechtenstein

Tel: +423 235 81 81
Fax: +423 235 82 82
www.marxerpartner.com

33 Costs**Can a successful party recover its costs?**

Where the arbitral proceedings are terminated, the arbitral tribunal decides upon the obligation to reimburse the costs of the proceedings, unless the parties have agreed otherwise.

In exercise of its discretion, the arbitral tribunal takes into consideration the circumstances of the case, in particular the outcome of the proceedings. The obligation to reimburse may include any and all reasonable costs for bringing the action or defence. In the event the parties agree on the termination of the proceedings and communicate this to the arbitral tribunal, a decision on costs is only made where a party applies for such a decision together with the notification of the agreement to terminate the proceedings.

Together with the decision upon the liability to pay the costs of the proceedings, the arbitral tribunal, as far as this is possible and provided that the costs are not set off against each other, determines the amount of costs to be reimbursed.

Alternative dispute resolution

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

The most important alternative dispute resolution paths are arbitration (governed by the ZPO) and mediation proceedings (governed by the Law regarding Mediation in Civil Law Matters). However, while arbitration is seen as the main ADR mechanism to ordinary state court litigation, mediation proceedings have less practical importance. Another form of ADR available in Liechtenstein are proceedings before the Conciliation Board with one mediator. It has been created to deal with conflicts between clients and various financial service providers such as asset management companies, banks, professional trustees and others. The Conciliation Board is regulated in the Ordinance regarding the extrajudicial Conciliation Board in the financial services sector. In practice, such conciliation proceedings do not play an important role.

35 Requirements for ADR**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?**

Participation in ADR before or during proceedings is voluntary. Hence, neither the court nor the tribunal can compel the parties to participate in an ADR process.

Miscellaneous

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

No.

Luxembourg

Joram Moyal and Claver Messan

MMS Avocats

Litigation

1 Court system

What is the structure of the civil court system?

The Luxembourg civil court system is based on three levels of jurisdiction after the French Napoleonic system:

- first instance courts;
- the Court of Appeals; and
- the Supreme Court (Court of Cassation).

Judgment handed down by the lower courts may be appealed before a higher jurisdiction and a higher court's decision can also be reviewed by the Supreme Court.

First instance courts can be subdivided in two categories: Justices of Peace and District Courts.

Justices of Peace

There are three Justices of the Peace in Luxembourg: Luxembourg City, Esch-sur-Alzette and Diekirch.

The Justices of Peace have jurisdiction over civil claims up to an amount of €10,000, and for specific cases such as tenancy law, seizure on wages or certain family matters (support payments).

Cases before Justices of Peace are handled by one judge: the Judge of Peace.

District Courts

There are two District Courts in Luxembourg: Luxembourg City and Diekirch.

The District Courts have jurisdiction on all matters where the value of the claim exceeds €10,000. Some matters are exclusively reserved by law to the District Courts as matters related to the procedure of exequatur.

The District Courts of Luxembourg also have jurisdiction over judgments handed down by the Justices of Peace in appeal provided that the value of the claim exceeds €2,000.

Cases before District Courts are handled by chambers composed of one or three judges depending on the nature of the proceedings. Chambers composed of one judge mostly deal with urgent applications. The other District Courts' chambers are all composed of three judges.

Courts of Commerce

The Courts of Commerce are not independent bodies, but rather are embedded in and part of the Luxembourg District Courts. The Courts of Commerce may be considered as specialist commercial and financial courts mainly dealing with such matters.

The Courts of Commerce have jurisdiction over commercial matters such as disputes regarding corporations, shareholders and insolvency proceedings.

As with the District Courts, chambers of the Courts of Commerce are composed of three judges.

Court of Appeal

There is one Court of Appeal in Luxembourg (Luxembourg City). It has jurisdiction over judgments handed down by District Courts and Commercial Courts. There is no second appeal of a judgment handed

down by a District Court or Commercial Court in appeal of a judgment rendered by the Justice of Peace. Chambers of the Court of Appeal are composed of three judges.

Supreme Court

There is only one Supreme Court in Luxembourg (Luxembourg City).

The Supreme Court has jurisdiction over decisions handed down by the lower courts provided that all appeals have been exhausted.

Judgments of the Justice of Peace that are not subject to appeal (when the value of the judgment does not exceed €2,000) and judgments rendered in appeal from the District Courts on decisions of the Justice of Peace as well as decisions handed down by the Courts of Appeal can be reviewed by the Supreme Court.

The main characteristic of the Supreme Court is that it does not review the facts of the matters, but only whether the first instance judges or the judges of the Court of Appeal have properly interpreted the law, treaties or binding supranational regulations.

As a rule, the Supreme Court does not properly settle the dispute. The Court confirms the judgment or quashes it and sends the matter back to another court at the same level of jurisdiction as the court whose judgment has been cancelled.

2 Judges and juries

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

There are no juries involved in civil actions in Luxembourg. The jury trial was abolished in 1814; since then, all trials are conducted by qualified judges.

Civil proceedings are adversarial and the judges have a passive role as judgments will be handed down on facts and evidences submitted by the parties.

However, the judge can order an inquiry on a party's request or require submission of certain documents by himself, if this is necessary for the Court before rendering its judgment.

But often the role of the judge is passive as the parties need only to submit the facts and evidences to the judge who will apply the law accordingly.

Judges are usually appointed from among lawyers from the bar having passed an additional magistrates exam.

3 Limitation issues

What are the time limits for bringing civil claims?

Under Luxembourg legislation, time limits for bringing civil claims depend on the nature of the claim.

The most common time limit regarding 'real action' (debt collection, real estate) is 30 years. Most other claims have a time limitation of 10 or two years (eg, under construction law or divorce matters). Claims of consumers on a lack of conformity of purchased goods are limited to a period of two years.

The parties cannot agree to suspend time limits and such an agreement will be considered as void.

4 Pre-action behaviour

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

There is no pre-action behaviour required unless the parties agreed not to start legal actions before alternative dispute resolution by way of mediation for instance.

It is, however, advisable to send an official reminder letter to a debtor. This may also have the effect of making the interests run. There is no disclosure requirement in Luxembourg.

5 Starting proceedings

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 start with a service of a writ of summons notified by the bailiff to the defendant.

In certain cases, for instance, before the Justices of Peace, the writ of claims can also be sent to the opposing party by the court clerk.

The delivery of the writ of claims summons the defendant to appear before the court.

Under Luxembourg law, the writ of claims needs to be drafted very carefully and evidence on which the claim is based must be mentioned in the writ. New pieces of evidence can be brought to light and communicated to the opposing party at a later stage of the proceedings.

According to the EU Justice Scoreboard 2017, Luxembourg came on top with regard to the duration of civil court cases. According to the report, civil and commercial disputes lasted an average of 86 days. In practice, however, court cases seem to take much longer.

The Grand Duchy also spends the most money per inhabitant for its court system, at €187 per inhabitant per year.

6 Timetable

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

Luxembourg civil proceedings can be divided into six points:

- service or notice of the writ of summons;
- registration of the writ at the court;
- introductory hearing;
- exchange of written submissions (as regards the written proceedings);
- oral pleadings; and
- judgment.

Usually after having served the summons to the defendant, the claimant must register the claim with the court clerk.

The case will be called the first time at an introductory hearing. At this hearing the case will be postponed in order for the parties to exchange written submissions or evidence documents.

Once the parties have exchanged all their written arguments, the judge will set the case for oral pleadings.

Regarding written proceedings, from the service of the summons until the judgment, the proceedings will usually last between 10 and 18 months.

Claims before the Justices of Peace that do not require a service through a bailiff will automatically be registered with the court clerk.

After registration the clerk will schedule an introductory hearing before the Justices of Peace at which the case will be directly postponed for oral pleadings.

Some commercial proceedings also follow the same proceedings as before the Justices of Peace where no written arguments are exchanged.

7 Case management

Can the parties control the procedure and the timetable?

The parties are traditionally in charge of the procedure, particularly the claimant. They have influence on the timetable as they can decide when to submit their written arguments.

However, if there is an unfair delay for one party to submit its written arguments, the court may deliver an injunction against the party, forcing it to submit under threat of foreclosure.

Unless the party under injunction submits its arguments, the judge can close the case and set it for oral pleadings.

Written arguments can be exchanged as often as necessary until all arguments have been debated. However, the judge can speed up the proceedings if necessary.

Proceedings before the Supreme Court is specific as the timetable for submitting written arguments are set up in the law, which is two months after serving and registering the writ of summons.

8 Evidence – documents

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 duty to disclose all documents relating to the case.

The parties shall only disclose the evidence on which they intend to rely.

However, a party can ask the court to issue an order on the other party to disclose evidence.

9 Evidence – privilege

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

Some documents could be deemed privileged as communications between lawyers of the Luxembourg Bar Association.

The privilege can be waived if the sending document is marked as being official.

Advice from an in-house lawyer is usually not privileged.

10 Evidence – pretrial

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

The parties do not usually exchange evidence prior to trial.

It may, however, be part of litigation tactics to exchange evidence to impress the other side to exchange evidence beforehand in order to find an out-of court solution.

11 Evidence – trial

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

Evidence documents are often presented as written documents.

Oral evidence is possible under Luxembourg legislation but very rarely used in civil proceedings.

12 Interim remedies

What interim remedies are available?

A wide range of interim remedies is available provided that the case is urgent and the evidence submitted to the court is not seriously disputed.

Some interim measures of injunctions under summary proceedings are also available.

13 Remedies

What substantive remedies are available?

A Luxembourg court can enjoin a party to perform an obligation or refrain from an action or behaviour under penalties.

The court can also grant damages, cancel contracts or appoint experts with specific tasks.

14 Enforcement

What means of enforcement are available?

Decisions of Luxembourg courts are not automatically enforceable. It depends on the court concerned, the type of claim and on the content of the judgment.

Enforceability means that a bailiff can enforce the judgment once it has been notified or served to the other side if the judgment is automatically enforceable.

Update and trends

Since 2013 the government of Luxembourg has been discussing major reforms of the justice system which are part of a bigger constitutional reform.

With the the latest speech of the current Ministry of Justice of March 2017, a small part of the major reform of 2013, the strengthening of the independence of the judiciary, will be brought into action.

The government intends to create a Supreme Judicial Council. The future body will, among other things, be responsible for the nomination and promotion of magistrates. Political nominations, which until now were theoretically still possible by law, will thus be excluded in the future.

In addition, the Supreme Judicial Council is to deal with disciplinary matters within the magistrate. Furthermore the council may make recommendations on the work of the judiciary.

The new body is also to deal with complaints lodged by citizens relating to the functioning of the justice system, without, however, opening a new possibility for recourse.

According to the plans, four judges are to belong to the Judicial Council, including the presidents of the Superior Court of Justice and the Administrative Court as well as the Attorney General.

The Luxembourg Bar should also be able to appoint a member. Two other members are to represent the civil society.

As all parties in Parliament seem to agree with this proposal, it seems very likely that this reform will be set into action before the end of 2017.

Further long-term proposals by the government to reform the justice system include:

- reform of the prosecution;
- generally changing the organisation of the civil and criminal courts;
- reform of the organisation and procedure of the administrative courts;
- reform of the position of employees of the justice system; and
- changing proceedings relating to appeals and judicial review (cassation).

The discussions are still ongoing and further proposals on the abolishment of the District Court of Diekirch and the limitation of powers of the state prosecution are also being discussed.

Historically the two District Courts were necessary to assure access to the judiciary to people living in the north of the country. However, as Luxembourg City and Diekirch are only 50km away it is disputed if this should still be upheld today.

It is unlikely that any reform will take place in the near future.

Finally, according to the EU Justice Scoreboard 2017, Luxembourg came on top with regard to the duration of civil court cases. According to the report, civil and commercial disputes lasted an average of 86 days.

The Grand Duchy also spends the most money per inhabitant for its court system, at €187 per inhabitant per year.

On the other hand, a court decision is only enforceable when it becomes final (ie, either not subject to appeal or if any appeal has been lodged against that judgment after expiry of the appeal deadline).

15 Public access

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

Court hearings are held in public, except if the court has decided otherwise.

16 Costs

Does the court have power to order costs?

There are, strictly speaking, no court fees in Luxembourg. However, the court usually impose costs on the unsuccessful party to be paid to the opposing party. These costs are based on the amount in dispute and are assessed pursuant to a Grand-Ducal Regulation.

The amount is increased if the matter is particularly complex or requires several submissions from the parties.

In addition, the unsuccessful party is often sentenced to cover a fair share of the lawyers' fees engaged by the successful party.

Under Luxembourg legislation, the total amount granted rarely covers all the costs.

Also under Luxembourg legislation a Luxembourg defendant may require from a non-EU plaintiff a deposit of a guarantee (caution judicatum solvi).

The deposit is not required if there is a treaty to this end between Luxembourg and the country of the foreign plaintiff.

17 Funding arrangements

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?

Luxembourg lawyers' rules strictly prohibit the quota litis pact or 'no win no fee' agreements.

However, a success fee may be agreed in addition to the regular lawyers' fees or flat fee.

Luxembourg lawyers' rules require lawyers to charge fees with moderation, fairness and according to the complexity of the case.

18 Insurance

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

Insurance to cover all or part of legal costs is available in Luxembourg.

19 Class action

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

Class actions, as they are known in the United States, do not exist in Luxembourg.

However, several claimants can file a claim together against one or many defendants and defending their interests.

The part claim of each plaintiff must, however, be determined clearly from the claim of the other plaintiffs.

20 Appeal

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

Any judgment can be appealed.

The main exceptions are those ruled by the law as, for instance, matters before the Justice of Peace with a claim threshold of €2,000.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments from courts of EU member states are easily recognised and enforced in Luxembourg in accordance with Regulation No. 1215/2012 of 12 December 2012, provided that they have been rendered in compliance with due process requirements and with Luxembourg public policy principles.

As concerns judgments from courts of states other than those covered by this regulation, specific rules may result from international treaties.

22 Foreign proceedings

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

Between member states of the European Union (except Denmark) Council 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 applies.

According to the Regulation, courts must directly address their requests to the Luxembourg courts that have jurisdiction on the witness to be heard or the person holding the request document.

Where Council Regulation 1206/2001 does not apply, specific bilateral or multilateral conventions may apply.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Luxembourg arbitration rules are not based on the UNCITRAL Model Law.

Luxembourg law makes a distinction between international arbitration and domestic arbitration and provides for a different set of rules applicable to each of those two categories of arbitration.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Except for the fact that arbitration agreements must result from an agreement signed by both parties, they are not subject to any formal requirement.

They are enforceable provided that they evidence the intention of the parties to resort to arbitration.

25 Choice of 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 on the appointment of the arbitrators, Luxembourg law requires the designation of three arbitrators.

Each party must appoint one arbitrator and the third one shall be appointed by mutual consent of the parties.

If the parties failed to appoint their arbitrator, the president of the District Court may appoint the arbitrators.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Luxembourg law does not require that arbitrators have any specific qualifications. Arbitrators can be civil servants or, if they are not involved in the dispute, lawyers or magistrates, but they can also be chosen from among any category of professionals relevant for the dispute resolution (eg, engineers). Arbitrators do not have to meet any specific requirements. Parties are also free to choose as many arbitrators as they want, as long as this is in line with the arbitration agreement or the arbitration clause.

27 Arbitral procedure

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

Luxembourg arbitration law grants the parties and the arbitrators much freedom to organise the arbitral proceedings.

Otherwise Luxembourg law requires a speed procedure within three months.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The courts will not interfere directly with arbitral proceedings unless the parties or arbitrators, or both, ask the courts to intervene in a specific matter.

As long as the agreement is in accordance with Luxembourg law (especially article 1244 of the New Civil Procedure Code (NCPC)), it can override the court's power.

29 Interim relief

Do arbitrators have powers to grant interim relief?

An arbitral jurisdiction is entitled to order provisional or protective measures, such as conservatory measures to preserve evidence or prevent irreparable harm.

30 Award

When and in what form must the award be delivered?

Luxembourg law provides for specific rules. The award must be delivered within three months unless otherwise agreed by parties.

The award must be motivated and contain the date of the award and the names of the arbitrators.

31 Appeal

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

An arbitral award can only be appealed to request its annulment under specific conditions outlined in article 1244 NCPC.

The same applies to international arbitration.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

A domestic award can only be enforced after an order delivered by the president of the District Court further to the arbitration. This order is a mere formality.

As regards international awards, these could be enforced by way of an exequatur procedure in Luxembourg.



Joram Moyal
Claver Messan

j.moyal@mms-legal.com
c.messan@mms-legal.com

205, route d'Arlon
L-1150 Luxembourg

Tel: +352 20 60 03 90
Fax: +352 20 60 03 91
www.mms-legal.com

33 Costs**Can a successful party recover its costs?**

There are no rules for allocating costs to a party under an arbitration unless otherwise agreed by parties.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

Under Luxembourg law there is no statutory obligation to consider alternative dispute resolution before resorting to litigation or arbitration.

However, parties may agree in a contract to refrain from starting a court action until they have failed to resolve their dispute through an alternative dispute resolution mechanism.

If such a clause has been agreed upon, Luxembourg courts and arbitral tribunals will refuse to hear the case unless the claimant gives evidence that the clause has been given full effect.

35 Requirements for ADR**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 cannot compel the parties to participate in an ADR process, which requires their consent, but the writ of summons must mention the diligences made to organise such method before introducing court actions.

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

No.

Macedonia

Tatjana Popovski Buloski and Aleksandar Dimic

Polenak Law Firm

Litigation

1 Court system

What is the structure of the civil court system?

The civil court system in the Republic of Macedonia is divided into three levels:

- first level – basic court (27 in total);
- second level – appellate court (four in total); and
- third level – the Supreme Court of the Republic of Macedonia.

The system does not recognise specialised courts, but in each of the civil courts there are the following departments according to subject matter: a civil dispute department, labour dispute department, commercial dispute department and payment order department. Administrative disputes are resolved by the Administrative Court at first instance and by the Higher Administrative Court at second instance. Thus, the system does not recognise any specialist commercial or financial courts.

The appellate court decides upon an appeal against first-instance judgments or decisions made by the basic court. In certain cases and under the terms and conditions stipulated by law, the parties have the right to challenge the appellate court judgment at the Supreme Court.

At the first level, in the basic courts, the individual judge decides upon interim measures and civil claims of a value of up to 1.8 million denars. In cases in which the claim exceeds this amount, as well as in certain types of disputes stipulated by law (labour disputes, intellectual property disputes, certain family law disputes, etc), the court acts as a council composed of one professional judge and two lay judges.

2 Judges and juries

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

The judge is a career judge appointed by the Judiciary Council. Jurors are not professional judges.

In the civil procedure, it may be conceded that the judge's role is rather passive. The judge controls the process from the procedural perspective and decides which evidence provided by the parties will be examined during the proceeding. The judge does not collect evidence at his or her discretion.

The jurors are part of the court council when certain thresholds with regard to the value of the claim or type of a dispute are met. The jurors have the right to ask questions to the parties or witnesses, to vote for a procedural decision, when required, and to vote for a judgment. The votes of the jurors are equal in value to the vote of the professional judge.

The judges and presidents of the courts shall be elected and dismissed by the Judicial Council of the Republic of Macedonia under the conditions and in the procedure defined by and regulated with the Macedonian Law on Courts.

A person meeting the following requirements may be elected as a judge:

- a citizen of the Republic of Macedonia;
- actively using the Macedonian language;
- having the capability for work and having a good general health condition, which is assessed by medical check-ups;
- a law graduate who has completed a four-year higher education in law with a minimum 8.0 GPA or a law graduate who has acquired

300 credits according to the European Credit Transfer System (ECTS), with a minimum 8.0 GPA in both cycles of university studies, or who holds a validated diploma for having acquired 300 credits from a foreign faculty of law;

- having passed the judicial exam in the Republic of Macedonia;
- actively using one of the official languages of the European Union, mandatorily the English language, which is certified by one of the following internationally recognised certificates:
 - TOEFEL – at least 74 points in the computer-based exam, and a certificate not older than two years as of its issuance;
 - IELTS – at least 6 points, and a certificate not older than two years as of the day of its issuance;
 - TOLES – at least higher level;
 - ILEC – at least B 2 Pass; or
 - the Cambridge Certificate – at least First Certificate in English FCE – B 2;
- able to work with computers; and
- has a good reputation, integrity in the exercise of the judicial office and social skills for exercising the judicial office, for which integrity and psychological tests are conducted.

Jurors shall also be elected and dismissed by the Judicial Council of the Republic of Macedonia, under the conditions and in a procedure regulated by the Macedonia Law on Courts. An adult citizen of the Republic of Macedonia who has completed at least higher education, and who actively uses the Macedonian language, has a good reputation in the exercise of the referred function and is not older than 64 can be elected as a juror. Furthermore, a juror involved in the trying of juveniles shall be elected from among persons with experience in youth education.

3 Limitation issues

What are the time limits for bringing civil claims?

Civil claims between individuals and between individuals and legal entities would be time-barred after five years, except for claims related to compensation for damage, rents and other cases specified by the law, where the statute of limitation is three years. A one-year statute of limitation period applies in cases of payments related to water supply, electricity bills and similar.

Claims between legal entities that arise from commercial agreements are time-barred after three years.

The parties cannot agree to suspend time limits. However, the debtor may acknowledge the claim and thereby cease the limitation period, which would start to run again from the day of acknowledgment.

4 Pre-action behaviour

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

In general, there is no pre-action consideration that the parties should take into account or take before initiating a civil procedure except for certain cases provided by law (eg, in the event of material or legal defect, the claimant must inform the other party about the defect within eight days at the latest. If not, the claimant would lose the right to seek court protection). Also, in case the plaintiff intends to propose an expert opinion as evidence in the court procedure, such expert

opinion should be performed before submitting the lawsuit and delivered to the court along with the lawsuit. The same rule applies for the defendant party. Namely, in case the defendant intends to propose an expert opinion as evidence in the court procedure, such expert opinion, if possible, should be performed before submitting of the response to the lawsuit and delivered to the court along with the response to the lawsuit. The latest changes in the Law on Civil Procedure, which started to apply on 31 January 2016, provide that in commercial disputes for a monetary claim whose value does not exceed 1,000,000 denars and that should be initiated by way of a lawsuit before a court, the parties would be obliged to try to resolve the dispute by mediation before filing the lawsuit.

As provided in the Law on Court Procedure, when there is a justified fear that it would not be possible to exhibit certain evidence or that its later exhibition would be hindered, each party can propose to exhibit such evidence both during and before initiating the procedure. The party submitting the proposal shall be obliged to state the facts to be substantiated, the evidence to be exhibited and the reasons why the party considers the evidence cannot be exhibited later or why their exhibition will be hindered in the submission requesting provision of evidence. The name and surname of the opposing party shall be stated in the submission, unless it is unknown due to the circumstances. The submission containing the proposal on providing evidence shall also be served to the opposing party, if known. If there is risk of postponement, the court shall decide upon the proposal without a statement from the opposing party. In the determination adopting the proposal, the court shall schedule the hearing for exhibiting evidence, shall state the reasons why evidence is being exhibited, as well as the evidence being exhibited, and if necessary, it shall assign expert witnesses. If the evidence is exhibited before a procedure is initiated, the minutes (ie, the audio record on the exhibition of evidence) shall be kept in the court where the evidence is exhibited.

5 Starting proceedings

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 manner of commencing of the civil proceedings depends on the type of the document on which the plaintiff bases its claim towards the defendant.

If the bases of the plaintiff's claim are invoices, promissory notes, bills of exchange, public deeds, excerpts from the plaintiff's verified book-keeping records, private deeds verified according to the law, including lists for calculation of interest (trustee deeds), the procedure should be initiated with a proposal filed by the plaintiff against the defendant to a competent notary public (notary payment order). On the basis of such proposal, the notary public will reach a decision for enforcement and deliver such decision to the defendant party. The defendant party shall be entitled to file an objection against this decision within eight days from the date of receipt. If the defendant party files an objection, the procedure shall continue in front of the court as a procedure initiated with a lawsuit; otherwise, the notary decision shall become final and enforceable. As an exemption, if the petition refers to a monetary claim, and such claim is proved by trustee deeds, and if the obligation should be enforced abroad, the court, and not a notary, shall issue an order to the defendant to fulfil the petition (court payment order).

If the plaintiff does not base its claim towards the defendant on trustee deeds, the civil proceeding is commenced by the filing of a lawsuit by the claimant. There are very strict rules in law on what the lawsuit should contain. If not, the court may ask for removal due to deficiency or reject the lawsuit if it is filed by professional lawyer, that is, an attorney-at-law. The proceeding starts from the moment when the defendant has duly received the lawsuit. Delivery of lawsuits is within the competence of the basic court. The latest changes in the Law on Civil Procedure, which started to apply on 31 January 2016, provide that in commercial disputes for a monetary claim whose value does not exceed 1 million denars and that should be initiated by way of a lawsuit before a court, the parties would be obliged to try to resolve the dispute by mediation before filing the lawsuit.

In the past few years certain legal measures (changes to the relevant laws) have been carried out to increase the courts' efficiency and

it creates an impression that the courts currently have capacity to deal the cases in a timely manner.

6 Timetable

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

Pursuant to the law, after the lawsuit has been filed, the court shall deliver the lawsuit and shall ask the defendant party to file its response to the lawsuit within a period provided by the court. This period cannot be longer than 30 calendar days in complex cases or less than 15 calendar days. The parties are obliged to submit relevant evidence as enclosure to the lawsuit or response to the lawsuit, and to provide proposals for other evidence to be adduced during the procedure. After receipt of the response to the lawsuit, the court will schedule a preliminary hearing for collection or proposal of evidence. The preliminary hearing may revert to a main hearing. However, usually the main hearing takes place after the preliminary hearing is closed. The forthcoming hearings would be related to the hearing of witnesses and the findings of experts, if necessary, and the hearing of the parties and the examining of other evidence. The first-instance proceeding in a lawsuit usually takes between six and 12 months.

7 Case management

Can the parties control the procedure and the timetable?

The parties do not have the right to control the procedure or the timetable. The parties are obliged to respect the rules of proceedings stipulated by law. Misuse of procedural rights may be sanctioned by the court with a monetary fine against the party or its attorney.

8 Evidence – documents

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

The procedural law does not provide an obligation to preserve documents and other evidence pending trial.

The law provides a general obligation for the parties to provide all relevant documents in support of the facts declared by them. The parties cannot share the relevant documents between themselves directly, but only through the court.

The law does not provide that a party should provide the opposite party with a document that is unhelpful to its case. However, if one of the parties is referring to a document that it is held by the other party, the court shall summon the latter party to submit the document within a certain period.

A party cannot refuse to submit that document if it has itself referred to the same document as evidence in its allegations, or if it refers to a document that, according to the law, that party is obliged to submit, or if the document, in regard to its content, is considered mutual to both parties.

A party may refuse to provide certain documents for important reasons, and especially if such an action would expose the party to shame, significant material damage, or personal criminal prosecution or criminal prosecution of his or her relatives, or it has obtained such a document in performance of professional duties as attorney, doctor or another profession that is obliged to maintain confidentiality.

When the party summoned by the court to submit the document denies that it holds the document, the court can exhibit evidence in order to confirm this fact.

The court can order a third party to submit a document only when that person is obliged to provide or show such a document under the law, or if such a document pursuant to its content is mutual to that person and the relevant litigation party. The court will hear the third party before the court reaches its decision as to whether the third party should provide such document. If the third party denies that it holds the document, for the purpose of confirming this fact, the court can examine evidence. The enforcement of a decision to provide such document by a third party would be made under the rules of enforcement law.

As an exception to the above stated, a party or a third party who is required to submit a document may not submit it if:

- it contains a business secret or another confidential trade or financial information;

- it is protected by the industrial property right: patent, industrial design, brand, mark of origin and geographical mark;
- it is protected by particular professional authorisations or a business secret in accordance with the Law on Law Practice, the Law on Notary Practice, and the Law on Health Protection;
- it contains a state secret;
- there is a reasonable possibility that it is lost or destroyed;
- the access is restricted or prohibited by law; and
- the privacy of the party or of any other natural person might be violated by access to the document.

If the relevant document is held by a state administration or institution or by a legal entity or individual that performs public duties and the party itself cannot obtain it, then the court, on the basis of a proposal by that litigation party, shall obtain the document.

9 Evidence – privilege

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

The procedural law does not regulate the issue of privileged documents. The parties are free to provide any document that they deem relevant to support their legal position in the litigation. The law provides a general privilege when allowing a person that was or is an attorney-at-law to refuse to give a testimony or a document that was entrusted to him or her by a relevant party as a client. See question 8. If an in-house lawyer is not engaged as a professional attorney-at-law of the party, but is its employee, such advice would not be treated as privileged.

10 Evidence – pretrial

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

The parties cannot directly exchange written evidence from witnesses and experts prior to trial.

The parties should submit written evidence and expert opinions as enclosures to the lawsuit or to the response to the lawsuit, but in any case all evidence, including proposals of witnesses to be heard by the court, must be revealed at the preliminary hearing at the latest. All evidence that the court finds relevant would be produced at the main hearing, except for expert opinion that, if possible, should be delivered and proposed as evidence along with the lawsuit and the response to the lawsuit. If any of the parties prove that due to the objective circumstances (lack of documents, lack of time, etc), such expert opinion could not be provided before submitting of the lawsuit (ie, the response to the lawsuit), such party may propose expert opinion as evidence at the preliminary hearing as well.

11 Evidence – trial

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

Witnesses must be heard by the court directly. The court and the parties may ask questions of the witness.

Experts provide written opinions and, if necessary, an expert may be heard by the court and the parties after the opinion has been delivered.

12 Interim remedies

What interim remedies are available?

The following interim remedies are provided by law, but the law does not limit the nature of the interim remedy.

The following interim remedies may be provided by the court at the request of the relevant party for securing a monetary claim, but are not limited to these:

- prohibition on the debtor to have moveables at his or her disposal, as well as keeping those objects;
- prohibition on the debtor to alienate or burden his or her immovable or other proprietary rights being registered on the property on his or her behalf, including any note about that prohibition in a public book, or giving them under lease;
- prohibition on the debtor to sell securities and shares;

- prohibition on the debtor's debtor to pay a claim to the debtor or to give in objects, as well as a prohibition on the debtor to receive objects, collect a claim and have them at his or her disposal; and
- order to the finance officer of the debtor or third party not to approve payment from the debtor's accounts in the monetary amount subject to an approved temporary measure, by order of the debtor.

For non-monetary claims, the law provides the following measures:

- prohibition on alienation and encumbrance of movables that are subject to securing, as well as keeping these objects;
- prohibition on alienation and encumbrance of an immovable that is subject to securing, including any note on the prohibition in a public book;
- prohibition on the debtor from undertaking activities that can cause damage to the creditor, as well as a prohibition on performing changes on the objects that are subject to securing;
- prohibition on the debtor's debtor to give in the objects that are subject to securing to the debtor; and
- payment of salary compensation to the employee during a dispute due to unfair dismissal, if that is necessary for his or her support and support of the persons that, in accordance with law, he or she is obliged to support.

In the case of foreign proceedings, issuance of interim reliefs is not directly prescribed. But by way of analogy with this possibility in international arbitration, it may be conceded that a party may ask for an interim measure from a Macedonian court. The court should be able to grant such measure and order the party to initiate relevant litigation in front of the foreign forum within a specific period.

13 Remedies

What substantive remedies are available?

The remedies depend on the type of claim. If the claim is a monetary claim, then the plaintiff has the right to claim penalty interest. Punitive damages (ie, contractual penalties) are not automatically allowed, unless such damages are agreed by the parties in dispute and such an agreement (fulfilment, termination, etc) is the subject of the dispute, since the contractual penalty may be agreed only in cases of non-monetary claims.

14 Enforcement

What means of enforcement are available?

The enforcement of a judgment is handled by enforcement agents. Enforcement may be addressed against moveable and immovable property of the debtor, as well as claims against third parties.

In the case of disobeying enforcement over the share of the debtor in a trade company, the court will issue a monetary fine against the company and the manager. A fine will also be issued in the case of obstructing enforcement of a non-monetary claim.

The Criminal Code provides a criminal liability for a responsible person in a legal entity that refuses to execute the final and enforceable court decision. The punishment is a monetary fine or imprisonment of up to three years.

15 Public access

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

Court hearings are public, unless the dispute is a family law dispute or there is a special reason for the court not to allow the public to be present at the hearing. Court documents (such as pleadings, witness statements and orders) are not available to the public. The court, after the announcement and finalisation of the written filing, publishes its judgment or decision on the website of the court, subject to the protection of personal data of the parties, namely, the names and other relevant data of the parties are not published.

16 Costs

Does the court have power to order costs?

The court will order the settlement of procedural costs if the party requests it, if the conditions for issuance of such order regulated by the

law are fulfilled (the party has succeeded in the case or the costs are incurred exclusively owing to fault of the other party).

If the party has been represented by a professional attorney-at-law, then the court, upon the request of the party that succeed in the case, will order the other party to compensate the procedural costs to the other party in a value determined by the advocacy tariff. The advocacy tariff is based on the value of the dispute or type of dispute. If the party and its attorney have made an arrangement with regard to the costs and award of the attorney, the court will not accept it.

If the party is not represented by a professional attorney-at-law, then it has the right to be compensated, as the winning party, for the costs related to court taxes, expert costs and similar costs.

From July 2016, the Macedonian Bar Association established a new tariff for attorneys' costs and awards that allows for significantly higher attorney awards compared to the previous tariff and which the courts should follow when determining the amount of costs in litigations.

17 Funding arrangements

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 Advocacy Tariff provides the possibility for the client and the attorney-at-law to make an agreement about fees, notwithstanding the official tariff, but in such case the amount of the agreed fees cannot be lower than the amount of the fees regulated with the Advocacy Tariff. Therefore 'no win, no fee' agreements or other types of contingency or conditional fee arrangements between lawyers and their clients may be agreed respecting the rules of the contractual law. The same applies to third-party funding or share of the risk.

18 Insurance

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

Insurance is not available as a solution to cover all or part of a party's legal costs. If one of the litigation parties is a foreign legal entity, the domestic party may ask the court to order *cautio iudicatum solvi*, if the conditions regulated by the law are fulfilled.

Namely, as provided in the Macedonian Law on International Private Law, the defendant would not be entitled to ask for insurance of its costs:

- if in the country of the plaintiff's residence Macedonian citizens are not required to provide such insurance;
- if the plaintiff is granted asylum in the Republic of Macedonia;
- if the plaintiff's claim arises from its employment relation in the Republic of Macedonia;
- in case of marital disputes or disputes for establishing or opposing the paternity or maternity and in case of alimony; and
- in cases related to claim arising from promissory notes, in case of a counter lawsuit, or in case of issuance of a payment order.

19 Class action

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

The law does not specifically regulate class actions. However, several claimants may file a lawsuit together based on the same legal and factual grounds (eg, litigation in cases of collective redundancy, compensation of damages). There have been no recent developments in Macedonia regarding class actions.

20 Appeal

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

The right to appeal against first-instance court decisions is always provided, unless the party has waived this right. The term for appeal is 15 calendar days from the date of receipt of the decision. In certain cases, such as labour disputes and commercial disputes, the term for appeal

is eight calendar days. In certain cases stipulated by law, the parties have the right to challenge the appellate court judgment at the Supreme Court (if the value of the claim is more than 1 million denars in civil disputes and more than 1.5 million denars in commercial disputes, in certain family cases, in intellectual property cases, etc) by filing a revision, which is an extraordinary legal remedy. The term for filing this remedy is 30 calendar days from the date on which the second-instance court decision was received.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments will be recognised by Macedonian courts if the following conditions are met:

- the party has provided the original or duly verified copy of the award to be provided;
- the award is confirmed as final by the relevant authority;
- the judgment is confirmed as enforceable by the relevant authority;
- there was no violation of due process in the foreign procedure against the opposite party;
- there is no exclusive jurisdiction of a Macedonian court for the subject of the dispute;
- there is no agreement between the parties that a Macedonian court be competent for solving the dispute;
- there is no *res iudicata* in the substantive case; and
- the judgment is not contrary to Macedonian public policy.

Reciprocity is not a condition for recognition of a foreign judgment.

The procedure for recognition is as follows:

- a proposal for recognition and determination of enforceability of the foreign judgment is to be filed with the competent Macedonian court (on the basis of residence of the opposite party) against the opposite party;
- the court will examine *ex officio* whether the above conditions for recognition have been met and may schedule a hearing;
- if the above conditions for recognition have been met, the court will make a decision on the recognition and determination of enforceability of the foreign judgment;
- the court will send the decision to the opposite party;
- the opposite party has the right to file an opposition against the decision within 15 calendar days from the day of receipt of the decision;
- a council of three judges will decide upon the opposition of the opposite party. If the court finds that the decision upon the opposition depends on certain disputable facts, then the court will decide upon a hearing;
- the court will make a decision upon an opposition; and
- any unsatisfied party has the right to file an appeal within eight days to the appellate court.

22 Foreign proceedings

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

The law stipulates a procedure for collection of oral or documentary evidence before or during the litigation at the request of a party. However, the possibility of a foreigner as a party to collect evidence locally for the purposes of foreign litigation is not explicitly regulated in law; nor is it prohibited. The practice in this regard is not developed.

In relation to the support of the courts, the courts shall provide legal assistance to foreign courts in cases anticipated by an international agreement, as well as in the case of reciprocity in providing legal assistance.

The court shall refuse to provide legal assistance to a foreign court if it is requested to perform an activity against the public policy of Macedonia. In this case, the court competent for providing legal assistance shall, *ex officio*, refer the case to the Supreme Court.

The courts shall provide legal assistance to foreign courts in a manner anticipated by the national legislation. The activity that is the subject of the foreign court's request can also be enforced in a manner requested by the foreign court, unless such procedure is against Macedonian public policy.

Arbitration

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

International arbitration with a basis in Macedonia is regulated by the Law on International Commercial Arbitration in the Republic of Macedonia, based on the UNCITRAL Model Law. Rules of the Law on International Arbitration of the Republic of Macedonia determine the international nature of the arbitration (if at least one of the parties is an individual with his or her domicile or habitual residence abroad, or a legal entity whose registered office is abroad; or if the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected is abroad). There are certain differences, which are in fact additions to the UNCITRAL rules related to practical implementation of the procedure, such as receipt of written communications, language of the proceeding and costs.

Domestic arbitration is regulated by the Law on Civil Procedure from 2005 with subsequent changes. This Law regulates the rules for implementation of procedure at the 'chosen court', as well as the terms and conditions for annulment of the award of such a court and by the Rulebook on the Permanent Elected Court (within the Chamber of Commerce) that apply to proceedings at this forum. The Chamber of Commerce is an arbitration authority for domestic and international disputes, and has its own procedural rules.

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

The arbitration agreement must be in writing. The law provides that an 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 that provide a record of the agreement, or in an exchange of a lawsuit and response to the lawsuit in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document (the general term for a legal deed, text of another agreement or similar) 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.

In addition, the law provides that an arbitration agreement may also be concluded by the issuance of a bill of lading if the bill of lading contains an express reference to an arbitration clause in a shipping agreement.

The arbitration agreement (even in the form of general terms of a legal deed) must also be in writing for the purpose of domestic arbitration.

25 Choice of 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?**

In an intentional arbitration in Macedonia, if the number of arbitrators is not determined by the agreement between the parties, three arbitrators shall be appointed.

If the parties have not agreed on the procedure for appointment of an arbitrator or arbitrators, then in arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If one party fails to appoint the arbitrator within 30 days as of the receipt of the 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, upon a request of one of the parties the appointment shall be made by the court.

In an arbitration with a sole arbitrator, and if the parties cannot agree on the arbitrator, upon request of one of the parties he or she shall be appointed by the court (basic court Skopje 2 in Skopje).

If during the procedure for appointment agreed by the parties, one of the parties fails to act in accordance with the rules of that procedure, or the parties, or the two arbitrators, cannot reach an agreement in accordance with the rules of that procedure, or a third party, including

an institution, fails to perform the duty entrusted in accordance with the rules of that procedure, each of the parties can request the court to take the necessary measures, unless the contract for the procedure for appointment anticipates another way to ensure such appointment.

When appointing arbitrators, the court shall take into consideration the qualifications required for appointment of an arbitrator on the basis of the agreement of the parties and everything that can ensure appointment of an independent and impartial arbitrator, and in the case of appointment of a sole arbitrator or a third arbitrator, the advisability of appointing an arbitrator of a citizenship other than those of the parties should take into consideration.

Appeal against the decision of the court is not allowed.

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless they have already been informed of them by him or her. An arbitrator may be challenged only if circumstances that give rise to justifiable doubts as to his or her impartiality or independence exist, or if he or she does not possess the qualifications agreed by the parties. In addition, the party can request disqualification of the arbitrator appointed by it or in whose appointment it participated only for reasons of which it becomes aware after the appointment.

In national arbitration, there must be an odd number of judges in the selected court. Unless the number of judges is established in the agreement of the parties, each party shall appoint one judge, and the two judges shall elect a president. The courts' judges can only be elected as president of the selected court.

In national arbitration, it is provided that an arbitrator can be exempted in certain circumstances, such as:

- he or she is a party, legal representative or a party's attorney-in-fact, if he or she is in a relationship of co-authorised person, co-obligor or regress obligor with the party, or if he or she has been heard as a witness or expert witness in the same case;
- he or she is permanently or temporarily employed as an employee who is a party in the procedure;
- the party or the legal representative or the party's attorney-in-fact is his or her direct blood relative to any degree, and indirectly to a fourth degree, or is his or her spouse, unwed partner or an in-law up to twice removed, regardless of whether the marriage has ended;
- he or she is a guardian, adoptive parent, adopted child, supporter or dependant of the party, of its legal representative or of the attorney-in-fact;
- he or she has, in the same case, participated in bringing the decision of the court of lower instance or another body; and
- any other circumstances that put his or her impartiality in doubt.

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

The Law on Civil Procedure regulates domestic arbitration. According to this law, the party that, according to the arbitration agreement, should appoint a judge of the selected court can summon the opposing party in a period of 15 days to perform this appointment and to notify it thereof. Such summons shall be valid only if the party addressing it has appointed its selected judge and has notified the opposing party thereof. When, according to the arbitration agreement, the appointing of the judge shall be performed by a third party, each party can address the summons to the referred third party. The person summoned to appoint a judge of the selected court shall be bound to the appointment being performed as soon as such appointment has been announced to the opposing parties (ie, to one of the parties). If the judge of the selected court is not appointed on time, and nothing else results from the agreement, the judge shall be appointed by the court, on a proposal of the party.

The Rulebook on the Permanent Elected Court (within the Macedonian Chamber of Commerce) that applies to proceedings at this forum provides two lists of arbitrators from which the parties should elect the arbitrators – a list of arbitrators for disputes with international elements and a list of arbitrators for disputes without

international elements. These lists are determined by the management board of the Macedonian Chamber of Commerce on proposal by the President of the Permanent Elected Court. The parties may agree for the dispute to be solved by a single arbitrator or by a council of three arbitrators. In the event the dispute is to be solved by a single arbitrator, the parties should inform the Secretary of the Permanent Elected Court of the name of the arbitrator. In the event the dispute is to be solved by a council of three arbitrators, and the parties did not agree otherwise, the council will be formed as follows: the plaintiff party will appoint an arbitrator in the lawsuit, the defendant party will appoint an arbitrator in the response to the lawsuit, and a third arbitrator who will act as chair of the arbitral tribunal will be appointed by the President of the Permanent Elected Court.

27 Arbitral procedure

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

The law stipulates that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to the provisions of the law. If the parties do not agree, the arbitral tribunal may, again subject to the provisions of the law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance and materiality of any evidence.

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents, and of any procedure for taking evidence. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall also be communicated to the parties.

In the case of domestic arbitration, the Law on Civil Procedure provides that if the parties did not agree otherwise, the procedure shall be determined by the arbitrators.

28 Court intervention

On what grounds can the court intervene during an arbitration?

In international arbitration in Macedonia, the court will stay actions in favour of agreements to arbitrate if the party objects to the court's competence in a manner and time provided by law.

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may also request assistance from a competent Macedonian court in taking evidence. The court may execute the request within its competence.

29 Interim relief

Do arbitrators have powers to grant interim relief?

In international arbitration in Macedonia, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. If a party to which an interim measure relates does not agree to undertake it voluntarily, the party that made the motion for such measure may request its recognition before the competent court and, if applicable, enforcement in front of the enforcement agent. Since enforcement is conducted by the enforcement agent, and not by the court, this provision should be tested in practice.

30 Award

When and in what form must the award be delivered?

After the proceeding in international arbitration in Macedonia has been closed, the arbitral tribunal will make its decision.

The arbitral award shall be made in writing and must be signed by the sole arbitrator or the members of the arbitration panel. In an arbitration procedure with more than one arbitrator, the signatures of the majority of the members of the arbitration panel shall be sufficient, provided that the reason for any omitted arbitrator's signature is stated.

The arbitral award must contain the reasons on which it is based, unless the parties have agreed that no explanation shall be given or if it is an arbitral award adopted on the basis of a settlement of the parties.

The date of adoption and the place of holding the arbitration determined should be stated in the arbitral award. It shall be considered that the award is adopted at that place.

Following the adoption of the arbitral award, each of the parties shall be delivered a copy signed by the arbitrators.

31 Appeal

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

In international arbitration in Macedonia, the award may be annulled for the following reasons, if a plaintiff provides proof that:

- a party to the arbitration agreement was incapable of concluding the arbitration agreement or to be a party to an arbitration dispute according to the law applicable to its capacity;
- the arbitration agreement is not valid under the law to which the parties have referred to or, failing any indication thereon, under the Macedonia;
- a party was not duly represented;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the commencement of the arbitral proceedings, or was otherwise unable to present his or her case;
- 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 that contains decisions on matters not submitted to arbitration may be set aside; or
- 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 the Law on International Arbitration in Macedonia from which the parties cannot derogate or, failing such agreement, was not in accordance with the cited law.

Such arbitration award may also be annulled by the court if it finds, even if a plaintiff has not raised the above grounds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Macedonia; or the award is in conflict with the public policy of Macedonia.

An award of a national arbitration tribunal may be annulled for the following reasons:

- no agreement has been concluded for the chosen court or the agreement is not valid;
- in terms of the composition of the chosen court, any provisions of the Law on Civil Procedure or of the agreement for the chosen court have been violated;
- the award has not been explained, or the master copy or the copies of the award have not been signed in the manner determined by law;
- the chosen court has exceeded the limit of its assignment;
- the wording of the award is incomprehensible or self-contradictory; or
- the award is contrary to the Macedonian Constitution and to the established basis of the state system, and grounds exist for repealing the procedure as provided by the Law on Civil Procedure.

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

Foreign arbitration awards should be recognised by the competent Macedonian court prior to the enforcement. The procedure should be initiated with submission of a proposal for recognition of the foreign arbitral award if the general conditions for recognition of foreign arbitral awards (which are the same as for the recognition of foreign judgments; see question 21) are met, the court will recognise it without re-examination of the merits of the case.

National awards do not have to be recognised by the court.

As of 1 January 2017 a new Law on Enforcement is being applied; however, the basic principles of enforcement have remained the same.

33 Costs**Can a successful party recover its costs?**

A successful party may recover its costs in accordance with the award.

As provided by the rules of international arbitration in Macedonia, at the request of a party the arbitral tribunal, in the arbitral award or the conclusion of proceedings, shall determine which party and to what extent it is obliged to compensate the other party for the costs of conducting the procedure, including the costs of representation and the fees of arbitrators, and to submit its own expenses, unless otherwise determined in the arbitration agreement.

The arbitral tribunal shall freely assess the costs of the proceedings, taking into consideration all the circumstances of the case, especially the outcome of the arbitral proceedings.

If the arbitral tribunal fails to decide on the costs of the proceedings, or if such decision is possible only after the termination of the proceedings, the arbitral tribunal shall adopt a separate arbitral award regarding the costs.

According to the Law on Court Procedure, the court, upon a request from the party, shall decide if the witness is obliged to compensate the costs caused by its unjustified absence (ie, unjustified refusal to testify). Also, upon a request of the party, the court can order the expert witness to compensate the costs caused by its unjustified absence or unjustified refusal to testify.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

Mediation is provided by law as an ADR process. However, mediation is still not widely developed and popular with parties. However, further development in the application of mediation should be expected in the future.

35 Requirements for ADR**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 litigation, in disputes where mediation is allowed, the court is obliged to serve the parties with written instructions, together with the summons for the pre-trial hearing, stating that the dispute can be resolved in a mediation procedure.

This rule is not provided in the case of international arbitration in Macedonia.

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

No.



Tatjana Popovski Buloski
Aleksandar Dimic

tpopovski@polenak.com
adimic@polenak.com

OrceNikolov 98
1000 Skopje
Macedonia

Tel: +389 2 311 47 37
Fax: +389 2 312 04 20
www.polenak.com

Mexico

Fernando Del Castillo, Carlos Olvera and Roberto Fernández del Valle

Santamarina y Steta

Litigation

1 Court system

What is the structure of the civil court system?

The Mexican civil court system is integrated by courts, courts of appeals and administrative units that are organised by hierarchy, location, matter and size of the claims.

There is no principle or criterion that establishes a precise number of courts or courts of appeals in each state. All states organise their courts by themselves.

Mexico City is the principal jurisdiction in the country.

Hierarchy

Mexico is a federal republic consisting of 32 states. Courts are organised at federal and state levels. At both levels, the Mexican civil court system is based on a hierarchy structure as follows:

- the first instance in charge of a single judge; and
- the second instance in charge of a collegium of three magistrates at the state level and only one magistrate at the federal level.

A decision issued by first instance justices may be appealed at the second instance level.

All rulings issued by federal and state second instance courts can be challenged on human rights and constitutional grounds through a remedy called '*amparo*'.

Regarding civil matters, an *amparo* can be solely focused on issues of legality.

The *amparo* recourses are normally processed before a federal collegiate court formed by three magistrates; however, in certain extraordinary cases, the National Supreme Court of Justice, which holds the highest degree in the Mexican court system, can resolve these kinds of remedies.

The National Supreme Court of Justice can act as a collegium of 11 justices or can be divided in two chambers formed by five justices each. Usually, the First Chamber concentrates its work on civil and criminal matters and the Second Chamber's work is focused on tax, labour and administrative matters.

The cases addressed by both Supreme Court of Justice Chambers are normally associated with human rights and constitutional issues.

Moreover, the judgments rendered by the federal collegiate courts resolving *amparo* recourses can be challenged by the parties under special circumstances when a relevant point of human rights or constitutional law is analysed and ruled upon, creating a relevant criterion. The remedies challenging judgments of federal collegiate courts are processed before the National Supreme Court of Justice, and their admission is subject to high standard requirements.

Subject matter

The subject matter criteria are based on the specific matter of the dispute such as civil, commercial and family issues. In the principal jurisdictions around the country, both at state and federal levels, normally there are courts specialised in civil matters only.

Territorial jurisdiction

Both state and federal courts are divided according to different territorial criteria. On the federal level, the courts have an important presence throughout the Mexican territory, especially in the most relevant jurisdictions and the capital cities of the states.

At state level, there are several courts generally distributed in accordance to the political divisions of each state.

In Mexico City at state level, there are 73 first instance civil courts and 10 civil courts of appeal.

Size of the claim

At state level, the courts are divided and specialised according to small and large quantity issues.

The Mexican rules of procedure have special provisions for the small quantity cases.

It is important to bear in mind that under state civil procedure law, normally the parties are empowered to follow an oral summary proceeding for small quantity issues.

Regarding the above, due to an amendment made to Mexico's Commerce Code in January 2017, eventually almost all commercial complaints will be processed through oral summary proceedings.

2 Judges and juries

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

Mexico's civil procedural laws do not provide the participation of a jury in civil proceedings; all civil trials are exclusive jurisdiction of civil judges.

Furthermore, the judge has a guiding role in the civil procedure, and he or she can only take into account the arguments and evidence submitted by the parties at the trial to render his or her judgment.

The parties are in charge of preparing the evidence for its submission and to stimulate the development of the proceedings.

Nonetheless, the judge has the power to summon witnesses to testify or to enquire information for fact acknowledgement during the trial.

On the other hand, in certain matters considered as public interest (such as family disputes), the judges have a more active role to safeguard the well-being and the best interests of certain parties (for example, when children are involved in a trial).

Moreover, in class action procedures the judges have an active role regarding the management of the proceedings, the celebration of settlement agreements, and the execution of judgments, among others.

3 Limitation issues

What are the time limits for bringing civil claims?

The Mexican civil and commercial codes provide different statutes of limitation depending on the action.

The most common statute of limitation is 10 years; however, there are exceptions to this general rule; for example, in certain civil liability matters the statute of limitation is two years.

The events in which suspension on time limits may occur are given by law, and it is not possible for the parties to agree on such matter.

4 Pre-action behaviour

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

On a general basis, the parties are not obliged to fulfil any specific actions before bringing an action to court unless they agreed that such actions must have been previously carried out.

However, a party might need to follow certain pre-action procedures before filing a civil action under certain scenarios. For example, in some debt cases, before filing a lawsuit, payment should be required to the debtor through a notary public.

Also, the parties can start summary proceedings at a court to gather evidence before bringing an action through orders to exhibit documents, deposition of witnesses or possible defendant parties, investigations regarding the legal situation of real estates, among others.

If the person towards whom a summary proceeding is directed fails to comply with the requirement performed by the judge, an implicit confession may emerge in favour of the petitioner, which may be used in court against the defendant.

5 Starting proceedings

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 statement of claim before the competent judge, joined by all documents supporting the lawsuit.

Then the judge should render a ruling on the commencement of the proceedings within approximately five days of the receipt of the statement or might request the defendant to clarify the lawsuit before admitting it.

The service of process of the defendant may be performed by a court officer or by means of the publications of edicts in newspapers and official gazettes if the domicile is unknown and the judge has been unable to find out the domicile of the defendant after performing a thorough investigation.

Moreover, the court officer in charge of the service of process of the defendant must observe strict requirements established by the Mexican civil procedure law, such as fully identifying the individual who addresses the service of process and making sure that the address corresponds to the defendant's domicile.

If the service of process does not meet the mentioned requirements, the defendant is entitled to file a motion to try to nullify his or her summons.

In class action proceedings, the judge must qualify the petitioner's legitimate standing in the preliminary stage of the proceedings of the trial before admitting the lawsuit.

6 Timetable

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

In general, Mexican civil procedures consist of five phases:

- service of process;
- conciliatory hearing;
- offering and submission of evidence;
- closing arguments; and
- ruling of the judge.

Once the service of process has been performed, the defendant usually has a 15-working-day period to answer the lawsuit.

In some cases, a conciliatory hearing can be held after the defendant has been given the opportunity to file a writ responding the lawsuit.

At the end of the hearing, in case that the parties do not reach any settlement regarding the claims, the judge will ask the parties to offer evidence usually within a 10-working-day period and will schedule a hearing for the submission of such proofs.

Submission of evidence may take place in several hearings if the particular circumstances of the case require so.

Once the submission of evidence has been accomplished, the court will receive the closing arguments of the parties, generally within a three-working-day period, and thereafter, the judge will render his or her judgment.

On the other hand, regarding oral commercial proceedings, the timetable for a trial is shorter, because, for example, several phases of the trial take place at a single moment.

7 Case management

Can the parties control the procedure and the timetable?

The general rule for civil procedures is to follow the timetable established by law; therefore, normally the parties may not agree or control in any way the rules of the procedure or timetable.

However, due to the fact that the parties are in charge of preparing the evidence for submission and to motivate the development of the proceedings, in some way the parties might have an indirect control of the procedure.

On the other hand, especially regarding commercial matters, the parties are empowered to enter agreements to fix certain rules of procedure and the timetable of the trial. Also, in some commercial litigations, the parties may agree to stop the proceedings for a certain period of time, and in these cases, any party may request the judge to restart the procedure at any time.

8 Evidence - documents

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 duty to preserve evidence pending trial; however, certain particular subjects, such as merchants, are obliged to preserve relevant documents for a period of five to 10 years, depending on the kind of documents.

On the other hand, the judges have the ability to request the parties, or any other person, to exhibit the documents requested by a litigator. In this particular case, if it is a party fails to attend the requirement performed by the judge, an implicit confession may emerge in favour of the petitioner.

In regard to class actions, the judges are empowered to request the defendant to allow a general discovery of evidence.

9 Evidence - privilege

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

Mexico recognises that certain documents are privileged, and as consequence, must be kept undisclosed from the public. Nonetheless, in some cases, the judge is empowered to order the exhibition of such documentation.

In general, all client-lawyer communication is protected from disclosure by professional secrecy although exceptions may apply.

10 Evidence - pretrial

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

No. There is no general duty to exchange written evidence from witnesses and experts between parties prior to trial.

11 Evidence - trial

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

Under Mexican civil procedure rules, all evidence should be offered during a specific stage of the trial.

Nonetheless, in order for documents to be admitted as evidence in a trial, they should be joined to the statement of claim or the answer of the claim. The parties may exhibit documents at a later stage if such documentation was not in their power, or if they did not know about their existence, and as long as the party meets certain particular requirements.

Depositions on behalf of the plaintiff or the defendant and witness evidence are submitted orally.

Finally, expert opinions must be provided in writing. However, in some cases, the judge is empowered to summon the experts to answer questions of the parties orally.

12 Interim remedies**What interim remedies are available?**

Under special circumstances and requirements, in some cases the parties can request interim remedies before and after the trial has begun, normally through summary proceedings.

The most common available interim remedies under Mexican civil procedure law are the seizure of assets and certain restraining orders.

However, some case law empowers judges to be able to adopt other kind of remedies deemed more suitable according to the circumstances of each case, if the petitioner is able to prove that such a special interim remedy is essential to preserve his or her interests.

On the other hand, there are certain summary trials that allow the plaintiff to obtain the attachment of assets without having to fulfil special requirements, such as when the lawsuit is based on a promissory note, a check, or other documents that presume the existence of a debt.

13 Remedies**What substantive remedies are available?**

Generally speaking, damages and losses are compensatory under Mexican civil law; however, recent case law grants judges more power to determine indemnifications taking into consideration human rights criteria.

Moreover, there are certain court precedents providing that punitive damages may be imposed in civil trials regarding pain and suffering situations.

On the other hand, the judge may issue injunctions or annul contracts, depending on the petition filed by the plaintiff.

Interests run according to the legal rate unless the parties have agreed on a specific rate, and interests are usually generated from the day the defendant was legally bound to pay and failed to do so.

14 Enforcement**What means of enforcement are available?**

Regarding the orders given by the judge during the trial, they are immediately enforceable. If voluntary compliance does not occur, the judge is empowered to apply enforceable measures, such as fines and arrests.

On the other hand, the court's judgment is only enforceable until it has acquired the authority of a final decision and *res judicata*. Depending on the needs of the case, a final judgment may be enforced, for example, through the seizure of assets, auctions to sell assets property of the losing party, or by means of an eviction, among others.

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

Documents exhibited in a trial and pieces of the file are not public unless permission of the parties is acquired.

On the other hand, rulings rendered by the judges are public; however, relevant information regarding privacy of the parties is generally removed.

Court hearings are public unless particular circumstances of the case require that they are private.

16 Costs**Does the court have power to order costs?**

According to Mexican constitutional rules, the civil procedure is governed by the principle of legal aid, which means that the court is unable to recover expenses generated by the trial from the parties.

However, the judge has the power to order the payment of legal costs. Generally speaking, such costs are imposed on the losing party.

If payment of legal costs is imposed, they are assessed by a summary proceeding.

17 Funding arrangements**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?**

Mexican law does not regulate these kinds of agreements, but neither does it prohibit them. Nonetheless, rules of professional ethics in Mexico recommend lawyers to avoid 'no win, no fee' agreements.

Normally there are no limitations on third-party funding or risk-sharing agreements.

In any case, these kinds of agreements must be analysed case by case in order to determine if they are legally valid under Mexican law.

18 Insurance**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, and the most common cases for this are civil liability lawsuits and the application of a title insurance regarding real estate litigation.

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

Class actions may be brought to court when a group of individuals suffer damages from a common cause and in cases where common rights are involved. Class actions are basically allowed regarding consumers' rights and environmental issues and are regulated by the Federal Civil Rules of Procedure and the Federal Law of Environmental Liability.

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

First instance judgments may be appealed unless the size of the lawsuit is small; in such cases the civil rules of procedure do not allow an appeal.

An appeal must be presented generally within nine to 12 working days.

The judgment from the second instance may be appealed through a constitutional remedy (*amparo*) filed before a federal collegiate court.

As stated, all rulings issued by federal and state second instance courts can be challenged on human rights and constitutional grounds through an *amparo*, which regarding civil matters can be solely focused on issues of legality.

If an appeal remedy is not available for the parties because of the size of the claim, the parties can still file an *amparo* recourse.

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

Whether reciprocal agreements apply or not, judgments from foreign courts may be enforceable in Mexico through a summary proceeding in which the court basically will review whether the trial in which the judgment was issued abided the rules of due process, such as if the service of process of the defendant was properly conducted, the judgment acquired the authority of a final decision and *res judicata*, etc.

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

Yes, these procedures are available in Mexico through certain particular motions; therefore, Mexican judges can help a party obtain oral or documentary evidence for use in foreign jurisdictions.

In addition, in order to obtain oral or documentary evidence for use in civil proceedings in other jurisdictions, the Hague Convention on

Update and trends

Through a constitutional reform published in February 2017, the Mexican Congress has been empowered to issue a federal law providing new general rules regarding ADR procedures.

Accordingly, the guidelines for ADR will soon be established at a federal level and developed and implemented at a state level, which will most likely lead to amendments to local legislation regarding ADR.

the Taking Evidence Abroad in Civil or Commercial Matters, and the American Convention on the Taking Evidence Abroad, may also apply.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Mexican arbitration rules, which are included in the Federal Commerce Code, are based on the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be incorporated in a contract or a separate document. The arbitration clause must be in writing and shall state, at least, the following:

- applicable law;
- rules of arbitration;
- number of arbitrators;
- the place in which arbitration is going to take place; and
- language in which the arbitration procedure is going to be carried out.

25 Choice of 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?

The parties may agree to appoint the arbitrators themselves or by delegating the appointment to a third party. If the parties do not state the number of arbitrators, there will be only one arbitrator.

If the parties do not state how the arbitrators will be appointed, they may request a judge to appoint them.

Also, the parties have the right to challenge an arbitrator appointment on the same grounds as any judge designation in accordance with the Mexican civil rules of procedure.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

At first, it will depend on what the parties agreed on the arbitration clause that gives place to the arbitration.

On the other hand, the Mercantile Rules of Procedure provide that parties can designate the arbitrators no matter their nationality.

27 Arbitral procedure

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

In general, Mexican law does not impose any substantive requirements for the arbitral procedure. Parties often agree that the arbitral procedure is governed by any of the rules of international or domestic chambers of arbitration.

However, Mexican law states that in every arbitration process, the parties must be treated with equality and that due process rules must be abided by.

28 Court intervention

On what grounds can the court intervene during an arbitration?

On general basis, Mexican courts can intervene in arbitral proceedings when some of the following circumstances occur:

- to designate arbitrators;
- to decide a motion challenging the appointment of an arbitrator;
- to assist arbitrators to obtain evidence; and
- to grant interim relief to the parties.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Under the Mexican rules of procedure, if an interim relief is to be executed in Mexican territory in connection with an arbitration, such measures have to be granted or validated by a Mexican judge.

30 Award

When and in what form must the award be delivered?

Mexican procedural rules do not state a time limit for the arbitrators to issue their award. For that matter, it is common for the parties to agree that the award and the time limit, in which it is going to be delivered, is governed by any of the rules of the international or domestic chambers of arbitration.

In general terms, arbitrators are obliged to deliver their award according to the arbitration agreement and the usage of the trade applicable to the transaction.

31 Appeal

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

Generally speaking, there is no appeal remedy against arbitral awards. However, the parties may request a judge to review the legality of the award if one of the following circumstances occurs:

- non-existence or nullity of the arbitral agreement;
- the arbitral tribunal was not duly integrated; or
- one of the parties was not properly notified of the arbitral procedure.

Also, under Mexican law there are exceptions that prohibit the parties from submitting to arbitration certain disputes, such as family matters. In a case like this, the award could be nullified on the premise that it would be contrary to public interest.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

All awards must be enforced through a summary trial in which the court will basically analyse whether the arbitral procedure in which the award was issued abided by the rules of due process.

Also, the judge may review in this summary trial the validity of the arbitration agreement and any other arguments that the defendant party raises.

33 Costs

Can a successful party recover its costs?

Generally speaking, the possibility of a party to recover the costs generated by an arbitration process is governed by the rules of arbitration agreed on by the parties.

Nonetheless, the Mexican Commercial Code states that in absence of such an agreement the costs will be imposed to the losing party.

In any case, the arbitrators are empowered to impose the payment of the costs based on the facts and circumstances of each case.

Alternative dispute resolution**34 Types of ADR**

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

The most common ADR processes used in Mexico are mediation and conciliation.

In some civil procedures, there is a stage of the trial in which the court invites the parties to conciliate.

On the other hand, mediation has gained a good reputation and popularity, to the point where in Mexico City there is a specialised Mediation Centre sponsored by the Supreme Court of Justice of Mexico City.

35 Requirements for ADR

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 general requirement for the parties to consider alternative dispute resolution before or during trial.

On the other hand, several administrative rules state that the judges must invite the parties to participate in these kinds of proceedings.

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

Due to a couple of constitutional amendments made in June 2011, all Mexican authorities are obliged to defend and preserve human rights.

The mentioned amendment led to a new case law doctrine that authorises all judges to analyse human right issues, which with regard to civil procedures means that judges can review the validity of the applicable laws in certain cases and even reject the observance of a law if a judge considers that such a law is in violation of human rights.

Moreover, the judge can perform interpretations of civil laws and civil rules of procedure taking into account the criteria based on human rights.

Santamarina
+ Steta

Fernando Del Castillo
Carlos Olvera
Roberto Fernández del Valle

fcastillo@s-s.mx
colvera@s-s.mx
rfernandez@s-s.mx

Campos Eliseos 345, Floors 2, 3 and 11
Chapultepec Polanco 11560
Mexico

Tel: +52 55 5279 5400
www.s-s.mx

Netherlands

Jeroen Stal, Niek Peters and Maarten Drop

Cleber NV

Litigation

1 Court system

What is the structure of the civil court system?

The Dutch civil court system provides provides that civil matters may be heard in three instances: district courts and courts of appeal rule on the facts, while the Supreme Court reviews judgments, but only with regard to matters of law.

There are 10 district courts. The district courts have general jurisdiction in all civil matters. Each district court has a cantonal division that has jurisdiction over all civil claims up to €25,000 and civil matters regarding employment contracts, commercial agency agreements, rental agreements and lease purchase agreements. Representation by an advocate is not mandatory in the cantonal division, which sits with a single judge only.

All other civil matters, including all commercial claims over €25,000, are heard by the civil division, which sits with a single judge or a panel of three judges, as the matter may require in the view of the district court. In these cases representation by an advocate is mandatory.

Additionally – and this is one of the best features of the Dutch civil court system – each district court has a chamber consisting of experienced single judges sitting in interim relief proceedings that are held at short notice, at a maximum within six weeks, but if necessary on the very same day. The interim relief judge will render an order within two weeks or much sooner if necessary. Although only interim relief can be ordered, monetary claims may be awarded without prejudice to the merits, which makes the interim relief very effective. Parties often accept the order without recourse to subsequent proceedings on the merits.

Barring civil claims for less than €1,750, decisions of the district court may be appealed against and brought before the court of appeal; there are four courts of appeal. All appellate cases are heard by three justices.

The Supreme Court reviews decisions of lower courts, but only with regard to matters of law as it is bound by the facts established by the lower courts. At the discretion of the Supreme Court cases will be heard by three or five justices. The decision will be taken by the appointed justices but only after plenary deliberation.

In addition, there are some specialised courts and chambers. The most well known is the Enterprise Chamber with the Court of Appeal in Amsterdam, vested with exclusive jurisdiction in all disputes concerning the corporate governance of Dutch legal entities and issues regarding their financial statements. It hears all cases sitting with three professional justices and two lay justices, who are specialists in the field of either finance, audit or management.

In the near future the Netherlands Commercial Court (NCC) will be established. The NCC will consist of a specialised chamber within the Amsterdam District Court, and, on appeal, with the Amsterdam Court of Appeal. Proceedings before the NCC will be heard and conducted in English and decisions will be rendered in English. A substantive link between the dispute and the Netherlands will not be required. The NCC only has jurisdiction on a voluntarily basis.

The Amsterdam Court of Appeal has exclusive jurisdiction to review collective settlements under the Collective Settlement of Mass Claims Act. The collective settlements do not necessarily need to have

tangible Dutch elements. An approved collective settlement will automatically be recognised within the EU.

2 Judges and juries

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

The Dutch court system provides for professional, appointed judges. Judges are civil servants, but to safeguard independence from the executive, they are appointed for life, until mandatory retirement at the age of 70. Over 50 per cent of the judges are now female. The number of Dutch citizens with a non-western European cultural background is not yet reflected in the bench.

A fundamental principle of the Dutch Code of Civil Procedure (DCCP) is that judges have a merely passive role in court proceedings, especially with respect to fact-finding and establishing the boundaries of the dispute and the legal debate, which fall within party autonomy. Recent decades have seen a tendency towards judges taking a more active role.

3 Limitation issues

What are the time limits for bringing civil claims?

The default rule is that civil claims become time-barred after 20 years, but there are important exceptions. Most civil claims will become statute-barred after a period of five years, the inception of which will depend on the nature of the claim concerned. A claim for the performance under a contract, especially payment, must be pursued within five years after the performance fell due; a claim for damages must be pursued within five years after the aggrieved party becomes aware of both the damage and the liable person. A claim for the rescission of a contract based on non-performance must be made within five years after the creditor's becoming aware of the default.

These time limits may be extended by a written notice reserving the right to pursue the claim, or by the commencement of legal proceedings. Once the time limit has been extended, a new full period of equal duration will start running. Extension of time limitations may be repeated. Courts may only entertain a plea by a defendant and may not ex officio rule that a claim is time-barred.

4 Pre-action behaviour

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

There is no requirement for a 'letter before action', for example, but rules of conduct of Dutch advocates may imply that civil proceedings may not be commenced without prior notice.

For strategic purposes a pretrial witness hearing may be conducted and/or a pretrial expert report may be obtained beforehand, as evidence in later proceedings. Dutch law does not provide for standard pre-action disclosure of documents.

To safeguard successful enforcement of a subsequent court decision a creditor may apply for an order authorising a pre-judgment attachment on property of the debtor. In certain instances documents or other evidence can also be made subject to an attachment so as to ensure that evidence is preserved. Any such order will be obtained ex parte: the interim relief judge will grant the order within one or two days

provided the alleged claim is plausible and the formalities have been met. The same court will quickly arrange for a hearing if the defendant applies for the lifting of the attachment but a full review of the claim will only take place in proceedings on the merits. If in the latter proceedings the creditor's claim is subsequently rejected, the attachor will be liable for damages incurred by the defendant.

5 Starting proceedings

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?

Claims of an adversarial nature must be commenced with the service by a bailiff of a writ of summons upon the defendant. Such proceedings are considered pending as of the date of the service, notwithstanding the later introduction of the case with the court. In the writ of summons the defendant is summoned to appear in court, but the defendant or his or her counsel will only need to enter appearance electronically.

The writ of summons must set forth the relief sought and the grounds. The plaintiff must mention the known defences of the defendant and must present all relevant facts and available evidence.

Civil matters that will have a direct impact on the legal status of third parties are commenced by the filing with the court of an application for a court order. The structure of the petition is essentially equal to that of a writ of summons. The court will inform all interested parties, as identified by the petitioner and set a schedule for the filing of responses. If proceedings are commenced with the wrong document, the court will afford a possibility for rectification.

Starting on 1 September 2017 and initially limited to two out of the 10 district courts, the writ of summons and the petition will be replaced by one single document called 'case introduction', which may be filed in electronic form only, as will all other submissions and communications during the proceedings. The court will inform the defendant or the respondent about the commencement of the proceedings. Service of the case introduction by a bailiff remains possible, either before or after its filing with the court.

Courts struggle with their caseloads, productivity requirements and budgetary restraints. Capacity issues do not impact the listing of disputes, but do affect the time period it takes for the courts to schedule hearings and to render decisions. However, except for one or two appellate courts where delays are more problematic, delays due to capacity issues are limited to a few months.

6 Timetable

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

Under the DCCP and regulations by the Dutch judiciary the exchange of submissions in an adversarial trial will normally take three to six months. A hearing will be then scheduled at which the parties will argue the case and discuss such matters as further evidence, the continuation of the case and settlement possibilities. The court will either render a decision or allow for reply and rejoinder. Deviations occur in the event of, for example, motions for lack of jurisdiction, joinder, intervention, impleader or if witness or expert evidence is ordered.

In some 60 per cent of all civil matters the first instance trial before the district court is decided in less than 12 months; approximately 85 per cent of all commercial claims are decided within 24 months.

Between 10 and 15 per cent of all first instance judgments involving commercial claims are appealed. Less than 50 per cent of these appeals are decided within 12 months. Approximately 80 per cent of all appeals are decided within 24 months. Cases before the Supreme Court last on average 24 months.

7 Case management

Can the parties control the procedure and the timetable?

The parties can control the procedure to some extent, in that they may agree on deviating from established time periods or the normal order of proceedings. Although increasingly common in high-profile cases, this remains exceptional and subject to prior discussion with the court. Regular deadlines for submissions are applied strictly; any second extension will be granted only in the event of force majeure or compelling reasons.

8 Evidence – documents

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 under an obligation to truthfully submit all relevant facts and evidence supporting or disqualifying their position. Such obligation is, however, not comparable to disclosure obligations that exist in common law jurisdictions.

Upon request or at its own motion the court may order a party to submit (further) documents that are in the possession of such party. Such party may refuse to provide such documents or evidence on account of compelling reasons, for which a high threshold applies. There exists no general obligation to preserve documents or other evidence pending trial. The submission of evidence remains the responsibility of each party; discovery by the opposing party is not available. There is no notion of 'contempt of court', but the court may draw negative inferences in the event of non-compliance with the obligation to fully and truthfully submit relevant facts, in the event of destruction of evidence or if evidence is withheld. The burden of proof of evidence having been available earlier will generally lie with the party advancing such position. A viable alternative for expensive discovery is an ex parte order authorising a pretrial attachment on documents or other evidence, a copy of which will be made and kept by a court appointed bailiff.

9 Evidence – privilege

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

Under Dutch law, privilege lies with a lawyer rather than with the client. Privilege implies that the advocate cannot be compelled to share information or documents obtained from his or her client with any (judicial) authority. Privilege does not extend to advice by an in-house lawyer, unless such lawyer is an advocate. Privilege does thus not attach to certain documents but to the question of whether an advocate has rendered advice in such capacity. The party itself will be able to invoke the confidentiality of advice as one of the 'compelling reasons' that bar disclosure as set forth in question 8.

10 Evidence – pretrial

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

The parties will generally not exchange written evidence from witnesses and experts prior to trial. Exceptions apply in certain industries such as insurance or certain maritime disputes.

11 Evidence – trial

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

The emphasis in civil proceedings is on written submissions. Parties must submit the available relevant evidence in their first possible submission. Most cases, including high-profile disputes, are decided based on written submissions only. The parties may submit reports by party-appointed experts. Witness statements are becoming more common but do not have the same evidentiary value as the transcript of a court hearing where witnesses are heard under oath. Such hearing will take place only following an order by the court that a party or both parties bears the onus of proof as to certain factual matters and that (further) evidence is to be submitted. Especially in disputes involving technical aspects the court may appoint an expert; it is at the discretion of the court whether an oral hearing regarding the expert opinion ordered. In any event the parties must be afforded an opportunity to comment on such evidence. Often this will be in a written brief only.

12 Interim remedies

What interim remedies are available?

Many different interim remedies exist. Parties may seek an order for the ex parte pre-judgment conservatory attachments discussed in question 4, a preliminary witness hearing, the production of documents, the posting of a bond to cover the liquidated costs and disbursements of the

action. Interim remedies may be sought both prior to the commencement of proceedings on the merits and as provisional relief while proceedings on the merits are pending. Several interim remedies, notably the pre-judgment conservatory attachments discussed in question 4 or the production of documents, can be obtained in support of any foreign proceeding.

13 Remedies

What substantive remedies are available?

In addition to declaratory judgments a party may seek specific performance, rescission or annulment of a contract, in both cases together with damages, or damages alone. In certain cases involving the performance of a legal act the court's decision may substitute the performance by the defaulting party. Damages must generally be proven and do not include punitive damages. Court decisions other than money judgments can be reinforced with penalties in the event of non-compliance. Interest at a contractual or statutory rate must be claimed but can be awarded as of the date the payment obligation arose.

14 Enforcement

What means of enforcement are available?

A judgment may be enforced immediately after service of the bailiff's copy thereof. It is not necessary for the judgment to be final and conclusive. However, once the losing party lodges an appeal against the decision, its enforceability is suspended until the conclusion of the appellate instance, that is unless the appealed judgment has been or is declared enforceable notwithstanding an appeal. The prevailing party should realise that such enforcement will trigger liability for damages in the event the decision is quashed by an appellate court.

In the event of non-compliance with the judgment, the prevailing party may proceed to levying executory attachments on the debtor's assets and may claim penalties, if the decision so provides.

15 Public access

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

Court hearings are public, save for a number of statutory exceptions. Submissions by the parties in either an adversarial proceeding or in proceedings introduced by a petition are not public. Court decisions in adversarial proceedings are public, but will be anonymised as regards the names of private individuals mentioned therein. Many judgments are made available online at the courts' website, www.rechtspraak.nl.

16 Costs

Does the court have power to order costs?

As a rule, the court will order the losing party to pay the liquidated costs of the prevailing party consisting of the court fees and legal costs; the latter consist of fixed amounts that do not bear any relationship with the real cost incurred by the litigant. Court fees are very moderate in the Netherlands compared to other western European or common law jurisdictions. Although court fees for proceedings before the NCC will be related to the amount of the claim, these will be still modest by international standards.

Security for costs by the defendant must be claimed early on in the proceedings and is available only if the claimant resides in a jurisdiction that does not have an enforcement treaty with the Netherlands.

17 Funding arrangements

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 of professional conduct disallow Dutch advocates from entering into conditional or contingency fee arrangements, except in case of personal injury claims where these are currently allowed subject to a number of conditions. Provided that at least the actual costs

are covered, litigation lawyers may, however, conclude fee arrangements at a reduced hourly rate that is subject to a subsequent increase in the event of victory or successful settlement; the increase may consist of a percentage of the amount awarded. In addition, advocates may agree to provide services on the basis of commonly accepted debt collection fee rates.

Third-party litigation funding is allowed. It is common in mass claims, which are often litigated or settled by Dutch foundations as special claims vehicles. Third-party litigation funding is not very widespread with regard to individual claims, but the market seems to be emerging, both in litigation before the courts and in arbitration. There are, in principle, no limits to the fees and the interest third-party funders may charge, other than the general limits of enforceability of contracts and the powers of courts to mitigate the effect of or amend contract clauses that should qualify as wholly unreasonable. These powers are rarely exercised in practice.

18 Insurance

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

There are several insurance companies that offer insurance policies for legal assistance. These policies cover a party's own legal costs only and generally subject to a stated maximum.

19 Class action

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

Since 2005 a law on collective settlement has offered the possibility of efficiently settling 'mass claims'.

A foundation or an association may represent the interests of undisclosed claimants in bringing liability claims based on tort. Any such aggrieved party may seek a declaratory judgment regarding the defendant's liability. However, the object of such litigation may not include monetary compensation; once the liability of the defendant has been ascertained, separate litigation for the determination of any monetary liability toward individual plaintiffs is necessary, that is if the matter is not settled at that stage, as is often the case.

20 Appeal

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

The general rule is that a decision concluding the relevant instance may always be appealed. Interim and interlocutory decisions may not be appealed other than together with the decision that concludes the instance, unless leave for earlier appeal is expressly granted. As discussed in question 1, decisions of courts of appeal can be appealed before the Supreme Court that deals with issues of law only.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

With respect to judgments originating within the EU, Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) allows for an automatic recognition and an easy enforcement of judgments.

Absent a multilateral or bilateral treaty on enforcement, a foreign judgment will in principle not be recognised and enforced. Dutch case law provides, however, that a full retrial will not be necessary, provided that the foreign court properly had jurisdiction, that the procedure complied with principles of due process, and that the decision does not contravene Dutch public policy. If these conditions are met, the Dutch court will render a decision that reproduces to the extent possible the effect of the dispositive of the foreign decision.

22 Foreign proceedings

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

Within the EU, Regulation No. 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters provides that the foreign court wishing to obtain evidence, witness testimony, documents or the investigation of other objects may direct its request directly to the court within the Netherlands that has jurisdiction over the witness or in respect of the location where the documents or objects are to be found.

Assistance from the Dutch courts may also be sought pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence. Bilateral treaties can also provide access to the Netherlands courts' assistance.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Netherlands has not adopted the UNCITRAL Model Law (on International Commercial Arbitration), but Dutch law on arbitration does show similarities. This law has been enacted in book 4 of the DCCP and is commonly referred to as the Netherlands Arbitration Act. As of 1 January 2015 a new act came into force, replacing the 1986 act. Interestingly, the Netherlands Antilles and Aruba, territories that make up autonomous regions within the Kingdom of the Netherlands, have in fact adopted the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The DCCP does not provide for any specific requirements as to the form of an arbitration agreement. It thus is possible for parties to conclude an oral arbitration agreement.

If the existence of a valid arbitration agreement is disputed, proof of the agreement's existence must be provided in the form of documentary evidence (article 1021 DCCP). No other type of evidence is admissible.

If the existence of a valid arbitration agreement is not disputed, the tribunal must assume jurisdiction, unless the matter is not capable of settlement by arbitration.

25 Choice of 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 parties to an arbitration have failed to agree beforehand on the number of arbitrators to be appointed, the DCCP allows them to attempt to reach a consensus. If the parties cannot agree on the number, any party may approach the relevant district court to have the number of arbitrators determined.

In the absence of an agreement by the parties on the method of appointment, the parties shall jointly appoint the arbitrators. The appointment must take place within three months after commencement of the proceedings or within three months after the date on which the number of arbitrators has been determined by the court. The parties may extend or shorten this term. In the event the arbitrator or arbitrators are not appointed within this time frame, the most diligent party may request the competent district court to appoint one or more arbitrators.

If a party becomes aware of circumstances that give reason to question an arbitrator's impartiality or independence, it may lodge a challenge to the arbitrator's continued involvement in the arbitration. A party may only challenge an arbitrator appointed by that party for reasons of which that party became aware after the appointment was made. Arbitrators have a duty to disclose information that may give rise to a challenge of their impartiality and independence prior to their appointment and during the arbitration. The competent district court will decide on the challenge unless the parties have agreed on another

Update and trends

Collective redress in class actions is currently not possible but a draft act was submitted to the Dutch parliament in November 2016 that will allow collective redress in group actions as well. The legislative process is expected to continue upon the formation of a new government later this year.

third party to that effect, for instance, by agreeing to applicability of the (institutional) arbitration rules.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Under Dutch law every person that is legally competent can act as arbitrator. As the Netherlands is a relevant jurisdiction for international arbitration, a pool consisting of advocates, judges, academics and technical specialists serve as arbitrators.

27 Arbitral procedure

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

The DCCP supports the rights of the parties to agree on their own set of procedural rules for arbitrations taking place within the Netherlands. Basic norms of fairness, due process and the equal treatment of the parties must always be respected. As a general rule the parties are allowed to file a statement of claim and statement of defence. A tribunal shall, at the request of one of the parties or at its own motion, give the parties the opportunity to present their case orally at a hearing. Arbitrators are not bound by any procedural or substantive rule of evidence and shall be free to determine the rules of evidence, the admissibility of evidence and assessment of the evidence and the burden of proof, unless the parties have agreed otherwise.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Dutch courts may generally not intervene in an arbitral proceeding if the parties have validly agreed to submit the dispute to arbitration. In certain limited circumstances, the District Court of Amsterdam is empowered to order the consolidation of separate arbitrations, while through the intervention of the District Court of The Hague a tribunal may make a request as referred to in article 3 of the European Convention on Information of Foreign Law of 7 June 1968. In addition, a district court in the Netherlands may, for instance, have a supporting role in determining the number of arbitrators of the tribunal, in appointing arbitrators or in ruling on challenges. Furthermore, the district court may also be requested to allow the examination of a witness who refuses to either appear in the arbitration or to make a statement. Dutch courts may also grant preliminary or injunctive relief to parties involved in arbitrations, also when the existence of arbitration agreement is invoked, if the requested relief cannot be obtained in arbitration or not in a timely fashion.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Parties have the ability to empower a tribunal to grant an order or award in summary proceedings. A tribunal in proceedings on the merits can also grant interim relief. It is, however, still possible for a party to initiate summary proceedings before the interim relief judge if the required relief cannot be obtained in arbitration or not in a similarly timely fashion.

30 Award

When and in what form must the award be delivered?

The DCCP contemplates different types of awards that may be rendered by a tribunal. A tribunal may render a final award, a partial final

award, an interim award, an award correcting an error in a previous award, an additional award if the tribunal failed to decide a claim in the final award, and a new (final) award after the case has been remitted.

An award must meet several formal requirements. Unless otherwise agreed upon, it must be based on a majority decision of the tribunal. An award must be in writing and signed by the arbitrators. The names and places of residence of the arbitrators must be mentioned, as well as the names and places of residence of all the parties involved. An award must also state the date on which it is made as well as the place thereof. Last but not least the arbitral award must have a reasoned decision, although the parties may waive this right under article 1057(5) DCCP. There are no statutory time limits within which a final award must be rendered.

31 Appeal

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

The Netherlands Arbitration Act explicitly allows for the parties to agree on arbitral appeal proceedings. An award cannot, however, be appealed in the courts. The DCCP allows parties to apply to the court seeking the setting aside or revocation of an award. Such proceedings must be commenced before the court of appeals in whose judicial district the place of arbitration is located. Thereafter appeal may be lodged with the Supreme Court, unless the parties have validly waived that right. A natural person not acting in the conduct of a trade or business cannot waive this right.

An award can be set aside only on one of the following grounds set forth in article 1065 DCCP: (i) the absence of a valid arbitration agreement, (ii) the constitution of an arbitral tribunal in violation of the applicable rules, (iii) breach by the tribunal of its mandate, (iv) failure to sign the award or provide a reasoned basis for the award, or (v) the violation of public policy.

An award may be revoked if it was rendered on fraudulent grounds. Also, a party may seek to revoke an award if it can demonstrate that the documentary evidence upon which the award is based, either partially or wholly, is later on found to have been forged, or if documents come to light after the rendering of the award that would have had an influence on the decision of the tribunal, and such documents were withheld due to acts of the opposing party.

The court of appeal may remit the case to the tribunal to reverse a ground for the setting aside or the revocation. Remission can also result in a substantially different decision. Remission is, however, not possible if it should be found that a valid arbitration agreement is lacking.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Parties seeking to enforce arbitral awards must first obtain an exequatur from the competent district court. The DCCP distinguishes between domestic awards (articles 1062–1063 DCCP), awards that are rendered in countries that are party to the New York Convention or that are party

to other treaties with the Netherlands (article 1075 DCCP) and awards that are rendered in countries that are not party to a relevant treaty with the Netherlands (article 1076 DCCP). Exequaturs for domestic awards will generally be rendered after ex parte proceedings; no appeal is in principle possible if an exequatur is granted. Leave for enforcement for foreign awards will, however, only be granted after proceedings in which the party against whom leave for enforcement is sought has been given the possibility to present its arguments against the requested exequatur. In practice, the grounds upon which a court may refuse enforcement are largely the same for awards rendered outside the ambit of the New York Convention as those where no treaty is applicable, but there are differences. If the New York Convention is applied and an exequatur is granted, the party against whom an exequatur was granted may in principle not appeal. Appeal is, however, possible for the party whose exequatur application was denied.

33 Costs

Can a successful party recover its costs?

There is no express provision in the Netherlands Arbitration Act concerning the recovery of the costs of the arbitral proceedings. The tribunal is free to award a party its costs unless the parties have agreed otherwise.

Alternative dispute resolution

34 Types of ADR

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

Mediation and adjudication (expert determination or binding advice proceedings) are popular ADR proceedings and have surpassed all other ADR in the Netherlands.

35 Requirements for ADR

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 legal requirement to attempt ADR before or during proceedings. However, judges sometimes actively encourage parties to try mediation. Many parties agree to mediation or other ADR procedures in their contracts. However, a mediation or conciliation clause in a contract does not prevent the parties from going to court even if mediation or conciliation has not been tried at all. If parties have agreed on binding advice, the court will, however, refuse to hear the case on account of inadmissibility if such agreement is invoked in a timely manner.

CLEBER

advocaten

Jeroen Stal
Niek Peters
Maarten Drop

stal@cleber.nl
peters@cleber.nl
drop@cleber.nl

Herengracht 450
1017 CA Amsterdam
Netherlands

Tel: +31 20 305 8888
Fax: +31 20 305 8889
www.cleber.nl

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

The World Justice Project ranks the Netherlands first on rule of law in civil matters (https://worldjusticeproject.org/sites/default/files/documents/ROLIndex_2016_Netherlands_eng%20%281%29.pdf). In spite of budgetary restraints affecting the Dutch judiciary as a whole, decisions rendered in international landmark cases such as the *Yukos* affair show that the Dutch courts are not afraid of doing justice in politically sensitive cases. This and the imminent introduction of the NCC are viewed as increasing the attractiveness of the country as a forum for international dispute resolution in high-profile cases.

Nigeria

Babajide O Ogundipe and Lateef O Akangbe
Sofunde, Osakwe, Ogundipe & Belgore

Litigation

1 Court system

What is the structure of the civil court system?

Nigeria is a federal republic consisting of 36 states and a Federal Capital Territory. Courts are organised at state, territory and federal levels. At state level, there are two tiers of civil courts. The lower tier consists of magistrates' and customary courts. Appeals from these courts go to the High Court of the state or territory, which is the upper tier. The lower courts are, for these purposes, of very little importance. Decisions of state High Courts and of the High Court of the Federal Capital Territory can be appealed to a federal court of appeal, and from there to a federal Supreme Court, which is the final appellate court.

In addition to state High Courts, there is a Federal High Court. The jurisdiction of all the High Courts is set out in the Constitution of the Federal Republic, with the Federal High Court possessing exclusive jurisdiction in certain areas, such as admiralty, aviation, taxation, revenue, trademarks, patent rights and corporate matters. State High Courts have unlimited jurisdiction over all other matters in respect of which the Federal High Court does not have exclusive jurisdiction. In Lagos, the High Court is divided into five geographical judicial divisions, and into six subdivisions according to subject matter. There is no maximum number of judges in the High Court, and there are presently 53 judges in the Lagos State High Court.

The Constitution was amended a few years ago to elevate the Nigerian Industrial Court to the status of a superior court of record and, at the same time to limit rights of appeal from decisions of that court. While appeals from final decisions of High Courts are a matter of right, and with leave from interlocutory decisions where the ground of appeal is not of law alone, appeals from the decisions of the National Industrial Court to the Court of Appeal will only be a matter of right if they involve questions of fundamental rights. Appeals on other subject matters shall only be by leave, provided such an appeal is prescribed by an act of the National Assembly. Further appeals from the Court of Appeal to the Supreme Court on all decisions may be made where the grounds of appeal are grounds of law. In all other circumstances, appeals require the leave of the lower court. Where leave is denied, a further application for leave to appeal may be made to the appellate court.

Apart from the superior courts of record expressly created by the Constitution of the Federal Republic of Nigeria, 1999, the National Assembly or the House of Assembly of the State are also empowered to create specialist courts, with limited jurisdiction over specific subject matters. Some of these special courts are the Investment and Securities Tribunal (IST) for the purpose of adjudicating over capital market issues, and the Tax Appeal Tribunal (TAT) for the purpose of adjudicating on all tax disputes arising from operations of the various tax laws. The House of Assembly of Lagos State also created a fast-track court to entertain claims in excess of 100 million naira.

2 Judges and juries

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

In Nigeria, which is a common law jurisdiction, civil proceedings operate on the adversarial model. Parties to civil actions are required to present all the evidence and arguments in support of their cases before the court. The role of the judge in civil proceedings is to control the

proceedings as well as to act as the arbiter of issues of law and fact. While the judge is empowered to ask questions of witnesses and counsel, the judge ought not to take any inquisitorial or investigative role in civil proceedings. There are no jury trials in Nigeria, be it in civil or criminal proceedings.

The appointment of the Chief Justice of Nigeria, other Supreme Court Justices, the President of the Court of Appeal, and the Chief Justice of the Federal High Court is made by the President on the recommendation of the National Judicial Council, subject to confirmation of the Senate. On the other hand, the Justice of the Court of Appeal and other Federal High Court Justices are appointed by the President on the recommendation of the National Judicial Council, without the requirement of the Senate's confirmation. As for the Justices of State High Courts, they are to be appointed by the Governor of each state on the recommendation of the National Judicial Council. However, the appointment of the Chief Justices of each state shall be subjected to the confirmation of the House of Assembly of the State.

Appointments to the federal bench are made based on the federal character principle, as enshrined in the Constitution. The principle ensures that no tribe and region of the country is left out in the appointment. Aside from the federal character, there is no specific provision or written policy that encourages a gender-diversified bench. However, the Constitution strictly prohibits discrimination against any citizen on the basis of sex, religion, political opinion, place of origin or ethnic group.

3 Limitation issues

What are the time limits for bringing civil claims?

There are time limits for bringing civil claims. These limits are set out by the statutes of limitation of each state and vary according to the subject matter of the claim. Most limitation periods are between three months and six years (12 years for claims for land) from the date the cause of action arose or ought to have been discovered, and may be waived either expressly or by conduct.

4 Pre-action behaviour

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

Parties are required, in most states, to complete some pre-action protocols or steps in advance of instituting action in civil cases, and to provide evidence that this has been done as part of the process of commencing actions. This normally requires notification of the claim and an invitation to the adverse party to settle the claim so as to avoid the action. Such notices will, in some jurisdictions, require that the availability of some ADR procedures be mentioned in the notice. In other instances, primarily in relation to actions against certain government agencies and officials, pre-action notices may be required. For instance, some government agencies such as the Asset Management Corporation of Nigeria (AMCON), and several others, require a 30-day notice in writing before an action can be brought against them by any individual.

5 Starting proceedings

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 way of originating processes issued and served by the courts. There are various types of originating process. These include writs of summons, originating summonses, originating motions and petitions. In Lagos, most substantive actions must be commenced by writ of summons. This must be accompanied by a statement of the claim, a list of witnesses and the written statements of the witnesses. In Lagos, the writ of summons is to be served within six months from the date of issuance, or, if renewed, within three months from the date of the last renewal. A number of other state jurisdictions have now adopted this procedure, which was first introduced in Lagos State.

Courts (especially those in highly commercial cities such as Lagos and Abuja) do experience capacity issues, which substantially affect their ability to attend to cases in a timely manner. However, some jurisdictions have invested heavily in various alternative dispute resolution mechanisms, in order to relieve the courts of their congested caseload. In Lagos State, the Multi-Door Courthouse was created to encourage out-of-court settlement. Courts are enjoined to refer parties to the Multi-Door Courthouse in order to have disputes resolved out of court. Various courts have also reviewed their procedural rules and practice procedures for the purpose of encouraging resolution of disputes through other alternative dispute resolution mechanisms. For instance, the High Court of Lagos State (Civil Procedure) Rules 2014 makes it mandatory for parties to have taken steps to have their disputes resolved amicably prior to taking out a writ of summons and evidence of such steps must be included in the originating processes, otherwise, the action shall be dismissed as being null.

6 Timetable

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

The rules and procedural steps in civil claims throughout Nigeria are now more or less the same, with most jurisdictions having adopted, to varying extents, the procedural rules first introduced in Lagos. Below is a summary of the steps to be taken in a civil action commenced in the Lagos State High Court:

- the claimant prepares a statement claim together with a list of documentary evidence, list of witnesses and their sworn written statements;
- the defendant files and serves a statement of defence together with a list of documentary evidence, list of witnesses and their sworn written statements within 42 days of service of the statement of claim;
- the claimant serves a reply to the statement of defence (optional) within 14 days;
- after issues have been joined and pleadings have been settled, there is a pretrial conference where the issues are narrowed down, admissions are made and judgment given on the basis of admissions, discoveries and interrogatories and relevant documents are exchanged;
- after the pretrial conference, the case is set down for trial;
- trial takes place within one to 12 months after the pretrial conference, depending on the number of witnesses, the length of the documents to be tendered and the schedule of the court;
- at the conclusion of the trial, the court must give its judgment within a maximum of 90 days; and
- unsuccessful parties may appeal to a court of appeal within three months of the date of a final judgment, and 14 days from the date of an interlocutory decision.

Parties may file motions at any time during the course of litigation, although the pretrial procedure is designed to ensure that all matters requiring the filing of motions are disposed of in advance of a case proceeding to trial.

7 Case management

Can the parties control the procedure and the timetable?

The case management techniques introduced by the new civil procedure rules have, to a very large extent, placed control of timetables and procedures with the court. Nevertheless, parties may make applications to abridge the times stipulated for taking a step in the proceedings, and may also seek extensions of time within which to take steps. The court has discretion whether to grant such applications.

8 Evidence – documents

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 to preserve documents and other evidence pending trial. Parties wishing to ensure the preservation of evidence in advance of trial may apply to the court for preservation orders. There is no obligation, in the absence of a specific request from the adverse party, to share relevant documents or disclose their existence.

9 Evidence – privilege

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

Certain categories of documents are privileged as a result of statutory provisions. These include official communications to or from judicial and police officers, and unpublished official material relating to state affairs. It would appear that an in-house lawyer would also be able to take advantage of the general protection afforded to legal practitioners under the statute, in addition to any common law protection that the courts might recognise. This area has received little attention from the courts and, consequently, there are no judicial precedents upon which reliance might be placed. The privilege granted to lawyers is not absolute and does not extend to material, for example, made in furtherance of any illegal purpose, or disclosing the commission of crime or fraud by a third party.

10 Evidence – pretrial

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

The Civil Procedure Rules of most jurisdictions in Nigeria now require parties to exchange written evidence prior to trial, and in most states such evidence must be delivered along with statements of the parties' cases. This procedure is required for both expert witnesses and witnesses of fact.

11 Evidence – trial

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

Evidence at trial is, almost universally, by way of viva voce evidence. However, as a matter of practice, where a witness or expert has provided written testimony, that witness or expert will only be subjected to cross-examination by the adverse party.

12 Interim remedies

What interim remedies are available?

All interim relief available in the United Kingdom, under common law, is available in the Lagos High Court, and is granted according to the discretion of the court. Available remedies include *Anton Piller* (disclosure and seizure) orders, *Mareva* (freezing) orders and other injunctions.

13 Remedies

What substantive remedies are available?

A wide range of substantive remedies is available. The most common type of remedy sought is an order for the payment of compensatory monetary damages. Interest, if claimed, may be awarded on money judgments. Punitive and aggravated damages are available in very limited circumstances. Behavioural remedies, such as permanent

injunctions, may be granted by the court, which may also grant declaratory relief. Generally, any relief granted must be specifically sought by a party. However, the court may grant consequential relief even where such relief is not sought by the party.

14 Enforcement

What means of enforcement are available?

There are various means of enforcing judgments. Monetary judgments are enforceable by the seizure and sale of the assets (both fixed and immovable) of the judgment debtor. Garnishee (attachment) orders may be obtained against debtors of the judgment debtor. Contempt proceedings are also available to enforce non-monetary judgments and to compel compliance with orders of the court by the judgment debtor.

15 Public access

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

The Constitution requires all proceedings of superior courts of record, including the announcing of decisions, to take place in public. Accordingly, members of the public are entitled, subject to the capacity of individual courtrooms, to attend court proceedings. All court documents are available to the public, upon payment of a relatively small official fee.

16 Costs

Does the court have power to order costs?

The courts have power to order that parties bear the costs of their opponent. The general principle is that costs follow the event, meaning that the successful party is entitled to recover its costs from the unsuccessful party. The court has the discretion to determine the rate to be paid. This general principle is not absolute – in certain instances, the courts could also award costs against the successful litigant to encourage parties to consider offers to settle and as a punitive measure against parties who refuse to accept reasonable offers. Costs are also awarded to compensate the successful party for its troubles and delay caused by interlocutory motions.

It must be emphasised, however, that under the current practice of courts in Nigeria, costs are very rarely awarded on a compensatory basis and are frequently nothing more than symbolic, bearing little or no relationship to the amount actually expended by a party in the prosecution of the case. In some jurisdictions, such as Lagos, there is a movement towards the award of more realistic sums as costs. However, in the appellate courts – a court of appeal and the Supreme Court – costs awarded continue to be no more than symbolic.

17 Funding arrangements

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 are permitted in Nigeria. There are no provisions regulating contingency fee arrangements. There are also no provisions preventing parties from using third-party funding to assist in the prosecution of proceedings. Likewise, there are no provisions prohibiting the third party from sharing in any proceeds of success.

18 Insurance

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

The use of such insurance in Nigeria remains rare, if such cover has ever been available.

19 Class action

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

There are, at present, no provisions that permit class actions in Nigeria. Notwithstanding this, a number of actions have been instituted on behalf of persons claiming to belong to a class, and presenting claims on the basis that they are class actions. To succeed, the claimants must plead and prove that they have the same interests, and each claimant is required to establish his or her individual claim. The courts, however, appear to have disregarded this requirement, and there have been a number of cases, mostly related to claims in respect of alleged environmental damage, in which communities have been granted relief. This notwithstanding, we believe that Nigerian law, as it presently stands, does not provide for class actions because of the need for each claimant to plead and prove the loss or damage alleged to have been suffered. It appears that this issue has not been taken to the level of the Supreme Court.

20 Appeal

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

Appeals may be pursued, as of right, from final orders of the High Court. The grounds of such appeal may be grounds alleging errors of law, fact, or a mixture of law and fact. Appeals against final decisions must be lodged in the registry of the High Court within three months of the decision. Appeals against interlocutory decisions may be pursued, as of right, where the error complained of is one of law, and where an injunction has been granted or refused. All other interlocutory appeals require the leave of the High Court or, where leave is denied in the High Court, a court of appeal. There are rights of further appeal from the court of appeal to the Supreme Court, as of right, where the error complained of is one of law. All other appeals require the leave of the court of appeal or of the Supreme Court.

An appeal against an interlocutory order must be made within 14 days from the date such order was made. Extensions are available, subject to the discretion of the court.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Nigeria has agreements for the reciprocal recognition and enforcement of foreign judgments with countries of the Commonwealth. In the past, the Lagos State High Court had declined to permit foreign judgments to be enforced by actions upon the judgment itself, even where there was no reciprocal agreement for the recognition and enforcement of judgments from Commonwealth countries. However, the Supreme Court has held that this position was erroneous, and it is now clear that foreign judgments are enforceable in Nigeria by action based on the judgment itself.

22 Foreign proceedings

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

The rules of civil procedure of Lagos contain no provisions for the obtaining of oral or documentary evidence in Lagos for use in civil proceedings in other jurisdictions.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The UNCITRAL Model Law of 1985 is the basis of Nigeria's arbitration law. Bills to amend the Arbitration Act have been presented to the National Assembly on at least two separate occasions, but have yet to be passed. The Lagos State House of Assembly, however, passed its own Arbitration Law (drawing heavily on the English Arbitration Act of 1996) in 2009, proceeding on the basis that the power to legislate on such matters was within the legislative competence of state governments and not the federal government. The Lagos State Arbitration Law

has still only been used in very few cases, and there does not appear to be any reported case where the Law has been considered.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Under both the Arbitration and Conciliation Act and the Arbitration Law of Lagos State, every arbitration agreement must be in writing, contained in a document signed by the parties, or in an exchange of letters, telex, telegrams or other means of communication providing a record of the arbitration agreement or clause. Thus, any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract. Section 3(4) and (5) of the Lagos State Arbitration Law provide that 'writing' includes 'data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be useable for subsequent reference', and 'data' is defined as including 'information generated, sent, received or stored by electronic, optical or similar means'.

25 Choice of 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?

Under the Arbitration and Conciliation Act, if the arbitration agreement is silent as to the number of arbitrators, the default number of arbitrators is three. Each party is required to appoint one arbitrator, and the other two party-appointed arbitrators are to appoint the third arbitrator together. Where a party fails to appoint an arbitrator the court may, upon application from the other party, appoint an arbitrator. If the two appointed arbitrators are unable to agree on the appointment of the third arbitrator, the court may appoint the third arbitrator. Under the Lagos State Arbitration Law, the default number of arbitrators is one, and where the parties are unable to agree, the appointment will be made by the Lagos Court of Arbitration, which was created by a Law of the Lagos State House of Assembly but is a body independent of government.

Under both the federal and the Lagos State statutes, a party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the qualifications agreed by the parties.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Under the Arbitration and Conciliation Act, parties may, in most instances choose arbitrators of their choice. The choice is, however, restricted to the extent that the so-appointed arbitrators must be independent and impartial and must make a declaration or disclosure of any circumstances that may affect their impartiality and objectivity. In addition, the parties' choice of arbitrators must be in accordance with the arbitration agreement. The appointed arbitrators must also have the necessary experience or professional qualification specified in the arbitration agreement.

Arbitration is still a developing branch of law in Nigeria. However, there are growing numbers of professionally trained arbitrators and reputable arbitral institutions in the country.

27 Arbitral procedure

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

The Arbitration and Conciliation Act makes provision for rules of procedure in domestic arbitration. Parties in international arbitration are at liberty to choose the rules of procedure to govern their proceedings. In the absence of this, the applicable law would determine the rules of the procedure to apply. Under the Lagos State Arbitration Law, the rules or procedure for the conduct of arbitration under the Law are those of the Lagos Court of Arbitration, a privately run dispute resolution centre established by statute by the Lagos State government.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court is required to play a supportive role and is not permitted to intervene in arbitral proceedings, save where expressly provided for in the statute. The circumstances where the court is empowered to intervene in arbitral proceedings are primarily in the appointment of arbitrators where one party has failed to make an appointment, where a party seeks to set aside an award or to remove an arbitrator, and for the purpose of enforcing an award. The Lagos State Arbitration Law provides for the courts to provide more extensive support to the arbitral process, and also includes procedural rules to regulate applications to the Lagos State High Court.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Yes. Under the Arbitration and Conciliation Act, the arbitrators have such power. Under the Lagos State Arbitration Law, in addition to the power of the arbitrator to grant interim relief, there are provisions for such relief to be granted by the court and procedural rules for the enforcement of interim relief granted by the arbitrator.

30 Award

When and in what form must the award be delivered?

An award must be in writing and signed by the arbitrator or arbitrators. The award must be reasoned, must contain the date on which it was made and the place of the arbitration, and a copy thereof must be delivered to each party. The legislation makes no provision for a time within which the award must be handed down.

31 Appeal

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

No appeal is permitted against an award under either the Arbitration and Conciliation Act or the Lagos State Arbitration Law. An aggrieved party may only apply to court within three months to have an arbitral award set aside, if the party making the application furnishes proof that the award contains a decision on matters beyond the scope of the submission to arbitration. Another ground for setting aside an award is that an arbitrator has committed misconduct or that the award was improperly procured.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The enforcement of foreign arbitral awards is governed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which is incorporated into the Arbitration and Conciliation Act as one of its schedules. Applications to enforce arbitral awards must be made to the court in writing, accompanied by an authenticated award or certified copy thereof and the original agreement or a certified copy thereof. The Lagos State Arbitration Law has gone further by providing that arbitral awards may be recognised as binding upon an application to the Lagos State High Court, irrespective of the jurisdiction or territory in which it was made. Despite the recent changes in the country's political landscape, the enforcement procedures of foreign awards remains the same.

33 Costs

Can a successful party recover its costs?

As a general rule, the successful party will be entitled to recover his or her costs from the losing party. However, the arbitrator has discretion to disallow all or part of the costs of the successful party. Nigeria has no experience of third-party funding of litigation or arbitration costs and it is uncertain how this issue would be treated, were it to come before the courts, and whether the costs of a litigation funder would be recoverable. However, costs in arbitration include the fees of the arbitral tribunal, expenses incurred by the arbitrators, the cost of expert advice, expenses of witness and costs for legal representation.

Alternative dispute resolution**34 Types of ADR**

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

Other than arbitration, the most commonly used ADR processes in Nigeria are mediation and conciliation.

35 Requirements for ADR

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 Lagos and the Federal Capital Territory, there is specific legislation enjoining High Court judges to encourage parties to use ADR and the 'multi-door courthouse' schemes in these jurisdictions. Lawyers are also required to make the availability of ADR and the multi-door courthouse known to clients. In addition, the High Court laws of most states of the federation provide for judges to encourage the settlement of cases.

Miscellaneous

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

No.

Sofunde Osakwe Ogundipe & Belgore
legal practitioners

Babajide O Ogundipe
Lateef O Akangbe

boogundipe@sooblaw.com
loakangbe@sooblaw.com

7th Floor, St Nicholas House
Catholic Mission Street
Lafaji Lagos
Nigeria

Tel: +234 1 462 2502
Fax: +234 1 462 2501
www.sooblaw.com

Norway

Terje Granvang

Arntzen de Besche Advokatfirma AS

Litigation

1 Court system

What is the structure of the civil court system?

The Norwegian courts are composed of the Supreme Court, six district appeal courts and 66 local or city courts. The courts are administered by the National Court Administration. There are no subdivisions of the courts according to subject matter, nature or size of claim, etc.

The Supreme Court has 20 judges appointed by the cabinet. The Supreme Court is divided into two chambers each of five judges. The high chamber of the Supreme Court is presided over by 11 judges. The High Chamber deals with cases of particular importance, for example, judicial review cases. In very unique cases the Supreme Court handles disputes as a plenary court.

The district appeal court is set with three judges in each case. The district appeal court has the authority to appoint expert judges in addition to the legal judges.

The local or city courts rule in each case with only one judge. The court has the authority to appoint expert judges.

In addition, Norway has a few special courts such as the Court of impeachment, the Labour Court (handling trade union disputes) and several land consolidation courts. There are approximately 428 conciliation boards (one in each municipality). There are no specialist commercial or financial courts.

As a main rule civil disputes begin at the conciliation board. Exceptions apply to lawsuits against the government and public bodies, family matters (divorces, child support, etc) and in cases where the dispute pertains to values in excess of 125,000 kroner and both parties are represented by legal counsel. The conciliation board has the power to pass judgment if both parties agree to let the board rule in the matter and in disputes pertaining to values less than 125,000 kroner. The main purpose of the conciliation board is to attempt mediation. If the parties do not succeed in finding an amicable solution or the board refuses to pass judgment the plaintiff has the option to bring the matter before the local or city court. If the matter brought before the court is of lesser value than 125,000 kroner the court will handle it as a small claims matter under a set of simpler procedural rules with the aim to reduce costs and simplify the proceedings. All decisions by the local or city courts may be appealed to the appeal court. The appeal court has the power to reject cases where the value of the dispute is less than 125,000 kroner. Moreover, the appeal court may reject an appeal if the court finds it obvious that the appeal cannot succeed. This option is rarely used by the court in practice. The Supreme Court only handles matters of principal interest. Rejection of appeals is quite common. In 2016 the Supreme Court has handled 61 civil appeals. One case was heard by the court in plenary session and three cases by the High Chamber. A total of 362 appeals were rejected.

2 Judges and juries

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

The jury only appears in criminal cases. The judge's role is to judge on basis of the facts and evidence presented by the parties in court during the proceedings. The judge has the authority to order the parties to produce evidence and to clarify matters, and may question parties and witnesses during trial, but has no inquisitorial role beyond the

duty of ensuring that the case is properly managed. Judges on all levels are appointed by the government by royal decree. The appointment is based on a recommendation by the appointment council (AP). The AP consists of three judges, one solicitor, one civil servant with a law degree and two non-lawyers. There is a move to promote diversity as to gender and professional background.

3 Limitation issues

What are the time limits for bringing civil claims?

There are no specific time limits for bringing claims under the procedural rules. The statute of limitations applies to claims. The nature of the claim will decide when the limitation period (normally three years) starts running. The parties may agree to suspend time limitation, but only for a maximum of three years at the time. The agreed-upon extension period must not exceed 10 years from the date the claim otherwise would have been time-barred.

4 Pre-action behaviour

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

In all disputes the claimant is statutory obliged to notify the other party in writing of the intent to file a lawsuit and to specify the claim and its basis. If the potential dispute is between private parties the notification must be sent on paper, unless other agreements have been entered into or the normal communication between the parties is electronic. The receiver of the notification shall, according to law, decide whether to accept or dispute the claim in whole or partially. If disputed the claimant shall receive a reason for the dispute and must also if a counterclaim will be lodged notify the claimant in writing thereof. Both parties are under the obligation to present important evidence during this phase.

Both parties are also under the obligation by law to attempt to resolve the matter outside of court.

Breach of these obligations do not have any consequences mandated by the law, but may influence the court's decision to shift costs.

With the exceptions mentioned above the main rule is that claims are brought before the conciliation board before being taken to the courts. The notification described here must also be sent prior to filing a claim before the conciliation board.

5 Starting proceedings

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 before the courts (after unsuccessful handling by the conciliation board) are commenced by lodging a writ of summons directly to the lowest court (local or city court). The writ of summons is required to state the claim, the facts forming the basis for the claim and the legal arguments supporting the claim. The exhibits that the facts described in the writ are based on are to be attached as appendices to the writ. In some courts the writ of summons and its exhibits may be filed electronically at the plaintiff's option. The court fee for filing a lawsuit will be billed automatically at a later stage.

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

The writ of summons is served by the court upon the defendant shortly after the filing with the court. If the defendant is represented by legal counsel the serving of the writ takes place by regular mail. The legal counsel for the defendant will then sign a form confirming the receipt of the writ of summons and return this form to the court. Within three weeks of the date of signing for the receipt of the writ of summons, the defendant must submit a defence. This time period can be extended by filing of an application to the court. A three-week extension is normally granted. Further extensions require the consent of the plaintiff. Subsequent to the defence the parties normally file one additional plea each. There are no limits as to the number of pleadings a party may file. Shortly after filing of the defence statement the court will summon the parties to a case management conference (CMC) as described in question 7. The case preparations are normally finished two weeks before trial. At this date the parties are not allowed to present further evidence to the court with a few exceptions. The parties are also normally ordered by the court to file a skeleton brief with a summary of the main factual and legal arguments that will be presented in court, a list of the evidence that will be presented and the statement of claim. The plaintiff will also have to present to the court a plan for the trial with details on how the scheduled time is to be shared between the parties, which has been agreed with the defendant.

The court is statutorily obliged to ensure that the trial (oral hearing) takes place within six months after the date of lodging of the writ of summons. In extraordinary cases this rule is not followed. The appeal courts are having capacity issues in listing the disputes in a timely manner. Very few civil appeals are heard by the court within the six-month deadline. Measures have been taken to speed up the process and some improvement has taken place lately.

7 Case management**Can the parties control the procedure and the timetable?**

The timetable is controlled by the court. Extension of the deadline for filing the defence is granted subject to the defendant's application.

Once the defence has been received by the court the judge responsible for the case will summon the counsel to a CMC. The CMC is in practice normally a conference call. Physical meetings are common only in extraordinary cases. The client is normally not present at the CMC. The agenda for the CMC is mandated in the Civil Procedure Act. The main issues are voluntary mediation, scheduling of trial, the evidence to be submitted, potential appointment of expert judges.

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

Before the writ of summons is lodged both parties are obliged to inform the other party of important documents and other evidence that the party is aware of and that one could not assume that the other party is not familiar with. This applies even if the document or evidence is unhelpful to the disclosing party's case. Pending trial the same applies.

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

Very few documents are privileged. Exceptions apply, for example, for documents and evidence pertaining to national security, certain confidential documents or evidence pertaining in particular to public bodies and evidence deriving from church ministers, legal counsel, physicians, midwives, nurses, etc. The attorney-client privilege applies to Norwegian as well as foreign lawyers. The same also applies within certain limits to in-house lawyers.

10 Evidence - pretrial**Do parties exchange written evidence from witnesses and experts prior to trial?**

Exchange of witness statements is uncommon in Norway. Statements from experts, however, are more common and are normally exchanged between the parties before trial. A party using an expert witness may, however, elect not to file a written report and instead rely on the expert witness to deliver an oral statement during trial only.

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

As a main rule factual witnesses only give oral evidence during trial. If an expert witness has prepared a written report that has been filed prior to trial the expert witness must appear in court for cross-examination.

Written evidence has to be documented in court. In some cases there will be arranged on-site inspections by the court and all the involved parties and their counsel.

12 Interim remedies**What interim remedies are available?**

Interim freezing injunctions are available for Norwegian and foreign claimants. Search orders are not available in civil cases.

13 Remedies**What substantive remedies are available?**

Punitive damages are not available. Interest (not compounded) is payable on a judgment for money according to the Act pertaining to interest on overdue payment. As of 1 January 2017 the interest rate is 8.5 per cent.

14 Enforcement**What means of enforcement are available?**

A claim for payment of money is as the main rule enforceable within two weeks after the passing of the judgment. If the judgment is appealed the enforcement is blocked until all appeals are exhausted. However, the claimant may apply the court for a security for the claim to be registered on property owned by the debtor. If court decisions (that are not appealed or final) are disobeyed, the claimant may ask the court for enforcement of the judgment. Such enforcement depends of the nature of the judgment, but may include putting the claimant in possession of specific items or forced sale of debtor's property to settle the claim covered by the judgment.

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

Court hearings are public. The court may in rare instances decide to close the doors.

The pleadings, witness statement, etc, are not available to the public. The only document that is available to the public is the skeleton brief that each party is ordered to file two weeks before trial. The skeleton brief is a one or two-page document summing up the main legal and factual grounds for the claim made in the case.

16 Costs**Does the court have power to order costs?**

The court has the power to shift costs. The main rule is that the losing party is ordered to pay the costs incurred by the winning party. Costs are only awarded to the extent the court deem the costs necessary. The courts are strict as to the level of costs and a winning party normally must expect to carry parts of the costs itself, at least in larger cases with a high cost level.

If the plaintiff is a foreign national from outside the EU the plaintiff may upon demand made in the defence statement, be ordered by the court to put up security for the defendant's potential costs.

17 Funding arrangements

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 cure, no pay' arrangements are allowed. Contingency arrangements where the lawyer gets a cut or percentage of the award are not allowed. Cases where the lawyer only gets paid if the case is won and costs shifted in favour of his or her party (type of pro bono) are allowed.

Proceedings made possible by third-party funding are allowed. The underlying agreement between the party and the funder is not a matter for the court to know or opine on.

18 Insurance

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

Insurance to cover a party's legal costs and the potential liability for an opponent's costs is available for potential defendants.

19 Class action

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

The concept of class actions was introduced in Norway in 2005. Class action lawsuits require that the claimants have claims based on uniform (or predominantly uniform) facts and legal grounds. Additional requirements are that the claims can be handled under the same procedural rules, the class action procedure is deemed to be the best way to handle the dispute and the court is able to appoint a group representative according to section 35-9 of the Civil Procedure Act. A class action proceeding is conducted by a group representative appointed by the court on behalf of the group.

20 Appeal

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

All city court judgments can be appealed to the district appeal court within one month as of the date the city court judgment was served upon the parties. The grounds for appeal may be the facts, legal grounds or procedural. In some special cases the one month deadline for an appeal is shorter. The right to appeal can be waived. If the right to appeal is waived before the judgment is passed by the court the waiver needs to be mutual in order to be valid. Counter-appeals can be lodged after the one-month deadline if the other party has appealed within the deadline. Judgments regarding claims less than 125,000 kroner must obtain a special consent by the appeal court for the appeal to be handled by the appeal court. The appeal court may also dismiss the appeal if the court unanimously deems it obvious that the appeal cannot be successful. This right to dismiss appeals is very rarely used by the court.

Appeal court judgments can be appealed to the Supreme Court. In some very special cases a city court judgment may also be appealed directly to the Supreme Court. In order for an appeal to be advanced to the Supreme Court the appeal needs the Supreme Court Appeal Board's consent. Most appeals are dismissed without handling.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments are only recognised and enforceable in Norway if the parties have submitted to the jurisdiction of the foreign court issuing the particular judgment, or an international convention or treaty has been entered into with one or more foreign states obligating Norway to this effect. Norway (not being an EU member) is a signatory to the Lugano Convention. The Lugano Convention regulates the recognition and enforcement of civil judgments among EU member states and, inter alia, Norway as one of the EFTA member states. There is also

a convention entered into between the Nordic countries regarding recognition of civil judgments.

22 Foreign proceedings

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

Norway is a party to the 1970 Hague Convention on the Collection on Evidence Abroad in Civil and Commercial Matters. The Convention mandates that courts in other member states may request evidence taken in Norway.

Arbitration**23 UNCITRAL Model Law**

Is the arbitration law based on the UNCITRAL Model Law?

The Norwegian Arbitration Act of 2004 is based upon and closely follows the UNCITRAL Model Law. There are few significant differences between the Arbitration Act and the Model Law. One major difference is, however, that the Norwegian Arbitration Act does not require that arbitration agreements are entered into in writing.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The Arbitration Act does not require a certain form of the arbitration agreement. It can be entered into orally or in writing. In practice most arbitration agreements are written.

25 Choice of 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 arbitration agreement is silent on the matter, the number of arbitrators to be appointed is always three.

If the parties fail to agree on the appointment of arbitrators the parties appoint one arbitrator each. The deadline for appointing an arbitrator is one month after the other party requested appointment of arbitrators. The two party-appointed arbitrators jointly appoint the third arbitrator. If the appointment of arbitrators according to this principle is not possible, each party can file a motion before the court and ask the court to appoint the missing arbitrator.

Appointment of an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence or if the arbitrator does not possess qualifications agreed between the parties. Moreover, challenging the appointment of an arbitrator on these grounds is only an option when the challenging party became aware of such circumstances after the appointment has been made.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The parties to the arbitral proceedings shall as a general rule cooperate to appoint the arbitrators. If the proceedings are subject to the rules of the Oslo Chamber of Commerce there is a pool of candidates available to choose from. This pool normally meets the needs of most types of arbitration. In private arbitral proceedings there is no pool of candidates and the parties are free to appoint whomever they desire, including foreign candidates. In Norway a typical arbitral panel consists of a high level judge as chair, one commercial lawyer and one person from academia (normally a law professor).

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

The Arbitration Act contains a number of substantive rules for the procedure to be followed. These provisions are only applicable to the extent the arbitration agreement is silent or to the extent the parties cannot agree on the procedure. Section 21 contains the main rule mandating that the arbitral tribunal decides how to handle the case based on what the tribunal deems appropriate. If the parties have not agreed on venue, language, deadlines for filing of the writ of summons, statement of defence, etc, it is within the authority of the tribunal to decide on such matters.

28 Court intervention**On what grounds can the court intervene during an arbitration?**

The regular courts do not have the authority to intervene during an arbitration.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

The arbitral tribunal may have the power to urge (or order) the parties to undertake certain measures, such as preserve assets or produce evidence. However an 'order' to this effect is not enforceable. Failing to comply with an 'order' made by the tribunal may, of course, influence the tribunal's assessment of the evidence produced by the reluctant party. The parties can also ask the court to assist in the collection of evidence such as ordering a party to produce documents, obtain depositions.

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

The award is rendered after the trial is finished and must always be in writing. There are no rules setting a deadline for when the award must be delivered.

The main rule is that the award is signed by all of the arbitrators. If there is more than one arbitrator it is, however, sufficient that a majority of the arbitrators have signed the award provided that the reason why the award has not been signed by all arbitrators is given in the award.

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

An award from the arbitral tribunal is final and cannot be appealed unless otherwise agreed by the parties. The award can, however, be challenged and set aside by the regular courts. Grounds for setting an arbitral award aside are that:

- one of the parties to the arbitration agreement lacks legal capacity;

- the arbitration agreement is invalid;
- the party bringing the action for setting aside the award was not given sufficient notice of the appointment of arbitrator or the arbitration or was not given an opportunity to present his or her views on the case;
- the award falls outside the scope of the jurisdiction of the tribunal; or
- the composition of the tribunal or the arbitral procedure was contrary to law or the agreement between the parties, and this has had an impact on the award.

Legal action to set aside an arbitral award shall be brought before the regular courts no later than three months after the party received the arbitral award.

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

Foreign and domestic awards are recognisable and enforceable in Norway and will follow the same procedural tracks as regular court judgments that are enforced. The award will, however, not be recognised and enforced if the dispute could not have been settled by arbitration under Norwegian law, or if recognition and enforcement would be contrary to public policy.

33 Costs**Can a successful party recover its costs?**

The parties are jointly and severally liable for the costs of the arbitral tribunal, unless otherwise agreed between the parties and the tribunal.

The tribunal shall, upon motion by a party, shift costs as the tribunal deems right. In practice this means that the losing party is ordered to pay all of the other party's costs and expenses in addition to the costs of the tribunal. If a case is only partially lost or partially won the tribunal may deem that costs are not to be awarded and the costs of the tribunal split equally between the parties. Adjustments may also take place if costs claimed by the winning party are deemed to be unreasonably high. Only costs deemed to have been necessary are recoverable. The costs are limited to legal fees and direct costs such as copying, travel, etc. Third-party funding costs are not recoverable.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

The purpose of the Conciliation Board mentioned above is to attempt to find amicable solutions to civil disputes of all kinds (with certain exceptions). The courts (not the Supreme Court) offer court-led mediation, which statistically proves to have been a successful process after



ARNTZEN
de BESCHE

Terje Granvang

tg@adeb.no

Bygdøy Allé 2
0204 Oslo
Norway

Tel: +47 23 89 4000
Fax: +47 23 89 4001
www.adeb.no

it was introduced about 20 years ago. A potential trend is that private ADR is increasingly attempted in complex commercial matters.

35 Requirements for ADR

**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 arbitration there is no obligation to consider ADR before or during proceedings. In civil disputes it is required that the parties have investigated if it is possible to resolve the matter before initiating legal proceedings.

All kinds of mediation are always voluntary. The courts do not have the power at any stage to compel the parties to participate in an ADR process. The same applies for arbitration.

Miscellaneous

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

No.

Panama

Evans Gonzalez and Fernando Aued

Patton, Moreno & Asvat

Litigation

1 Court system

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 (for example, 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 appellate court, one of them serving as main appellate judge.

Next are the circuit courts with jurisdiction on matters exceeding US\$5,001 and certain case-specific matters (for example, 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 form what are known as judicial districts. In civil matters, Panama has four judicial districts headed by a higher court: the First Judicial District, formed by the provinces of Panama, Colon, Darien, San Blas and Panama West; 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 higher courts or courts of appeals of the relevant province's judicial district.

The higher court or court of appeals generally serve as appellate court 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 higher courts are composed of five magistrates for the First Judicial District and three for the other judicial districts. The magistrates act as an appellate court of three magistrates, each alternating as main magistrate on different cases, pursuant to case distribution rules.

Challenges against decisions of the higher court are heard by 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 higher court forming 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 higher court forming part of the First Judicial District. There are also two maritime courts with nationwide jurisdiction and a maritime court of appeals.

2 Judges and juries

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

In civil matters the burden of proof is borne by the claimant. Therefore the judge's role consists of verifying and analysing the evidence

produced by the parties in the proceedings, and forming his or her own concept, based on his or her knowledge and experience, the applicable law and principles, and the rules for admission of evidence. This 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 claimant and his or her burden of proof duties. Juries are not involved in civil proceedings. Civil proceedings are mostly of a written nature.

3 Limitation issues

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, 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, is 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.

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 resulting relations and liabilities between shareholders/partners, as well as vis-à-vis the company, liability of liquidators or managers of corporations, interest due on leases when charged yearly or lesser periods, for collection of negotiable instruments, wholesale activity, financial leasing and banking facilities, have a time limitation of three years.

4 Pre-action behaviour

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

Considering the formal nature of civil proceedings, the claimant must verify that documents serving as evidence comply with the requirements of the governing law as well as for their admissibility (for example, signatures have been acknowledged before a notary, documents granted abroad have been legalised, documents have been signed by individuals with authority, certificates have been obtained within the legal timeline for their validity, etc).

The claimant can try to secure or produce evidence that may otherwise not be available during the proceedings, through pre-judicial 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 claimant can try to secure the claim through the pre-judgment attachment of assets, such as cash in banks, moveable assets, property recorded with the Public Registry, credits, inventories and others. 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 pre-judgment attachment is an *ex parte* application; once the order has been effected, the claimant has to 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.

5 Starting proceedings

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 have to be sent to the foreign jurisdiction through diplomatic channels. The defendant has to 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 restricted, and as a result, the progression of proceedings is slow.

6 Timetable

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

The timeline for an ordinary civil claim is as follows:

- Complaint.
- Answer to complaint: to be filed within 10 days after service of the order of admission of complaint.
- Filing of evidence: takes place 15 days after term for answer of the complaint, and has to be filed within the following five days.
- Counter-evidence: has to be filed within three days after filing of evidence term.
- Objections to evidence: has to be filed within three days after 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 after 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.
- Cassation: two to three years or more.

7 Case management

Can the parties control the procedure and the timetable?

The duty to keep the impulse or pace 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.

8 Evidence – documents

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.

9 Evidence – privilege

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 the attorney-client privilege.

10 Evidence – pretrial

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. See question 4.

11 Evidence – trial

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.

12 Interim remedies

What interim remedies are available?

General injunctive remedies such as freezing injunctions are not available in civil proceedings.

Claimants can seek pre-judgment attachment of a defendant's assets (see question 4).

Claimants 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 claimant files the complaint within 30 days after the document was recorded with the Public Registry or, if the document was not recorded, from the moment he or she 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.

13 Remedies

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), litigations costs and expenses, as well as legal fees set in accordance to the Bar tariff, which consider the type of procedure and claim amount.

Moral damages (for example, 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/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.

14 Enforcement

What means of enforcement are available?

If a defendant does not comply with the final order within six days after receiving service, the claimant can commence special enforcement proceedings and request the post-judgment attachment of the defendant's assets.

In certain cases, the claimant 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.

15 Public access

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 order.

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, those individuals authorised by the judge for purposes of research or education, as well as other individuals specially authorised by the judge.

16 Costs

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 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, when enforcement proceedings are required to seek performance of the judgment, when the defendant denies evident statements that should have been accepted as true, when false documents or witnesses are submitted, when no evidence is filed to substantiate the facts of the complaint or a motion, or when a party abuses his or her litigation rights.

The claimant is not obligated to provide security for the defendant's costs.

17 Funding arrangements

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.

18 Insurance

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

Not applicable.

19 Class action

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. Also 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 claimants or defendants exist.

20 Appeal

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 has to be filed before the first instance judge within five days, and the opposing party shall have 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 such case then the case file is sent to the higher 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.

21 Foreign judgments

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.

In order for a writ of exequatur to be obtained from the Fourth Chamber of the Supreme Court of Justice, the following is 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 as a result 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 on 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 was 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 claimant will have to commence special executory proceedings before the civil courts to seek collection of the owed amounts.

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

Foreign courts can request legal assistance to 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**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

Generally, yes, with influence of the ICC Arbitration rules, as well as the arbitration laws of other jurisdictions (Spain, France, Mexico and others).

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

The arbitration agreement has to 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.

25 Choice of 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?**

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.

If 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 after the last appointment of an arbitrator, or 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).

26 Arbitrator options**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 generally have served as arbitrators, and include national as well as internationally renowned specialists.

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

The law on arbitration contains substantive law 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.

28 Court intervention**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 claimant, 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.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

Yes.

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

In domestic arbitration, the general rule is that the award has to be delivered within two months following 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 has to be delivered within the term provided by the relevant rules, or as agreed by the parties or the arbitral tribunal.

Generally, the arbitration award has to 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 has to include the analysis and motivations (except as otherwise agreed by the parties), it has to include 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.

31 Appeal**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 is 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 which 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.

- That the international arbitral award breaches international public policy; in case of a domestic award, that such award breaches Panamanian public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign arbitral awards in Panama are recognised and enforced in accordance with either (i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); (ii) the Inter-American Convention of International Commercial Arbitration (Panama, 1975); or (iii) 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 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.

33 Costs

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, arbitrator and services fees of the institution, as well as general expenses incurred during the arbitration, for the evaluation by the arbitral tribunal and inclusion in the award.

Alternative dispute resolution

34 Types of ADR

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

The most commonly used ADR processes are mediation and conciliation. ADR has still to gather momentum; it is generally conceived as a pre-arbitration or pre-litigation stage.

35 Requirements for ADR

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

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

Not applicable.



PATTON, MORENO & ASVAT
INTERNATIONAL LAWYERS

Evans Gonzalez
Fernando Aued

egonzalez@pmalawyers.com
faued@pmalawyers.com

8th Floor, Capital Plaza Building
Roberto Motta Ave
Costa del Este
Panama City
Panama

Tel: +507 306 9600
Fax: +507 263 7887
www.pmalawyers.com

Romania

Cosmin Vasile

Zamfirescu Racoți & Partners Attorneys at Law

Litigation

1 Court system

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 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 recent major modification of the Romanian Civil Procedure Code, which came into force on 15 February 2013 (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. It should be mentioned that 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.

There is one judge in the first instance, two judges in appeal and three judges in second appeal, with some exceptions in special matters.

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, insolvency, etc.

The New Civil Code of Romania (the New Civil Code), which entered into force as of 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'.

2 Judges and juries

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, neither in civil nor in 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 the higher grades).

3 Limitation issues

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 year to 10 years, the general term being three years.

According to the New Civil Code, in force since 1 October 2011, the parties may contractually agree to suspend time limits. Until the adoption of the New Civil Code, according to the former legal provisions on limitation (which still govern legal relationships 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.

4 Pre-action behaviour

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

In particular cases expressly established by the 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 to be a preliminary step for bringing an action. In Romania, there are no provisions allowing a pre-action disclosure order.

5 Starting proceedings

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 moment when the claim fulfils all formal conditions, the court proceeds to communicate such claim to the defendant and proceeds 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 by the law usually being exceeded. Attempts 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.

6 Timetable

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 is 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 from 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 from 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.

7 Case management

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.

8 Evidence – documents

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.

9 Evidence – privilege

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.

10 Evidence – pretrial

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 will only come as documents, not as witness statements or expertise. The rule is that all evidence is presented directly in front of the judge and not by intermediary means.

11 Evidence – trial

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 at the file as a witness statement.

On the other hand, experts give primarily written evidence, in the form of the expertise report that is submitted to the file. However, if the judge requires additional information, the expert may be called in front of the court for an oral statement of clarification.

There also exists the possibility for the administering of evidence to be conducted between lawyers without the participation of the court within a deadline set in this respect by the court. In practice, though, this procedure is not used.

12 Interim remedies

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.

13 Remedies

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.

14 Enforcement

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 moveables and immoveables or the garnishment of bank accounts.

15 Public access

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 only in the

presence of the parties. In addition, following a grounded request of a party, the court itself may instruct that hearings are only held in the presence of the parties.

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 are now to be held behind closed doors and only in the presence of the parties, and only the closing arguments will be held in public sessions. However, for organisational reasons and owing to a lack of space, at present the applicability of such provisions has been delayed until 2016.

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.

16 Costs

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 the 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.

17 Funding arrangements

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 relationship 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 by 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.

18 Insurance

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.

19 Class action

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.

20 Appeal

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, since in Romania the double degree of jurisdiction principle is recognised by the law.

A second appeal is possible against the judgment issued in appeal. In particular cases expressly provided by law, a judgment can only be appealed once. The law enumerates cases eligible for second appeal. Failure to prove the existence of one of these cases may result in the annulment of the second appeal.

The law also provides further means of appeal that are only applicable in particular conditions.

21 Foreign judgments

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.

22 Foreign proceedings

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

23 UNCITRAL Model Law

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.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be concluded in writing; otherwise it is deemed to be 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 has to be concluded in a notarised authentic form under the absolute nullity sanction.

25 Choice of 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?

In such a situation, three arbitrators will be appointed, one by each party and the third arbitrator – the chair – will be appointed by the other two arbitrators.

The parties have the right to challenge the appointment of an arbitrator in the same conditions as the challenge of judges (eg, the arbitrator previously expressed his or her opinion in relation to the solution in the dispute he or her was appointed to settle, there are circumstances which justify the doubt that he or she, his or her spouse, his or her ancestors or descendants have a benefit related to the dispute, his or her spouse or previous spouse is a relative of maximum the fourth degree with one of the parties, etc). In addition, there are several other situations in which the arbitrator may be challenged as he or she does not possess the qualification agreed by the parties or the arbitrator's independence and impartiality may be questioned. 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.

26 Arbitrator options

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.

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 for the majority of complex arbitrable disputes.

27 Arbitral procedure

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

Provided that the arbitration clause is valid, there are no other substantive legal requirements for the arbitral procedure.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court has a limited role with regard to an ongoing arbitration case. Following the request of one of the parties, it can order precautionary or provisional measures regarding the object of arbitration or it can ascertain various circumstances of fact.

The parties' agreement cannot override the court's power.

29 Interim relief

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 such orders there is the possibility to request the intervention of the court, as explained in question 28.

30 Award

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 a written form, which must be communicated to all the parties involved within one month of its issuance.

31 Appeal

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

The grounds for setting aside an arbitral award are limited and mainly regard formal reasons such as the invalidity of the arbitration clause, wrongful constitution of the arbitral tribunal, non-observance of the six-month arbitration term, lack of signature by all the arbitrators, and infringement of public order, good morals or imperative provisions of the law. The court decision rendered following a setting-aside claim can also be further appealed before the superior court of law for formal reasons.

32 Enforcement

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.

33 Costs

Can a successful party recover its costs?

Yes; 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 such 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 the judicial taxes, the expert's fee, lawyers' fees, other expenses incurred in relation to the court proceedings (eg, travel expenses, etc). The court has the ability to limit the amount of the prevailing party's attorneys' fees by taking into consideration the difficulty of the litigation, the actual amount of work required from the attorneys and other similar elements. In the event a claim is only partly admitted, the court may order the costs to be shared (ie, each party will cover their own costs).

Third-party funding of the proceedings generates private law effects between the third party and the beneficiary but does not affect the procedural framework unless the third party purchases the rights stemming from the claim and becomes a party in the trial. 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.

Alternative dispute resolution**34 Types of ADR**

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

The most commonly used ADR process until recently was conciliation. In the past couple of years, though, mediation has become more popular. However, since 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 recently 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.

35 Requirements for ADR

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 is no longer 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 such procedure.

Miscellaneous

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 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.



ZAMFIRESCU RACOȚI & PARTNERS
ATTORNEYS AT LAW

Cosmin Vasile

cosmin.vasile@zrp.ro

12 Plantelor Street
District 2
Bucharest 023974
Romania

Tel: +40 21 311 05 17/18
Fax: +40 21 311 05 19
www.zrp.ro

Russia

Sergey Chuprygin

Ivanyan & Partners

Litigation

1 Court system

What is the structure of the civil court system?

The structure of the state civil courts (civil courts) in Russia has particular features that distinguish it from other jurisdictions, namely the division of all civil courts into two main categories: (i) *arbitrazh* (state commercial) courts, including, inter alia, a specialised *arbitrazh* court, the Intellectual Property Court, which considers commercial disputes, and (ii) the courts of general jurisdiction, which consider all other types of disputes.

Moreover, the disputes considered by the courts of general jurisdiction and the *arbitrazh* courts at the final stage are heard by a single court of supervision (in some cases a court of cassation), which crowns the system of all civil courts – the Supreme Court of the Russian Federation. This chapter will briefly describe the system of civil courts based on the two categories.

Arbitrazh courts resolve commercial disputes and cases relating to entrepreneurial and other business activity that arise between legal entities and individuals who carry out entrepreneurial activity without the status of a legal entity, and in some cases those that are directly envisaged by legislation (ie, matters that involve the Russian Federation, its constituent entities, municipal entities, state authorities, local and other authorities, officials, entities without the status of a legal person and individuals without the status of individual entrepreneur).

Given the general rule of jurisdiction, as described above, the *arbitrazh* courts consider the following types of cases:

- by way of action proceedings – economic disputes and other cases connected with entrepreneurial activity that arises from civil law relations.
- economic disputes arising out of administrative law and other public law relations (eg, cases challenging regulatory legal acts of federal executive authorities and cases challenging the acts of federal executive authorities, which contain legislative interpretation and have regulatory characteristics if consideration thereof is attributed by statute to the competence of the Intellectual Property Court; cases challenging non-regulatory legal acts, decisions and actions (omission) of state authorities, local and other authorities and organisations with public authority relating to the rights and legitimate interests of the applicant in the business sphere; certain cases of administrative offences that the law expressly includes in the jurisdiction of the *arbitrazh* court; cases for the recovery of mandatory payments, penalties, etc, from organisations and individuals engaged in entrepreneurial and other economic activities).
- cases concerning the establishment of facts of legal significance in the field of business and other economic activities (in particular, establishing the fact of possession and use by a legal entity or individual entrepreneur of real estate as its or his or her own; the fact of state registration of a legal entity or individual entrepreneur on a specific date in a specific place; establishing the fact of possession of a title deed effective in the field of entrepreneurial and other economic activities by a legal entity or individual entrepreneur in case of a conflict between the details of its holder and the actual registration data of the holder, as well as of other facts that have legal implications for entrepreneurial and other business activities).

- cases challenging arbitral awards and cases seeking the issue of writs of execution of arbitral awards relating to disputes arising out of entrepreneurial and other economic activities. Moreover, as of 1 September 2016, this category includes cases of provision of assistance to arbitration tribunals in disputes arising out of entrepreneurial and other business activities (the details of the upcoming changes in the dispute resolution laws will be addressed in the relevant section of this chapter); and
- cases seeking acknowledgement and enforcement of foreign judgments and arbitral awards relating to disputes arising out of entrepreneurial and other economic activities.

Arbitrazh courts also have special jurisdiction over the following categories of cases (cases are considered by *arbitrazh* courts regardless of whether the parties of legal relations that gave rise to the dispute or claim include legal entities, individual entrepreneurs or other organisations and individuals):

- insolvency (bankruptcy);
- corporate disputes (eg, relating to the establishment, reorganisation and liquidation of a legal entity; ownership of stock or interests in the authorised capital of the legal entity; or the disputes concerning the appointment, election, termination or suspension of powers of the management bodies of the legal entity, disputes relating to the issuance of securities, disputes arising out of claims of founders or shareholders seeking the recovery of damages incurred by a legal entity, disputes related to the issuance of securities, disputes resultant from the activity of the keeper of the register of securities);
- cases on refusal of state registration, evasion of state registration by legal entities and individual entrepreneurs;
- cases arising from the depository activities related to the registration of rights to the shares and other securities, and the exercise of other rights and duties established by the federal law;
- cases arising from the activities of public corporations relating to their legal status, management procedure, incorporation, reorganisation, liquidation, establishment and the powers of the bodies, and responsibility of the members of the bodies thereof;
- protection of intellectual property rights with the participation of organisations engaged in the collective management of copyright and related rights;
- protection of business reputation in the field of business and other economic activities; and
- other disputes arising out of entrepreneurial and other economic activities in cases envisaged by the federal law.

With regard to litigation, the hierarchy of *arbitrazh* courts is as follows: the court of first instance (an *arbitrazh* court of the constituent entity of the Russian Federation, a total of 83 courts, and a separate division of the court of first instance, which has been established in one of the entities as a permanent judgment seat conducting proceedings in remote areas of the entity).

The court of first instance considers the dispute on the merits, including the examination and assessment of all evidence (written and material evidence, forensic examination, interrogation of the witness, etc), as a result of which a judgment is issued (unless the proceedings in

the case are terminated or the claim is abandoned or left without consideration pursuant to a separate court order).

The court of first instance is also authorised to review the judicial acts that it passed earlier, which became effective in law upon newly discovered circumstances; to appeal to the Constitutional Court of Russia seeking to review the constitutionality of the law referred to in the consideration of the case; to examine and summarise case law; draw the proposals on updating legal acts; and to analyse legal statistics.

The judgment of the court of first instance may be appealed in the court of second instance – the *arbitrazh* appellate court, which has authority over several courts of first instance on a territorial basis.

Russia has 21 functioning *arbitrazh* appellate courts that reconsider cases by a panel comprised of three justices, verifying legality and foundation of judgments of the court of first instance that did not enter into force, albeit subject to certain limitations (a case is considered within the scope of the subject matter and cause of action previously declared in the court of first instance, that is, the change of the subject matter or cause of action or any changes to the amount of the claim are not allowed; in the case of an appeal, no introduction of new evidence is allowed except in cases where such evidence was not excusably introduced in the first instance court; moreover, the principles of consolidation and separation of several claims or substitution of an improper defendant, or joinder of new parties, among others, are not applied in the appellate court) in order to detect violations of substantive or procedural law committed by the court of first instance in the course of adoption of its judgment. The judicial acts of *arbitrazh* appellate courts that terminate the examination of a case on its merits are referred to as rulings.

In addition to these powers, the courts of appeal are authorised to review the judicial acts which they passed earlier and which became effective in law upon newly discovered circumstances; to appeal to the Constitutional Court of Russia seeking to review the constitutionality of the law referred to in the consideration of the case; to examine and summarise case law; draw the proposals on updating legal acts; and to analyse legal statistics.

The third stage of proceedings in the *arbitrazh* courts is that of Cassation Courts, which are organised on a territorial basis where each such court incorporates several appellate courts under its jurisdiction. These courts are referred to as *arbitrazh* courts of the circuit. There are 10 courts of cassation in the Russian Federation.

Similar to a court of appeal, a court of cassation administers justice by a panel comprised of three justices. However, when considering a dispute, a court of cassation does not review the case in its totality with the examination and assessment of evidence. When reviewing a judgment which became effective in law or a ruling of a court of appeal, its competence consists only in detecting violations to the legal rules committed by the courts of the first and the second instances in the course of rendering of judicial acts that terminate consideration of the case on the merits.

The acts adopted by the cassation court are referred to as rulings. It must be noted that, as a general rule, a judgment can be appealed against in the cassation court only if the interested party has previously appealed the judgment in the court of appeal, otherwise the cassation court will not review the judicial act (judgment).

For some types of cases, the cassation court adjudicates disputes as a court of first instance, including applications for compensation for violating the right to trial within a reasonable time or the right to execute a judicial act within a reasonable period of time.

Similar to the courts of first and second instances, the circuit's *arbitrazh* courts are authorised to review the judicial acts that they passed earlier and that became effective in law upon newly discovered circumstances; to appeal to the Constitutional Court of Russia for review of constitutionality of a law referred to in the consideration of the case; to examine and summarise case law; and to draw the proposals on updating laws and regulations.

Further, with regard to the hierarchy of *arbitrazh* courts, a separate board established as part of the Supreme Court of the Russian Federation – the Judicial Board on Economic Disputes – constitutes the second cassation instance.

Thus, the board considers appeals against effective judgments of courts of first instance (courts of entities), judicial acts of appellate courts, judicial acts of circuit courts and judicial acts of the Court for Intellectual Property Rights.

The characteristic feature is that the board considers appeals in two stages. The first stage is related to non-public consideration of an appeal together with the response to it, if submitted, by the board's sole judge, and rendering a decision on the existence of grounds for judicial review of the judgment in the public session of the board.

Thus, at the end of this stage the board represented by one justice decides either to refuse to refer the cassation appeal to the court session of the board, or to review the appeal in a public session where the parties and other persons involved are allowed to take part. Subject to the results of consideration of the case, the board renders an act, which is referred to as an order.

The grounds for reversal of judicial acts of lower courts on cassation appeal by the board include the material violations of substantive law and (or) procedural law that had an impact on the outcome of the case and that must be remedied to restore and protect the violated rights, freedoms and legitimate interests in the sphere of entrepreneurial and other economic activities, as well as to protect legitimate public interests.

Along with consideration of disputes, the board summarises case law, seeks assessment of the constitutionality of law by the Constitutional Court, and exercises other powers.

The ultimate stage of proceedings in the *arbitrazh* courts is a supervisory instance, namely, the Supreme Court of Russia, which acts as a supervisory authority represented by the Presidium, reviewing judicial acts rendered by the board on cassation appeal.

Consideration of a supervisory appeal is similar to the one of a cassation appeal lodged with the board. In particular, after the supervisory appeal has been lodged with the board to trial on appeal, the judge of the Supreme Court first examines it in a non-public order without summoning the parties. As a result of such review, a judgment shall be rendered:

- either to refuse to refer a supervisory appeal for consideration in a court session of the Presidium of the Supreme Court of the Russian Federation, where there are no grounds for review of the judgment; such refusal may be appealed against to the chairman or deputy chairman of the court who are entitled to reverse the refusal and submit the supervisory appeal for public consideration by the Presidium of the Supreme Court of the Russian Federation; or
- to refer a supervisory complaint for consideration in a court session of the Presidium of the Supreme Court of the Russian Federation.

The list of grounds for review of the case by way of supervision is extremely limited and is predicated on the fact that the breaches committed by the board in considering the case under cassational procedure must be fundamental and must offend the public order. In particular, such breaches include:

- a violation of human and civil rights and liberties guaranteed by the Constitution of the Russian Federation, generally accepted principles and norms of international law, international treaties of the Russian Federation;
- violation of the rights and legitimate interests of the general public or other public interests; and
- violation of rules of application or breaches in application and (or) interpretation of law by the courts.

The acts rendered by a judge of the Supreme Court of the Russian Federation in non-public proceedings by way of supervision are referred to as orders (of refusal to refer the case to the Presidium for public hearing and affirmation of inferior courts' judgments or to refer the case to a public hearing in the Presidium) and those adopted by the Presidium as a result of public hearing of the case are referred to as the rulings.

In addition to the above courts, which are established on a territorial basis, Russia has its first functioning specialised court – the Court of Intellectual Property Rights.

Within its jurisdiction in the broadest strokes as the court of first and cassation instances, the Court of Intellectual Property Rights considers disputes relating to the protection of intellectual property rights (in particular, cases challenging normative legal acts of federal executive authorities in the field of patent rights and rights to selection achievements, the right to integrated circuit layouts, the right to trade secrets (know-how), the right to legal means of individualisation of legal entities, goods, works, services and enterprises, the right to use

the results of intellectual activity as part of an integrated process; cases contesting the acts of federal executive authorities in the field of patent rights and rights to selection achievements, the right to integrated circuit layouts, the right to trade secrets (know-how), the right to legal means of individualisation of legal entities, goods, works, services and enterprises, the right to use the results of intellectual activity as part of an integrated process that contain legislative interpretation and have regulatory characteristics; cases involving disputes on granting or termination of legal protection of intellectual property and equivalent means of individualisation of legal entities, goods, services and enterprises (with the exception of copyright and related rights, and topologies of integrated circuits); cases involving an early termination of the legal protection of a trademark due to passiveness; cases involving identification of the patent holder, cases challenging the decision of a federal antitrust authority recognising the actions related to the acquisition of the exclusive right to the means of individualisation of a legal entity, goods, works, services and enterprises as unfair competition, identification of a patent holder). The above cases are heard by the Court of Intellectual Property Rights, regardless of whether the participants in legal relations, that the dispute arose of, include organisations, individual entrepreneurs or individuals.

The acts adopted by the Court of Intellectual Property Rights as the court of first instance after examining the case on its merits are referred to as decisions and can only be appealed to the court of cassation (no procedure of appeal is envisaged). The Court of Intellectual Property Rights itself acts as a cassation court, represented by its Presidium.

The number of judges involved in the consideration of a case at each level (described above) is as follows:

- at first instance, as a general rule, the case is considered by a sole judge (there are two exceptions of panel hearing): (i) when the *arbitrazh* court assessors are involved the case is considered by one judge and two *arbitrazh* court assessors (the arbitration assessors are usually engaged on petition of a party to the dispute in connection with extraordinary complexity of the case and (or) the need for expertise in the field of economics, finance or management); or (ii) by a panel comprising three judges in a specifically named category of cases (in particular, cases challenging regulatory legal acts, cases referred by the court of cassation to the court of first instance to be considered by a panel, cases, which pursuant to a decision of the presiding judge are to be tried by a panel due to their extreme complexity on the basis of a reasoned statement by the judge), and
- the court of second instance (the court of appeal) considers the case by a panel of three judges, the circuit court of cassation – by a panel comprising three judges, including a presiding judge.

The board of the Supreme Court of the Russian Federation considers a case upon cassational appeal as follows:

- the acceptance and non-public consideration of an appeal is carried out by a judge single-handedly; and
- a public hearing of the case is carried out by a panel composed of three or another odd number of judges.

The supervisory instance represented by the Presidium of the Supreme Court of the Russian Federation considers cases by a panel similar to the one of the board. Acceptance and non-public consideration of a supervisory appeal are carried out by a judge single-handedly, a public hearing is conducted by three or another odd number of judges. In total, there are 13 judges in the Presidium.

As for the Court of Intellectual Property Rights, examination of the case in the first instance is carried out publicly by a panel of three judges; examination in the cassation instance is carried out by the Presidium of the Court of Intellectual Property Rights, which consists of the chairman, his or her deputies, presiding judges and judges. The Presidium currently consists of five judges.

Depending on the nature of the dispute and amount of the claim, the proceedings in *arbitrazh* courts can take the form of action proceedings (full-fledged judicial proceedings) and summary procedure, the latter consisting in adoption of default judgment without summoning the parties in relation to claims that are straightforward from the standpoint of law.

The above distinction within the commercial proceedings was introduced last year. Thus, the summary procedure applies to cases where:

- the claims arise from the failure to comply with a contractual pecuniary obligation acknowledged by the debtor in the amount not exceeding 400,000 roubles;
- a claim is based on the protest of a bill for non-payment, non-acceptance or failure to put a date on the acceptance, if the amount of such claim does not exceed 400,000 roubles; and
- * a claim is made for recovery of statutory payments and penalties in the amount not exceeding 100,000 roubles.

Furthermore, the *arbitrazh* courts are divided depending on the type of dispute. Thus, the most serious and complex cases may be tried at first instance already by the Supreme Court of the Russian Federation. Such categories of disputes include, for example, cases challenging regulatory legal acts of supreme authorities (the president of the RF, the investigation committee of the RF, etc), cases related to the suspension of the activities of political parties and public associations, and the termination of activity of the mass media, etc.

The courts of general jurisdiction are competent to consider all other civil cases not falling within the jurisdiction of the *arbitrazh* courts and the Court of Intellectual Property Rights. These include, inter alia, litigation with the participation of individuals, organisations, state authorities and local authorities concerning the protection of infringed or contested rights, freedoms and lawful interests in disputes arising out of torts and violations of labour, residential, land, environmental and public law; cases subject to special proceedings (relating to the establishment of facts of legal significance, declaration of a person to be missing, adoption of a child, declaration of a minor as fully capable, amending the civil registration certificates, declaration of moveable property to be vacant and recognition of municipal ownership of vacant property, etc); cases challenging decisions of arbitration tribunals and seeking issue of writs of execution of arbitral awards; and cases seeking recognition and enforcement of foreign judgments and foreign arbitral awards. From 1 September 2016, their competence also includes provision of assistance to arbitration tribunals in cases envisaged by the law (for example, applications for repeal of arbitral awards and awards of international commercial arbitration tribunals issued in Russia; application for issue of a writ of enforcement of arbitral awards and awards of international arbitration tribunals issued in Russia).

In general, the hierarchy of the courts of general jurisdiction in relation to action proceedings is similar to that of *arbitrazh* courts.

In particular, the system of the courts of general jurisdiction consists of the courts of first instance, where the judge single-handedly considers the case on the merits and makes a relevant decision. Some types of cases are considered in the first instance court by a panel of three judges (eg, cases involving protection of citizens' electoral rights).

The courts of second instance (courts of appeal), consists of a panel of three judges who reconsider cases with the examination of evidence and investigation of the facts of the case (only new claims that have not been considered by a court of first instance are rejected by the court of appeal; further evidence can be introduced provided that it was not submitted to the first instance court for a valid reason). Following consideration of the case by the court of appeal an appellate order is issued. At the first and the second levels the case is tried publicly with the summoning of the parties.

At the courts of third (cassation) instance, the case is considered by a single judge in a non-public session or by a panel consisting of at least three judges, and where the subject matter includes the acts of lower courts that have become effective. The cassation procedure is as follows: the cassation appeal is considered by the judge single-handedly in absentia (without summoning the parties), as a result of which the decision is made to either refuse or allow referral of the case for public hearing (such refusal may be appealed against to the chairman or deputy chairman of the court). Following the results of the public hearing by a panel of three judges, the court makes a ruling or an order, which terminates the proceedings.

The fourth level is the Presidium of the Supreme Court of the Russian Federation, where the supervisory appeal is first considered by a single judge, who either refuses or allows the case to be referred for consideration by the Presidium in a public hearing, which includes summoning of the parties. A session of the Presidium shall be valid if attended by the majority of the members of the Presidium (in total, the Presidium shall consist of 13 judges – currently there are 10 judges in the Presidium). In this regard, the refusal to refer the supervisory appeal to

the Presidium may be repealed by the chairman of the Supreme Court of the Russian Federation or his or her deputy, and the appeal, therefore, is referred for consideration in a public court hearing. Following the public hearing of the case in the Presidium a judicial act referred to as a ruling is issued. All issues concerning supervisory appeal are decided by the Presidium by a majority vote of the members present. If the votes cast for and against the revision of the adopted decision are divided equally, the supervisory appeal is deemed to have been dismissed.

The submission to jurisdiction in the courts of general jurisdiction is based on the amount of the claim. Thus, property disputes with the amount of the claim not exceeding 50,000 roubles are subject to the jurisdiction of a justice of peace.

Moreover, the following categories of cases, depending on the nature of the claim, are subject to the jurisdiction of the justice of peace:

- the issue of a judicial order;
- the dissolution of marriage, provided the spouses have no disputes in relation to the children;
- the division of marital property if the amount of the claim does not exceed 50,000 roubles; and
- other cases arising from relations under family law, excluding contested paternity (maternity), paternity testing, deprivation of paternal rights, adoption of a child, other cases in disputes concerning children and invalidation of marriage; and establishing the procedure of use of property.

Aside from the above, there are no specialised state courts (financial and (or) commercial courts) in Russia.

2 Judges and juries

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

Arbitrazh courts

Arbitrazh court assessors can be engaged in the proceedings in the court of first instance before the case is considered on the merits, that is, at the preparatory stage, upon the petition of a party in connection with the extreme complexity of the case and (or) the need of expert knowledge in the sphere of economics, finance and management. The role of the assessors is to help the court understand the complex issues of the dispute relating to the specific area of knowledge and to help pass a judgment by taking part in the voting. In the proceedings involving *arbitrazh* court assessors, the court is comprised of a professional judge who acts as chairman and two independent *arbitrazh* assessors. The *arbitrazh* assessors enjoy the rights and perform duties of the judge.

The *arbitrazh* assessors are subject to statutory qualification requirements. Thus, they must be between 25 and 70 years old and have an impeccable reputation, hold a degree and have at least five years of work experience in the sphere of economics, finance, law, management or business.

Moreover, individuals with unexpunged or unspent convictions, along with individuals who were recognised to be legally incapable or partially incapacitated by an effective judgment, individuals holding public office, judges, prosecutors, attorneys-at-law, and so on are not allowed to act as *arbitrazh* assessors. The procedure of selection of *arbitrazh* assessors is as follows:

- the chambers of commerce and industry, associations of entrepreneurs, other non-governmental and professional associations submit their proposals concerning the candidate *arbitrazh* assessors to *arbitrazh* courts. After the lists of candidates are received, the court arranges for verification thereof;
- following the verification, the lists of *arbitrazh* assessors are submitted to the Supreme Court of the Russian Federation and are approved by the Plenum of the Supreme Court of the Russian Federation; and
- the lists of *arbitrazh* assessors are published in the specialised printed press edition and in other Mass Media. The number of *arbitrazh* assessors is determined in the ratio of at least two assessors per judge.

The choice of judge in the court of first instance or judges in superior courts is made at random by a specialised computer-aided system of allocation of claims/complaints installed at the court, which following registration of the claim/complaint automatically chooses the judge/

judges from those who specialise in the relevant type of disputes. If no such specialised system is available at a court, the allocation of cases shall be carried out by the chairman of the panels of judges and the presiding judges.

The judge of the *arbitrazh* court plays a relatively active role in the proceedings, notwithstanding the fact that one of the fundamental principles of arbitration proceedings is that of the free exercise of material and procedural rights by the parties in adversarial proceedings, whereby the court has to resolve the dispute by somewhat passively listening to the arguments of the parties and resolving the dispute after the hearing is over. Thus, a judge in the course of consideration of certain categories of cases (cases arising out of administrative and other public legal relations) can, on his or her own initiative, request the evidence; he or she is entitled to summon and question witnesses or to take other regulatory steps aimed at comprehensive resolution of the dispute. A relatively wide range of powers, which show the judge's role as investigator, follows from the authority vested in him or her, such as when a judge is entitled to suggest taking a particular step to a party to the dispute and levy a fine for non-compliance by a party with a court order (eg, the court is entitled to suggest providing additional evidence). The court may also issue court orders that promote the collection of evidence to other courts; visit the places of evidence for inspection thereof, if the latter cannot be presented in court; decide whether other persons should participate in the case (co-defendants, third parties).

Moreover, the Supreme Court expressly indicated in one of its commentaries on the application of legal rules that the plaintiff's reliance on unapplicable legal rules, that is, the wrong cause of action, does not constitute the grounds for refusal of the claim by the competent court; furthermore, in such cases the court is entitled to independently choose the correct legal rules that must be applied to the established facts in the course of proceedings. This is yet another proof that the court plays a rather active role in the proceedings.

Courts of general jurisdiction

There is no jury trial in courts of general jurisdiction in Russia.

As in the *arbitrazh* court, the role of the judge is quite active. Thus, the court does not merely hear the case in a passive fashion and resolve the dispute on the basis of arguments and evidence submitted by the parties, but in some cases the court is allowed to take steps on its own initiative for the purpose of comprehensive consideration of the case (eg, the court defines which circumstances are material for the case and which party is to prove them; it brings up facts for discussion, even if the parties have not referred to some of them; decides the issue of participation in the case of other persons (the defendant, a state body) including of its own motion).

Distribution of cases between the judges is similar to allocation of cases in the *arbitrazh* courts.

3 Limitation issues

What are the time limits for bringing civil claims?

The limitation periods for the *arbitrazh* courts and the courts of general jurisdiction are identical, therefore, it is not necessary to describe limitation periods separately for each category.

It should be noted in this respect that in late 2013 the legislation was changed in terms of limitation periods.

In particular, currently there are two types of general limitation periods in Russia: the objective period, which starts from the occurrence of violation of law and may not exceed 10 years, and the subjective period starting from the date when the person learned or should have learned about the violation of its right and who is the proper defendant in a lawsuit to protect the violated right. The subjective limitation period is three years.

In some cases directly stipulated by law the limitation period may be shortened or, on the contrary, extended in comparison with the general limitation period (eg, in relation to the claims for the protection of infringed rights in connection with distribution of information in the mass media discrediting honour, dignity and business reputation, the limitation period is one year from the date of publication of such information; with regard to claims contesting decisions of the meetings that have legal implications, the limitation period is six months from the date when the person, whose rights have been violated by the adoption

of such decision, learns or should have learnt about it, but not later than two years from the date when such information about the decision adopted becomes available to the members of the appropriate civil law community; in relation to claims for invalidation of a disputable transaction the limitation period is one year; a one-year limitation period is also envisaged for claims arising out of maritime cargo shipment contracts; the shareholder whose pre-emptive right was violated has the right to remedy it by requesting that his or her rights and obligations of the buyer be retransferred to him or her within three months; the limitation period for the claim made in connection with inadequate quality of work performed under a contract of work and labour).

The limitation period does not apply to claims such as claims for the protection of personal non-property rights, depositors' claims for their deposits against a bank, claims for compensation for bodily harm, claims of the owner or another possessor to remedy any breach of its rights, even if such breach is not associated with dispossession, and other claims directly envisaged by the law.

In Russia there is a strict rule that states that the limitation period may not be altered by agreement between the parties.

Moreover, it should be noted that the law contains express rules as to the cases when the running of the limitation period can be suspended (eg, in relation to all situations such as the occurrence of force majeure circumstances that impeded the timely lodging of the claim; moratorium of the performance of the obligation declared by the act of the government of the Russian Federation, the plaintiff or defendant doing service in Russia's armed forces put on a war footing, in the case of suspension of a statute regulating the relevant legal relation) or when the limitation period can be interrupted (in case of commission of actions by an obligor that would evidence the acknowledgment of debt). In case of occurrence of events that constitute a reason for the interruption of the limitation period, the limitation period shall be resumed after the interval and the time that elapsed before the interruption is not included in the new limitation period.

The above are general rules in relation to the limitation period; however, as a matter of practice, there is a great number of nuances. In particular, such peculiarities may relate to the participants of the legal relation, to which the statute of limitations is applied, whether the participants of a disputable relation include individuals or legal entities or both and public law entities, etc.

4 Pre-action behaviour

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

To file a claim and initiate the proceedings, with subsequent consideration of the dispute on the merits, the claimant needs to comply with two requirements that determine the relevant actions, which can be nominally be divided into the following two categories:

- actions, in the absence of which no application can be filed with the court (the claim is to be left without consideration); and
- actions, in the absence of which one can apply to the court, but the dispute may be left without consideration or the time limits for consideration thereof may be substantially increased.

The first category refers to the pretrial settlement of the dispute. With regard to courts of general jurisdiction, in some cases directly stipulated by law (such as disputes seeking alteration or termination of the agreement; dispute concerning the refusal to make a compulsory contract, etc) or where the parties provided for such a rule in the agreement when entering into contractual relations, in the event of a dispute the claimant is obliged to settle the dispute by way of negotiations before going to court, mostly by forwarding a complaint to its opponent (pre-trial settlement procedure). Only compliance with this rule allows the person whose rights have been infringed to go to court if the parties to the contract fail to reach an agreement. The failure to comply with this rule entails the court's refusal to consider the claim on the merits. In such case the claimant is entitled to go to court again, but only after all the steps required for pretrial settlement have been taken.

The rules of procedure in *arbitrazh* courts contained a similar rule through 1 June 2016. Prior to that date, compliance with pretrial settlement procedure was required only in exceptional cases directly envisaged by law and was not necessary by default (as a general rule), however, as of 1 June the rule has the opposite effect. The claimant shall

by default (ie, as a general rule) comply with the procedure of pretrial settlement of the dispute, save for exceptions directly listed in the law.

In particular, a dispute arising from civil law relations may be referred to an *arbitrazh* court after the parties take steps aimed at pre-trial settlement on expiry of 30 consecutive days from the date of the complaint (claim), unless a different time limit and (or) procedure is envisaged by law or contract, save for cases regarding the discovery of legally important facts, compensation for infringement of the right to trial within a reasonable time or right to enforcement of a judicial act within a reasonable time, bankruptcy (insolvency) proceedings, corporate disputes, class action, early termination of legal protection of trademark as a result of non-exploitation thereof, and challenging arbitral awards. Commercial disputes arising out of administrative and other public law relations may be referred to an *arbitrazh* court after the pretrial settlement procedure (if envisaged by federal law) has been observed.

With regard to the second requirement, in the absence of an obligation concerning a pretrial settlement of the dispute or if the desired outcome was not reached as a result of such settlement, before going to court the claimant is obliged to provide all parties to the dispute with a copy of the claim and all the documents it relies on as evidence in the statement of claim, which the other parties (the defendant, the third parties) do not have. If the claimant fails to comply with this requirement before the claim is lodged, the acceptance of the claim for consideration shall be suspended (the court leaves the claim without action) for a period established by the court (which, as a matter of practice, on average does not exceed one month) in order for the claimant to comply with its duty and forward the required documents to the other parties. If this requirement is met, the claim is considered to have been filed at the date of its original submission with flaws and is accepted for consideration. However, repeated failure to comply with this requirement shall result in the return of the claim to the claimant. In this case, the return of the claim does not prevent the claimant from lodging it anew, but only after the circumstances that resulted in its return have been removed. The above rules are material for compliance with the limitation periods. Thus, if the flawed claim is filed within the limitation period and is left without action, the subsequent correction of flaws after the expiry of the limitations period shall not be taken into account and the claim shall be deemed to have been submitted on the initial date. If the flaws are not remedied and the claim is returned and a new claim is subsequently lodged after expiry of the limitation period, the limitation period shall be deemed to have expired with the relevant effect.

The requirement concerning the pretrial settlement of the dispute applies in both the *arbitrazh* courts and the courts of general jurisdiction; the rule concerning the duty to forward the documents that the parties lack alongside a copy of the statement of claim applies only to *arbitrazh* courts. When applying to a court of general jurisdiction the claimant encloses copies of the statement of claim and annexes thereto in the number of persons involved in the case. When allowing a claim the court itself shall provide copies of documents to participants of the proceedings.

Therefore, in the courts of general jurisdiction the failure of the parties to forward a copy of the statement of claim and addenda does not result in the rejection of claim. The court will reject a claim only in case of failure to provide the documents supporting the claim directly to the court or when other requirements are not met (eg, the stamp duty is not paid, or the authority of the signatory of the statement of claim is not confirmed).

5 Starting proceedings

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 judicial proceedings in an *arbitrazh* court, as well as in the court of general jurisdiction, are commenced concurrently with the lodging of the claim, which may be filed directly with the court or forwarded by mail or online by filling in the application forms on the court's official webpage (the filing of claims online used to be typical of *arbitrazh* courts only, however, since mid-2016 this option has become available for courts of general jurisdiction).

Upon receipt of the claim by the court, provided it was filed in accordance with the rules established by the law, the court issues an order for the acceptance thereof. Already in the order on the acceptance of the claim the court sets out the initial steps that the parties should take in connection with the commencement of the proceedings (eg, to submit evidence supporting their respective cases, prepare arguments and objections, decide on the need in participation of other parties). Such orders are a hallmark of the commencement of the judicial proceedings.

After the court adopts the order on commencement of the proceedings, it shall send it by post to all the parties to the proceedings. In the case of arbitration proceedings, the parties receive claim papers (for example, to submit evidence supporting their respective cases, prepare arguments and objections, decide on the need in participation of other parties, etc) from the plaintiff, since forwarding the papers to all parties to the trial is a prerequisite for admission of a claim. The court merely complies with its duty to forward the order on admission of the claim to the parties.

The beginning of the trial in a court of general jurisdiction is different from the process in the arbitration proceedings. The plaintiff is not obliged to forward a copy of a claim to the defendant and other parties to the dispute prior to filing of the claim with a court. The plaintiff submits the claim immediately accompanied by the required set of documents in the amount of counterparts equal to the number of participants in the dispute. After this, the court issues a ruling whether it accepts the claim for consideration and forwards such ruling to the parties together with a copy of the claim accompanied by the documents received from the plaintiff. Subsequently, the trial participants in both types of proceedings shall be entitled to familiarise themselves with the case materials and make copies in the accordance with the established procedure.

Cases are allocated subject to the current workload of a judge and the allocation shall be carried out pursuant to the principle of equal distribution of caseloads between the judges.

The statistical data of applications filed with the court show the excessive workloads of the judicial staff, which sometimes results in extended periods of consideration of the cases. The courts and the legislative power are actively combating it, in particular using instruments such as:

- mandatory pretrial settlements of disputes aimed at reducing the caseloads; and
- summary proceedings, a simplified dispute resolution mechanism in most straightforward and least complex cases, have appeared in *arbitrazh* courts.

Debate is ongoing as to whether the court should be allowed to omit written reasons for some judgments, which is time-consuming and not always necessary. It is suggested that the court shall write the reasons for judgment only if specifically requested by the parties to the proceedings.

This novelty is currently discussed at various professional platforms and in due time we will know whether it will be implemented and made into law.

6 Timetable

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

Arbitrazh court

As noted above, the claim filing procedure involves either direct application to the court by handing in the documents to the court's secretarial office or by forwarding the claim by post, by courier or online by filling in the special application form on the court's official website.

There are no special rules regulating the time limits for the filing of the claim but it is important that the claim is filed within the limitation period. Otherwise, the particulars of the claim are dismissed if the defendant files a respective application. Alongside the claim, the plaintiff shall also submit the documents confirming the particulars of the claim (written evidence), documents confirming payment of state duty, and documents confirming the authority of the plaintiff to sign the statement of claim.

With regard to the documents that are to be served upon the parties, the list of such documents is of a general nature. In particular, the claimant has to forward all documents that the parties to the proceedings lack to such parties (besides the claim, this often includes written evidence that the parties to the proceedings may lack). There is no

specific time limit for forwarding the claim to the participants of the dispute, but the law requires it to be done before the claim is filed with the court, since the statement of the claim is presented together with the documents confirming postage of the documents to the parties to the dispute.

Court of general jurisdiction

The claim is filed with the court of general jurisdiction in accordance with the procedure similar to that of *arbitrazh* courts: either by handing it to the court's secretarial office or by sending a letter by post, or with a special online service by filling in the application form on the official website of the court (since summer 2016).

This requirement is balanced by the fact that the claimant must file with the court the number of copies of the statement of claim equal to the number of parties to the dispute. Subsequently, the court sends the statement of claim with addenda thereto to all participants in the case independently.

It is worth noting that if the claim is not submitted to the court on the last day of the limitation period, but is in the process of being mailed, the period of limitation is deemed to have been observed, provided that the claim has been taken over to a post office within the period.

7 Case management

Can the parties control the procedure and the timetable?

The parties to judicial proceedings have several ways to manage the proceedings and the time limits. These include:

- direct participation of a party's representatives in court hearings;
- receipt of judicial decisions sent by the court to the address of their stay or location;
- receipt of information concerning the progress of the proceedings, documents filed and all procedural steps, judicial acts rendered by the court in the course of examination of case materials outside the framework of a court hearing is possible in the hours established by the court on a motion submitted in advance;
- checking the progress of the case and core procedural actions with regard to the case on the court's official webpage (rendering of judicial acts, dates of court hearings, etc); and
- telephone conversations with employees of the court administration in the hours established by the court.

These methods of case management are typical of the *arbitrazh* courts and the courts of general jurisdiction.

Furthermore, in the course of judicial proceedings, not only are the parties able to passively monitor the time limits of the proceedings, as described above (ie, by checking the status of the procedural steps), but they can also actively influence them. Thus, if the proceedings exceed the time limit established by law, or if there are grounds to believe that the time limit will be breached, the participants of the dispute will be entitled to submit an application to the chairman of the court for the acceleration of the proceedings.

Upon consideration of the application, provided it is well founded, the chairman of the court is entitled to take action to expedite the case and to ensure that the judge has complied with the time limits provided by the statute.

Moreover, in order to encourage the courts to comply with the time limits of the judicial proceedings the legislator has provided for monetary compensation in the case of a breach of the right to trial within a reasonable time limit.

8 Evidence – documents

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

With regard to the preservation of documents before the trial procedure, the procedural law does not establish any specific regulations. The general rules established by special regulations of substantive law on custody, archiving and destruction of documents after the custody period has expired will be applied in each specific case (eg, depending on the procedural status of the party to the dispute).

In other words, if the law prescribes keeping certain documents indefinitely or if the prescribed period of storage of the document has not expired by the commencement of the trial, the party is obliged to

disclose such documents to the court and the parties (except in cases where the information contained in the documents is protected by law and has a special procedure for its disclosure).

Both in the *arbitrazh* court and the court of general jurisdiction, at the preparation stage or during the trial, the parties are obliged to provide each other with all documents and evidence on which they base their case. This rules safeguards the principle of adversarial proceedings and equality of arms.

9 Evidence – privilege

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

As a general rule, the participants in the dispute both in *arbitrazh* courts and courts of general jurisdiction have equal access to all documents contained in case files and all information contained in such documents.

Moreover, in accordance with the principle of publicity of judicial examination, the persons that are not party to the proceedings may be present at the hearings. However, the law provides for liability for disclosure of information contained in case files if this information has a special legal regime and is protected by law (information that constitutes business or state secrets). Each party to the dispute is warned by the court about the liability for disclosure of such information.

Since not only attorneys-at-law but also lawyers that do not have the status of attorney-at-law can act as representatives at court, there are exceptions whereby the lawyers without the status of attorney-at-law cannot be granted access to case files which constitute state secrets. Attorneys-at-law are allowed access to such documents.

10 Evidence – pretrial

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

A general rule concerning the advance disclosure of all evidence (prior to commencement of judicial proceedings) applies to the exchange of written witness and expert statements. However, if the parties did not disclose such evidence in advance, which sometimes happens, then in the case of disclosure of such evidence immediately during the trial, the other party is entitled to file a petition with the court to adjourn the hearing in order to review the new evidence and prepare the party's case, or, which is more typical of *arbitrazh* courts, the court may refuse to satisfy a motion on the submission of evidence, if it is not submitted in time and such failure to submit the evidence is intentional, related to the abuse of the right and aims at delaying or frustrating the trial. In this case, the new evidence is not adduced and the case is considered on the basis of the evidence available in the case file.

The court may also require the person who has committed a breach of the procedure or deadlines for submission of the evidence – that is, the person who abused the process – to reimburse the legal costs.

The above steps ensure that the basic principles of justice, such as equality of the parties and optionality, are implemented.

11 Evidence – trial

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

In both *arbitrazh* courts and courts of general jurisdiction, all evidence must be attached to the file in its original form or as duly certified copies (certified by a competent person). All documents in a foreign language must be accompanied by a translation and notarial certification, as judicial proceedings in Russia are conducted in the Russian language.

With regard to experts and witnesses, both in the *arbitrazh* courts and the courts of general jurisdiction the rule concerning the possibility to summon such persons and their duty to appear in court to provide verbal witness statements is applied.

The witness is also entitled to present a statement in writing to be filed by the court. It is important to note that the witness statement must be admissible, that is, the witness must state the source of his or her knowledge.

If the source of such information is not disclosed, the witness statement has no probatory value and is not taken into account in the consideration of the matter.

As a rule, the expert is summoned based on the results of the expert examination conducted on instructions by the court so that the parties to the trial can ask him or her questions concerning the results of such examination.

12 Interim remedies

What interim remedies are available?

The courts of general jurisdiction and *arbitrazh* courts have a system of interim remedies. It is primarily linked to the existence of the provisional remedy.

Before the claim is lodged, or at any time in the course of the proceedings, the claimant is entitled to file a petition with the court for the application of interim measures in order to secure the claim or the claimant's pecuniary interests. Interim measures are applied by the court only if non-compliance with these measures may make it difficult or impossible to enforce a judicial act, particularly if the enforcement of a judicial act is expected to take place outside the Russian Federation, as well as to prevent causing significant harm to the applicant.

The following interim measures are available:

- attachment of monies or other property of the defendant;
- prohibition of certain steps in relation to the subject of the dispute by the defendant or other persons;
- imposition of the obligation to take certain steps for the purpose of preventing damage or deterioration of the disputed property;
- transfer of the disputed property into the keeping of the claimant or another party;
- suspension of recovery under the enforcement document contested by the claimant;
- suspension of the sale of the property if a claim for the release of such property from the attachment is filed; and
- other measures.

The court's decision to apply interim measures must be based on the principle of proportionality of such measures and the claims made in the statement of claim.

With regard to the application for interim relief ordered by the Russian courts to support foreign proceedings, such application depends on the domestic law of the respective state where the dispute is considered in which the parties apply for interim relief in the Russian court, as well as on the existence of an agreement between the Russian Federation and such foreign state whereby the interim relief is recognised and enforced on the territory of another state.

13 Remedies

What substantive remedies are available?

The substantive law distinguishes the following remedies:

- recognition of the right;
- restoration of the situation that existed before the breach of the right and termination of the conduct that infringes such right or creates the threat of such infringement;
- invalidation of the voidable transaction to be invalid and application of consequences of its invalidity;
- application of the consequences of invalidity of a void transaction;
- invalidation of the resolution of the meeting;
- invalidation of an act of a state or local authority;
- self-help;
- adjudication of the performance of an obligation in kind;
- compensation of loss;
- recovery of penalty;
- compensation for psychological damage;
- termination or alteration of the legal relationship;
- court's refusal to enforce an unlawful act of a state or local authority; and
- other remedies stipulated by law.

As far as the remedy as compensation of loss is concerned, it includes both compensation of actual damage and compensation of lost profit.

With regard to the accrual of interest as punishment, it should be noted that in addition to the possibility of accrual of interest at the expense of the contractual or statutory penalty, the Russian law provides for 'liability for non-fulfilment of a monetary obligation', which enables the lender to charge interest on the funds improperly withheld

by the debtor. The amount of the interest depends on and is calculated on the basis of the bank interest rate. Since the summer of 2015, the amount of the interest rate has been calculated in accordance with the average rate of bank interest on deposits of individuals published by the Central Bank which were in force in the relevant periods at the place of residence or (if the creditor is a legal entity) location of the creditor.

As a general rule, the accrual of such interest is made until the date of the actual performance of the monetary obligation by the debtor.

14 Enforcement

What means of enforcement are available?

Judicial decisions are enforced with the help of a special public service, the court bailiff service. To ensure enforcement of judicial decisions the court bailiff service is entitled to take the following coercion measures against the debtor:

- recovery of the debtor's property, including money and securities;
- recovery of periodical payments received by the debtor as a result of labour, civil or social legal relationships;
- attachment of the debtor's pecuniary rights, including the right to receive payments under the enforcement proceedings, in which it acts as the judgment creditor; the right to receive rental payments, as well as the exclusive rights to the results of intellectual activity and means of individualisation; the rights of claim under the contracts of disposal or exercise of the exclusive right to the results of intellectual activity and means of individualisation; the right to use of the results of intellectual activity and means of individualisation held by the debtor as the licensee;
- seizure of the debtor's property adjudicated to the judgment creditor, as well as under the enforcement inscription of the notary public in cases envisaged by federal law;
- attachment of the debtor's property held by the debtor or by third parties in pursuance of the judicial decision for the attachment of such property;
- filing an application with the registration authority for the registration of the transfer of the rights to the property, including securities, from the debtor to the creditor in accordance with the procedure stipulated by law;
- taking the steps set out in the enforcement document for and at the expense of the debtor if such steps can be taken without the personal involvement of the debtor;
- the creditor's forceful occupation of a dwelling;
- the eviction of the debtor from a dwelling;
- the compulsory release of the non-residential premises from the debtor's presence and its property;
- compulsory deportation out of the Russian Federation of foreign nationals and stateless individuals;
- the compulsory release of the land plot from the debtor's presence and its property; and
- other steps envisaged by federal law or enforcement documents.

As to the failure to perform interim judicial acts, such as those associated with the discovery of evidence, a penalty and court costs may be imposed on the obliged party for such a failure.

Moreover, criminal liability may arise in the case of malicious failure to comply with the requirements of the judicial act.

15 Public access

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

Arbitrazh courts

As a general rule, court hearings are open to the public since the principle of publicity is a fundamental principle of judicial proceedings. Any third party without limitation is entitled to attend such hearings and follow their progress and judicial acts are declared publicly by the *arbitrazh* court. Such persons are entitled to make audio recordings of any hearing, and take photographs and make video recordings with the prior permission of the court.

The exceptions to this rule includes cases involving state secrets, as well as proceedings where the petition of a party to the dispute is satisfied that the party successfully proved that the open hearing will entail the disclosure of a commercial, official or any other protected

secret. The court renders a respective judicial act to consider the case in a closed court session, which is referred to as an order.

The documents that are available to the general public include only the judicial acts (both interim (adjournment of proceedings, disclosure of evidence, subpoena of a witness, commissioning of expert evidence, etc) and terminating the proceedings) that are published on the official website of the court; written arguments and other evidence of the parties are not made public and the persons that are not parties to the proceedings have no access to such documents.

Courts of general jurisdiction

Hearings in the courts of general jurisdiction are also open to the public. Any third party without limitation is entitled to attend such hearings.

Court hearings are closed in cases involving information that constitutes a state secret, the secret of adoption of a child, as well as in other cases directly envisaged by law.

A closed hearing is also allowed when the petition of a participant to the proceedings is satisfied where such person refers to the need to preserve commercial or any other legally protected secret, or privacy or other circumstances, the public discussion of which may entail the disclosure of such secrets or infringement of the rights and lawful interests of the individual.

16 Costs

Does the court have power to order costs?

Arbitrazh courts

The judicial costs borne by the successful parties to the case are recovered from the unsuccessful party. In case of partial satisfaction of the claim, the costs are allocated between the parties proportionally to the amount of the satisfied claims.

The representative's fees paid by the successful party shall be recovered by the *arbitrazh* court from the other party to the case in a reasonable amount.

The same applies to the state fee, which shall be recovered from the defendant if the claim is satisfied in full. The exception is when the parties make an agreement concerning the allocation of costs or when the claim is satisfied in part.

In case of partial satisfaction of the claim the amount of the state fee shall be distributed between the parties pro rata to their successful claims.

As a general rule, the issues of allocation of costs are resolved by the court through issuance of an order or by a judicial decision that terminates the consideration of the case on the merits.

It should also be noted that in some cases the court may depart from the general rule of imposing legal costs against the losing side or imposing such costs in proportion to the satisfied claims. In particular, in some cases, the *arbitrazh* court may impose all legal costs on a person abusing his or her procedural rights or failing to exercise his or her procedural obligations if this has led to the disruption of the court session, delay of the trial, obstruction of the proceedings or adoption of a valid and founded decision by the court.

Courts of general jurisdiction

The allocation of costs in the courts of general jurisdiction is similar to that in the *arbitrazh* courts. The obligation to reimburse the judicial costs is imposed on a party to the proceedings by a court order or decision terminating the proceedings on the merits in the respective tribunal.

When considering cases in courts of general jurisdiction, the court may recover compensation for the loss of time. Thus, the court may impose a compensation for the actual loss of time on the party that unfairly lodged an unfounded claim or initiated a dispute concerning a claim or regularly opposed the correct and timely consideration and settlement of the case, in favour of the other party. The amount of compensation is determined by the court within reasonable limits and subject to specific circumstances.

Reallocation of costs on the party that abused its rights and compensation for the loss of time are designed to anticipate an inequitable conduct of the parties to the dispute related to the protraction of the proceedings.

In recent years, no new rules regulating the procedure of recovery of judicial costs have been adopted.

17 Funding arrangements

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 accordance with the general rule stipulated in one of the decisions of the Constitutional Court of the Russian Federation (Ruling of the Constitutional Court of Russia dated 23 January 2007 No. 1-P), the execution of a contingency fee agreement between the principal and the attorney shall not be allowed because, according to the clarification of the Constitutional Court, such agreements actually pre-determine the actions of a state authority, since ultimately the outcome of the proceedings is dependent upon the actions of the authority. As the attorney cannot influence the adoption of a decision by the court, no agreement based on a contingency fee attached to the content of the judicial act or the outcome of the dispute shall be allowed. In all other cases, the fee shall be determined by an agreement of the parties, namely the principal and the attorney.

With regard to the distribution of risks between the party to the dispute and a third party, the relevant legislation allows this both in the *arbitrazh* courts and the courts of general jurisdiction. The distribution of risks is arranged by way of an assignment agreement and subsequent procedural legal succession of the third party in relation to the relevant (assigned) part. In this case, the general rules of assignment of claims are applied, according to which, for example, no assignment shall be allowed without the consent of the party with the outstanding obligation in which the identity of the creditor is essential for the debtor. Also, depending on the merits of the claim, in some cases, the assignment is only possible with the prior consent of the debtor.

18 Insurance

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

Russian legislation contains no prohibition of insurance of pecuniary loss in the form of litigation costs that may be imposed on a party to the proceedings. Such insurance is possible on the basis of general insurance provisions, since no special rules exist that specifically deal with insurance of litigation costs. Moreover, some insurance companies directly provide for insurance of litigation costs in their insurance rules. This applies equally to *arbitrazh* courts and courts of general jurisdiction.

However, since the summer of 2015, a new concept of compensation of losses incurred in case of occurrence of events specified in the contract has emerged in the substantive law. In some cases, this concept will also be relevant for the adoption of decisions on the compensation of costs.

This concept is to some extent similar to the concept of indemnity, has been long established in some foreign jurisdictions. As far as compensation of judicial costs is concerned, the parties to an obligation may execute an agreement whereby the party that is transferring something under a contract undertakes to compensate the judicial costs if judicial proceedings are subsequently initiated in relation to the transferred property by a third party, as a result of which the acquiring party will incur such costs.

As a rule, these agreements are typical of complex transactions with a high value (eg, in the case of a share purchase the buyer may request compensation of judicial costs if monetary claims that had arisen prior to the sale of shares (of which the buyer was not informed) are made against the company after the purchase).

19 Class action

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

Under Russian law a class action for damages is only typical of proceedings in *arbitrazh* courts. No possibility of lodging a class action for damages is expressly envisaged for courts of general jurisdiction.

With regard to arbitration proceedings, it should be noted that a class action may be lodged by an entity or an individual participant to

the legal relationship, out of which the dispute or the claim arose, to protect the infringed or contested rights and lawful interests of other participants in the same legal relationship.

The Code of Arbitration Procedure sets out the types of disputes in relation to which a class action may be filed. In particular, a class action can be filed in corporate disputes and disputes relating to the activity of professional security market participants. As the list of such disputes is not exhaustive, the relevant legislation allows class actions in relation to other types of disputes subject to certain conditions established by the Code (see above).

Moreover, the possibility of making a class claim is envisaged within the framework of administrative proceedings (such proceedings are conducted by the courts of general jurisdiction but are not included in the category of civil law disputes in property discussed in this article).

Thus, in accordance with the rules of administrative proceedings, individual participants of administrative and other public legal relations may lodge administrative class action to protect the infringed or contested rights and lawful interests of a group. The grounds for such action include:

- large or indefinite number of members of such group;
- uniformity of the scope of the dispute and grounds for making the claim;
- common administrative defendant; and
- use of the same remedy by all members of the group.

It should be noted that the rule concerning administrative class action is relatively new (only about two years in effect), therefore, the precedents in application thereof are currently unknown.

20 Appeal

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

Since the courts of general jurisdiction and *arbitrazh* courts have a four-tier system subject to certain peculiarities specified above in the description of the overall court system, there is a possibility of cassation and supervisory appeal after the case has been considered by an appellate court.

It should be noted with regard to the grounds of appeal in *arbitrazh* courts that the appeal can be lodged by a party to the dispute within one month from the issuance of the act (judgment) of the court of first instance in full. Upon the expiry of this one month term, the appeal can be filed with a petition for restoration of the time limit for the appeal.

The appeal can also be lodged by someone who is not participating in the dispute if the judicial act concerns their rights and duties.

The grounds for repeal of the decision adopted by the court of first instance are as follows:

- incomplete examination of circumstances that are material for the case;
- lack of proof of the material circumstances that the court of first instance has deemed to have been found;
- discrepancy between the findings and the facts of the case;
- violation or improper application of the rules of substantive law, which resulted in non-application of the applicable law, application of the law that was not to be applied; or misinterpretation of the law; and
- violation or improper application of the rules of procedural law if it resulted or could have resulted in the adoption of an incorrect decision.

In addition to the above grounds of repeal of a decision in an appellate court (which are not unconditional) there is a range of grounds of repeal of a decision in any event (unconditional grounds).

The unconditional grounds include:

- consideration of the case by an unlawfully composed *arbitrazh* court;
- consideration of the case in the absence of some of the participants that have not been properly notified of the time and place of the hearing;
- breach of rules concerning the language in the course of consideration of the case;
- adoption of a decision by the court concerning the rights and duties of persons that have not been joined to the proceedings;

- failure to get the decision signed by the judge or the signing of the decision by a judge other than the one specified in the decision;
- absence of minutes of the court hearing on case files or the signing of such minutes by persons who did not participate in the making thereof; and
- breach of the rule concerning the secrecy of the justices' deliberations in the course of making a decision.

With regard to the courts of general jurisdiction it should be noted that appeals are also to be filed within one month from the date of the court decision in their final form by the participants in the proceedings.

In general, the grounds for repeal of a judgment of the court of first instance are identical to those for repeal of a decision by the *arbitrazh* appellate court.

The right of further appeal, in the broadest sense, as noted above, corresponds to the hierarchy of the judicial system.

Arbitrazh courts

The judgment of a first instance court is appealed within one month to the court of appeal.

Rulings of the court of appeal are appealed against in the court of cassation within two months of the date of an appellate ruling.

A cassation ruling may be further appealed against to the Judicial Board on Economic Disputes of the Supreme Court of the Russian Federation within two months from the date of the cassation ruling by submitting the second cassation appeal.

The last instance of appeal is the Presidium of the Supreme Court of the Russian Federation, which acts as the court of supervisory instance, to which a party can apply within three months from the date of issue by the Judicial Board on Economic Disputes of the judicial act on consideration of the second cassation appeal.

The courts of general jurisdiction have the following system of appeal against judicial acts.

The judgments issued by courts of first instance may be appealed against within one month. Within six months from the date of an appellate act the judgment may be appealed against to the court of cassation. The supervisory court, namely, the Presidium, is the ultimate stage of appeal of judicial acts. The parties to the proceedings may apply to the latter within three months from the date of issue of a cassational act.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The procedure of recognition and enforcement of foreign judgments with regard to the *arbitrazh* courts is outlined below.

The recognition and enforcement of foreign judgments are possible if there is an agreement concerning the recognition and enforcement of such judgments between Russia and the state where the judgment was adopted, or if the domestic law allows for recognition and enforcement based on the principle of reciprocity.

The recognition and enforcement of a foreign judgment is carried out on the basis of an application filed with the *arbitrazh* court by the successful participant in the foreign judicial proceedings. The application is filed with the court at the location of the debtor or the location of his or her property (if the location of the debtor is unknown).

The application is considered by a judge single-handedly in a court hearing within three months from the receipt of the application by the court. The parties to the dispute are allowed to participate in the court hearing.

Following the results of the hearing the court issues an order for the recognition and enforcement of the foreign judgment or a refusal to recognise it. This order can be appealed against within one month with the cassation court.

The enforcement of the foreign judgment shall be effected on the basis of a writ of enforcement issued by the *arbitrazh* court that issued the order for the recognition and enforcement of the foreign judgment.

The recognition and enforcement of a foreign judgment in the court of general jurisdiction is also possible when a relevant agreement exists between Russia and the foreign state whose decision is subject to recognition, or on the basis of the reciprocity principle. The courts of general jurisdiction recognise and enforce the judgments in civil cases, excluding business disputes and other cases concerning

entrepreneurial and other economic activity and criminal sentences in the part relating to the compensation of loss inflicted by a crime.

The enforcement of a foreign judgment is possible within a period of three years. It is within this period that the judgment creditor can file a petition for the enforcement of the foreign judgment. In exceptional cases such term can be restored.

For the purposes of enforcement, the judgment creditor shall file a petition with the court at the location of the debtor or, if his or her location is unknown, at the location of the debtor's property. This petition is subject to consideration in a court hearing and the debtor must be notified of the time and place of its consideration.

Following the results of the consideration of the petition, the court shall issue an order on the enforcement of the foreign judgment or a refusal of such enforcement. Pursuant to the order, the court shall issue an enforcement order, on the basis of which the enforcement of the foreign judgment shall be effected.

With regard to the recognition of a foreign judgment not requiring enforcement by the court of general jurisdiction, such judgments are recognised without any further proceedings, provided there are no objections from the interested parties. Thus, within one month of becoming aware of the receipt of the foreign judgment the interested party can file its objections to the recognition of such judgment with a court at its location. The objections filed shall be considered in a court hearing with the notification of the party that filed such objections. Following the results of the hearing the court shall issue a relevant order.

22 Foreign proceedings

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

Effective procedural legislation does not directly regulate the issue of collection of evidence for use in civil proceedings in other jurisdictions. General requirements apply to the collection and registration of evidence for the mentioned purposes with regard to each particular jurisdiction.

Whether legal assistance in collection of evidence will be provided depends on the existence of the relevant agreement on legal assistance between Russia and the state requiring such evidence. It should be noted that Russia is a party to a number of such international agreements with various countries.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

We must distinguish between the concept of arbitration (arbitration proceedings) that is used to resolve domestic disputes between the Russian companies and the international commercial arbitration described in this section below.

As regards international commercial arbitration, it must be noted that as the Russian Federation acceded to the UNCITRAL Model Law in 1993, the legislation concerning international commercial arbitration is based on many regulations and provisions of UNCITRAL. In particular, this is stipulated directly in the law on international commercial arbitration, which refers to the fact that it relies on the provisions of the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be executed in writing in the form of an arbitration clause or as a separate agreement, according to the effective Russian legislation.

The agreement is deemed to have been concluded in writing if it is made in such form that allows recording the information therein contained or making such information available for subsequent use. It is deemed to have been concluded in writing as an electronic communication if the information therein contained is available for subsequent use and if the arbitration agreement is made in accordance with the requirements of the law envisaged for the contract made by electronic exchange of documents.

The agreement is deemed to have been concluded in writing if it is made through exchange of a statement of claim and statement of counterclaim where one party asserts there is an arbitration agreement and another party does not object against it.

It will also be deemed to have been concluded if the written agreement between the parties contains a reference to the document containing an arbitration clause, provided the reference allows considering the clause to constitute a part of the agreement.

An arbitration agreement can be made *inter alia* through its incorporation in the rules of on-exchange trading or clearing.

As far as the disputes between shareholders and a legal entity are concerned, an arbitration clause (agreement) may be included in the articles of association of such a legal entity.

At the same time, the arbitration agreement cannot be made by incorporation thereof in the articles of association of a legal entity with at least 1,000 shareholders owners of voting shares, as well as the articles of association of a public, joint stock company.

25 Choice of 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?

As far as the procedure of selection of arbitrators is concerned, the parties shall determine the number of arbitrators at their discretion, however, as a general rule, it should be an odd number. If the parties fail to establish a specific number of arbitrators, three arbitrators shall be appointed.

The procedure of election of arbitrators may be agreed by the parties and in the absence of an agreement the arbitrators shall be appointed as follows:

- in the case of a three-arbitrator proceedings, each party shall appoint one arbitrator and the two thus appointed arbitrators shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of the relevant request from the other party or if the two arbitrators fail to agree on the choice of the third arbitrator within 30 days from their appointment, such arbitrator shall be appointed by the competent court on application from any party; and
- in the case of sole arbitrator proceedings, unless the parties come to an agreement on election of the arbitrator an arbitrator shall be appointed by the competent court on request from any party.

If the arbitration is to be conducted by a sole arbitrator, the arbitrator shall also be appointed by the President of the Chamber of Commerce and Industry, unless the parties have agreed to nominate the arbitrator.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The arbitrators are elected or appointed from among the individuals with necessary expertise in resolution of disputes subject to the competence of international commercial arbitration.

The lists of arbitrators are updated every six years. There are four lists in the International Commercial Arbitration Tribunal of the Chamber of Industry and Trade of the Russian Federation for international commercial disputes, internal disputes, corporate disputes and sports disputes.

As a rule, the lists of arbitrators include the most well-known and authoritative representatives of the legal profession of prominent legal schools, experienced practising attorneys-at-law, heads of legal departments of companies from various industries, and retired judges. The lists are made subject to specialisation of the candidate and the disputes referred to the jurisdiction of the arbitration tribunal. Careful selection of candidates ensures and contributes to effective completion of the most complex arbitration proceedings arising in various areas of the economy.

27 Arbitral procedure

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

As a general rule, the parties may agree on the arbitration procedure. The sole requirement is that the procedure shall comply with the special law on international commercial arbitration. In the absence of an agreement between the parties the arbitration shall be carried out at the discretion of the arbitrators who shall also comply with the basic principles of procedure set out in the said law.

At the same time, the domestic law contains no special substantive requirements for the arbitration procedure, albeit it must, of course, comply with constitutional principles and public policy rules.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Under the effective legislation, the state court cannot interfere with the resolution of the dispute by the international arbitration tribunal.

The exceptions include situations where the parties to the arbitration proceedings contest the arbitration award adopted in relation to them in a state court.

The list of grounds for repeal of an arbitration award is rather limited and relates mostly to serious procedural violations by the arbitration tribunal.

It is discussed in more detail in question 31.

29 Interim relief

Do arbitrators have powers to grant interim relief?

The possibility of use of interim relief by the arbitrators is expressly set out in the law, which regulates international commercial arbitration.

It should be noted that the law does not expressly establish the types of interim relief that can be granted to the parties to the dispute in international commercial arbitration; rather, it enables the court (unless the parties have agreed otherwise) to grant any interim relief that it deems fit depending on the essence and the subject matter of the dispute.

Moreover, the arbitrators may request from a party to the dispute that requested provision of security of the claim to provide a counter security.

Moreover, until the arbitration tribunal (pool of arbitrators) is formed, interim relief may be granted by the arbitration institution that administers the arbitration proceedings, if the agreement between the parties so provides.

30 Award

When and in what form must the award be delivered?

The arbitration award must be issued following the results of the consideration of the dispute.

The award is issued in writing and is to be signed by a sole arbitrator (if the case was considered by one judge) or by the arbitrators (if it was considered by a panel of judges).

If the case was considered by a panel, the signatures of the majority of the arbitrators who considered the case must be in place for the award to be considered legitimate, and the reasons for the absence of the signature of the other arbitrator must be specified.

It is also subject to the general rules that apply to judgments and arbitration awards whereby the award must contain the underlying reasons for its adoption, a conclusion on the merits of the claim (to satisfy or dismiss), amount of arbitration fee and costs and distribution thereof between the parties, as well as the details, date, place of arbitration, etc.

If the arbitrators made errors in calculations or clerical errors when rendering the award, any party shall be entitled to request elimination of the mistakes within 30 days from the issue of the award. The same power to correct errors belongs to the arbitrators who can do so on their own initiative.

If any provision of the award is unclear, provided there is a relevant agreement between the parties, any party may ask the arbitrators construe the award or any part of it.

31 Appeal

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

Determining whether an award can be challenged falls within the scope of agreement between the parties in dispute. Thus, the parties may directly provide that an arbitral award is final. A final arbitral award is not subject to amendment. If the arbitration agreement does not provide that the arbitral award is final, the latter may be repealed by a court for the reasons below. The party that filed a petition for the repeal of the award has to prove one of the following circumstances:

- the arbitration agreement is flawed, resulting in its invalidity under the law that the parties chose to apply to the agreement, or in the absence of such an indication, the law of the Russian Federation;
- one of the parties to the arbitration agreement lacked legal capacity at the time of execution;
- the party to the dispute was not duly informed of the appointment of an arbitrator or of arbitration proceedings, including of the time and place of arbitration, or was unable to provide its explanations in the case for other reasons;
- the award was issued in a dispute that was not envisaged by or does not meet the requirements of the arbitration agreement or contains findings that are beyond the scope of the arbitration agreement; or
- the composition of the arbitration tribunal or the arbitration procedure did not comply with the agreement between the parties or, if no such agreement was made, with the law.

The arbitration award is also subject to repeal if the state court that is reviewing it finds that the object of the dispute could not have been the subject of proceedings in an arbitration tribunal in accordance with the law or that the arbitration award conflicts with Russian public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Procedure of enforcement of foreign arbitral awards

Domestic laws provide that the awards issued by foreign commercial arbitration tribunals in foreign states are recognised and enforced in Russia if the procedure is envisaged by an international agreement of the Russian Federation and a federal law.

Thus, Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In this regard, the provisions of the Convention are binding on the Russian Federation and enable it to enforce foreign arbitral awards in Russia by applying to a state *arbitrazh* court.

According to the general rule, to enforce a foreign arbitral award a party to the dispute must submit to the Russian state *arbitrazh* court a petition for the enforcement of the award executed in accordance with the law, as well as the original or a duly certified copy of the foreign arbitral award translated into Russian, and the original or a duly certified copy of the arbitration agreement.

The Russian state *arbitrazh* court shall consider such a petition if the relevant stamp duty in the amount established by the statute is paid.

The petition for the enforcement of a foreign arbitral award shall be considered by the Russian state *arbitrazh* court within one month (one of the changes in the procedure of recognition and enforcement of foreign arbitral awards consisted in that the time limit was reduced from three months to one month) of the date of its receipt.

The parties may participate in the public hearing if they wish, but their absence does not impede the consideration of the petition. Following the consideration of the petition, the court shall issue an order for recognition and enforcement of the arbitral award and issue a writ of enforcement, or shall dismiss the petition.

For example, the grounds for dismissal of the petition for enforcement of a foreign arbitral award include:

- the award has not become effective under the law of the country of its issuance;
- the party, against which such award was issued, was not duly notified of the time and place of arbitration hearing within the established time limits;
- the consideration of the case in accordance with a treaty of domestic law of the Russian Federation is subject to the exclusive competence of a Russian court;

Update and trends

The majority of last year's reforms in the judicial sphere have been addressed above (introduction of summary procedure in the system of arbitrazh courts, active reformation of e-justice, appearance of summary proceedings in the system of the courts of general jurisdiction, which is characterised by a small amount of the claim or non-complex nature of the dispute, which are terminated by issue of the operative part of the judgment only and preparation of the reasons for the judgment exclusively on request from the party to the dispute, etc).

No other notable changes were introduced last year.

The federal Law on Arbitration (Arbitration Proceedings), which streamlined many issues concerning the arbitration proceedings and included the best practice of the recent years in this field, came into effect on 1 September 2016. The adoption of this law is the landmark of a new era of arbitration proceedings in Russia, which we hope will bring arbitration in Russia to an entirely different qualitative level.

- there is an effective Russian judgment rendered in the dispute between the same persons with regard to the same subject matter on the same grounds;
- a dispute between the same persons, in relation to the same subject matter and on the same grounds is currently pending with a Russian court;
- the limitation period for enforcement of the foreign judgment has expired and has not been restored; and
- the enforcement conflicts with the public policy of the RF.

Procedure of enforcement of the award issued by a domestic arbitration tribunal

Overall, the procedure of enforcement of a domestic arbitral award is similar to that of enforcement of the foreign arbitral award.

The successful party shall submit a duly executed petition for the issue of a writ of enforcement to a state court. The following mandatory documents shall be annexed to the petition:

- original arbitral award or a duly certified copy thereof;
- original arbitration agreement or a duly certified copy thereof;
- document confirming payment of the state fee;
- documents confirming the powers of the signatory of the petition; and
- notice of service of the copy of the petition on the other party to the dispute.

The petition shall be considered within the time limit not exceeding one month, of which the parties to the dispute shall be notified. Their failure to appear in court does not impede consideration of the petition and adoption of a decision in relation to it. As a result of consideration of the petition, the court shall either satisfy it and issue a writ of enforcement or dismiss it.

Refusal to enforce and issue the writ of enforcement is possible as a result of gross breaches of arbitration procedure (failure to notify the parties to the dispute, invalidity of arbitration agreement, breach of arbitration procedure or procedure of forming of the panel of arbitrators, breach of public order, etc).

33 Costs

Can a successful party recover its costs?

The amount of costs and the procedure of their allocation between the parties to the dispute is established in the arbitration award. As a rule, the unsuccessful party shall bear the costs or, in case the claim is satisfied in part, the costs shall be allocated between the parties proportionally to the amount of satisfied claims. On the basis of the award, the party is entitled to recover the costs it has borne in connection with the judicial proceedings.

Alternative dispute resolution**34 Types of ADR**

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

Similarly to a number of other jurisdictions, we can regard mediation as the key type of ADR, the use of which has been enshrined in law, including procedural codes. The concept of mediation was also implemented at the level of by-laws.

In the broadest of strokes, the essence is that the parties to the dispute voluntarily, on the basis of a mutual agreement, use the services of an independent professional mediator who helps the parties to settle the dispute without going to court.

However, the mediation procedure has not been widely used by the contending parties, who prefer seeking judicial protection from the onset. The reasons include a lack of quality and thoroughly trained mediators, notwithstanding that organisations offering mediation services are being established nationwide.

As a rule, mediation services may be provided by an individual subject to relatively low requirements.

There is another reason why mediation lacks popularity. It is associated with the high cost of mediators' services as opposed to the relatively low costs of proceedings in state courts (stamp duty), excluding the fees of professional attorneys, etc.

35 Requirement for ADR

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 the mediation procedure is voluntary and parties decide to use it only at their own discretion, there is no court-ordered obligation to resolve disputes in this way.

The relevant legislation indicates that the court can only point at the existence of the possibility and propose that the parties resolve the dispute amicably, including through mediation, albeit the parties to the dispute have the last word in deciding whether to resort to mediation.

The involvement of mediators to resolve the dispute is possible at any stage of the proceedings, both before the initiation of the legal proceedings and thereafter.

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

It must be noted that high technology aimed at development of e-justice, which would ensure timely and effective protection of infringed rights, is being actively incorporated in the system of state *arbitrazh* courts. There were new developments in this area in 2016.

As we have previously noted, the components of e-filing include:

- creation of a judgment databank, electronic case files allowing prompt monitoring of case progress;
- creation of a videoconferencing system enabling to conduct proceedings involving persons located far from the trial court (for example, when the parties are located in different cities);
- issue of electronic writs of enforcement signed by the judge with enhanced encrypted and certified digital signature; and
- creation of a special resource to file claims and other procedural documents electronically.

Last year's novelties relate to the latter element, which is now regulated in detail.

Thus, previously, the statement of claim could be filed by any person and the procedure of identification of such person was simplified. Since recently, the submission of procedural documents is possible upon completion of a special identification procedure, which includes receipt of an enhanced encrypted and certified digital signature.

The above legislative initiatives are aimed at enhancement and facilitation of access to justice by the individuals.

IVANYAN & PARTNERS

Sergey Chuprygin
sergey_chuprygin@iplf.ru

Kadashevskaya nab., 14
119017 Moscow
Russia

Tel: +7 495 647 00 46
Fax: +7 495 647 00 45
www.ivanyanandpartners.ru

Singapore

Edmund J Kronenburg and Tan Kok Peng

Braddell Brothers LLP

Litigation

1 Court system

What is the structure of the civil court system?

The judicial power of Singapore is vested in the Supreme Court and the State Courts.

The Supreme Court is a superior court of record and consists of the High Court, which exercises both original and appellate jurisdiction, and the Court of Appeal, which exercises appellate jurisdiction.

As of 8 March 2017, the Supreme Court bench consists of 18 judges (including the chief justice and five judges of appeal), eight judicial commissioners, five senior judges and 12 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 period of three years.

The Court of Appeal, which is the highest appellate court in Singapore, hears appeals against decisions made by a judge at the High Court (including the Singapore International Commercial Court (SICC)). Appeals to the Court of Appeal are usually heard by a bench of three 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.

The High Court hears cases at first instance as well as appeals against decisions made by a judge in the State Courts. The High Court also exercises supervisory and revisionary jurisdiction over all State Courts. Unless specified otherwise by any written law, proceedings in the High Court are heard before a single judge. The judges of appeal may also sit in the High Court as a judge.

As a superior court of record, the High Court has unlimited original jurisdiction for civil claims. Save for probate matters, the action must be commenced in the High Court where the value of the claim exceeds S\$250,000. Probate matters are commenced in the High Court only if the value of the deceased's estate exceeds S\$3 million, or if resealing of a foreign grant is involved. Further, admiralty matters as well as company winding-up and bankruptcy proceedings are exclusively heard by the High Court.

Within the High Court, various specialist lists have been set up, including arbitration; tort; intellectual property/information technology; finance, securities, banking and complex commercial cases; and building and construction, shipbuilding, complex and technical cases. Certain judges 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 SICC is a 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 for 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 which are transferred from the Singapore High Court. Questions relating to whether the SICC has jurisdiction shall be heard and determined by the SICC. SICC proceedings may be heard by either one or three judges.

Within the State Courts, civil claims are handled by the district courts, magistrates' courts, employment claims tribunal (ECT) and small claims tribunals.

Civil claims with a value of up to S\$60,000 may be commenced in the magistrates' courts. From 1 November 2014, a simplified civil procedure, which includes features such as upfront disclosure of documents, limitation on interlocutory applications and early and robust case management, applies to magistrates' courts proceedings. 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, the value of the claim exceeds S\$60,000 but does not exceed S\$500,000) may be commenced in the district courts. However, a district court may have jurisdiction to try an action 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) if all parties agree. Parties to district court proceedings may by consent adopt the simplified procedure in use for magistrates' courts actions.

The ECT (operational with effect from April 2017) hears only salary-related (whether statutory or contractual) employment disputes for all employees regardless of their salary level, subject to a claims 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 at the Tripartite Alliance for Dispute Management. The proceedings in the ECT are designed to be informal and judge-led, and legal representation 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 were established to allow certain types of low-value claims to be adjudicated expeditiously and with minimal formalities (and costs). As such, parties are not allowed legal representation at the tribunals. The small claims tribunals have jurisdiction to hear claims not exceeding S\$10,000, although the jurisdiction can be raised to S\$20,000 on consent of all parties in writing. Only certain types of civil claims, such as claims relating to contracts for the sale of goods or provision of services, can be heard by the small claims tribunals.

2 Judges and juries

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 case. The judge generally has a passive role as the arbiter of both questions of fact and law, and decides based on the evidence and arguments advanced by the parties to the dispute or on their behalf. Since 1970, the jury system is no longer in use in Singapore.

The chief justice, judges of appeal, judicial commissioners 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. In 2016, Justice Judith Prakash was the first woman to be appointed as a permanent judge of appeal.

3 Limitation issues

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 have to 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 long-stop 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.

4 Pre-action behaviour

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

With the exception of personal injury claims (including medical negligence claims) and non-injury motor accident cases in the State Courts, there are no compulsory pre-action protocols to be observed before commencing an action for a civil claim.

The pre-action protocol for personal injury claims (excluding medical negligence claims) and for non-injury motor accident claims in the State Courts are similar. Briefly, the State Courts Practice Directions require the claimant to send a letter of claim with full particulars and enclosing supporting documents to each potential defendant. The potential defendant is required to send an acknowledgement within 14

days of the receipt of the letter of claim and thereafter, within the applicable prescribed timeline, a substantive response to the letter of claim including any counterclaims. The letter of claim and the responses are not intended to have the effect of pleadings. Certain prescribed information must be contained or followed by the letter of claim, acknowledgement or response, such as a proposed list of medical experts or pre-repair survey of the vehicle, depending on the nature of the claim. After the exchange of information and reports, parties are required to attempt to negotiate a settlement of the claim before commencing action in court.

For medical negligence claims in the State Courts, the State Courts Practice Directions require the claimant to apply for a medical report by way of a letter setting out briefly the basis of the claim. On receipt of the medical report, the claimant must send a letter to the hospital and each potential doctor-defendant to arrange for a without-prejudice discussion. The hospital or doctor or both must respond within 14 days after receipt of the letter to propose a date and time for the meeting. Generally, if the claimant intends to proceed with a writ, he or she must give 10 clear days' notice to the potential defendants after the expiry of two months from the date of request for the without-prejudice discussion.

There are various optional pre-action applications that parties may consider to make in aid of pursuing their claims, for example:

- Claimants may apply for pre-action discovery/disclosure against potential defendants or third parties for the purpose of identifying possible parties to any proceedings. The court must be convinced that there are good grounds for granting the application, that the defendant to the application has relevant documents in its possession, custody or power, and that discovery was necessary for disposing fairly of the proceedings or for saving costs. The court will not grant an application that it considers frivolous or speculative or amounts to a fishing expedition by the claimant.
- 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 after the date of its grant and is conclusive until set aside.

5 Starting proceedings

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?

There are two modes of commencing civil proceedings: by writ or by originating summons.

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 writ.

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 summons.

Originating processes (whether writ or originating summons) must be served personally on the defendants by the plaintiffs.

For individuals within Singapore, personal service is effected by delivering a sealed copy of the originating process to the person to be served. For a company incorporated in Singapore, this is usually accomplished by leaving a sealed copy of the originating process at the registered office. Alternatively, for any body corporate (whether Singapore-incorporated or not), the originating process may be served personally on the officers of the company (such as the chairman or president of the corporation).

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. If leave is granted, service may be effected in the same manner as personal or substituted service in Singapore. Alternatively, service may be effected in any manner that is in accordance with the law of the country in which service is to be effected, or through the assistance of foreign governments, judicial authorities or the Singapore consular authority in that 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. To enhance the effectiveness and efficiency of the judicial processes, the courts continually optimise resources through a multi-prong strategy, including the promotion of greater use of alternative dispute resolution, active case management at pretrial conferences and deployment of technology. Recently, the Courts of the Future Taskforce, which was set up to study and identify technological opportunities that will help the judiciary better anticipate and meet the future needs of court users, submitted its final report, and funding is now being sought to bring the proposed plans to fruition. In addition, by 2020, the current number of courtrooms is expected to increase by 50 per cent with the completion of the construction of the new State Courts Tower, to enhance capacity.

6 Timetable

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

Writs and originating summons (the two forms of originating processes) are valid for six months from the date of issue unless leave to serve the writ or originating summons out of the jurisdiction is required under the Rules of Court, in which case the writ or originating summons is valid for 12 months from the date of issue.

If a writ or originating summons is unable to be served within the initial validity period, the validity period may be further extended by an application to the court.

Originating processes must be served on the defendant personally unless the court orders substituted service.

Upon being served with a writ, the defendant must file a memorandum of appearance if he or she wishes to contest the claim. The memorandum must be filed within eight days of the date of service if the writ was served within the jurisdiction, or within 21 days of the date of service if the writ was served out of the jurisdiction. If a statement of claim was not endorsed with the writ, the claimant must serve the statement of claim within 14 days of the entry of appearance. The defendant has 14 days after the service of the statement of claim or the time limited for appearance, whichever is later, to enter a defence. The claimant may file a reply to the defence within 14 days of receiving the defence.

Pretrial conferences are regularly scheduled for the court to keep track of the progress of proceedings and to give directions for its efficient conduct including directions for discovery (the disclosure and exchange of documentary evidence) and exchange of affidavits of evidence-in-chief (written witness statements). The first pretrial conference is generally held within 10 weeks of the date of issue of the originating process.

Once discovery has been completed and the affidavits of evidence-in-chief have been exchanged, the matter may be set down for trial, and the trial will generally start within eight weeks of setting down.

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.

No appearance is necessary for proceedings commenced by way of originating summons. If a supporting affidavit was not served together with the originating summons, it must be served on the defendant within seven days after service of the originating summons. If the defendant wishes to adduce evidence at the hearing of the originating summons, he or she must do so by affidavit served on the claimant not

later than 21 days after being served with the claimant's supporting affidavit. The originating summons will generally be scheduled for hearing about six weeks from the date of issue of the originating summons.

7 Case management

Can the parties control the procedure and the timetable?

The procedure and timetable for civil proceedings are generally set out in the Rules of Court and controlled by the courts. However, parties have the opportunity to make proposals for the court's consideration during the regular pretrial conferences. The court has wide powers to depart from the procedure and timetable set out in the Rules of Court in the interests of justice and the efficient conduct of proceedings.

8 Evidence – documents

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 an obligation to preserve documents and other evidence that are relevant to the issues in dispute pending trial. The court may at any time in the proceedings order that parties give discovery by making and serving a list of documents that are or have been in his or her possession, custody or power. The list of documents is generally verified by an affidavit. Documents that may be ordered to be discovered include:

- documents on which the party relies or will rely; and
- documents which could adversely affect his or her own case, adversely affect another party's case or support another party's case.

The duty to provide discovery of documents falling within the ambit of any order for discovery continues during the course of the proceedings until its conclusion.

Parties in SICC proceedings need only produce documents that they will rely on. A party may also serve a request on any person (regardless of whether such person is a party to the proceedings) to produce specific documents, and if the requested person objects to this, the requesting party may apply to the SICC for an order to produce the documents sought.

9 Evidence – privilege

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 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.

10 Evidence – pretrial**Do parties exchange written evidence from witnesses and experts prior to trial?**

Evidence-in-chief to be given by a witness at a trial, including expert witnesses, must be given by way of an affidavit prepared in advance and exchanged with all other parties unless otherwise provided in any written law or ordered by the court. However, 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. For expert witnesses, the court may direct that the experts for the parties meet in advance of the trial for discussions aimed at identifying the issues in the proceedings and, where possible, reach an agreement on the same. The contents of the discussions between the experts may not be referred to at the trial unless the parties agree, and the parties are not bound by any agreement on an issue between the experts unless they expressly agree to be so bound.

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.

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

The affidavit of evidence-in-chief of each witness that has been prepared and exchanged before trial is only received into evidence if the witness attends the trial for cross-examination. If a witness is not presented for cross-examination, the affidavit may not be accepted as evidence for the trial without leave of court.

Witnesses subpoenaed to testify at trial would 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 affidavit of evidence-in-chief was filed or if the court otherwise orders.

Evidence in cross-examination is given orally at trial.

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 which parties may agree to disapply include rules relating to the examination of witnesses.

12 Interim remedies**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).

13 Remedies**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.

Judgment debts carry interest at a rate set out in the Rules of Court. In addition, the court may also award pre-judgment interest up to the date of the writ, as well as contractual interest.

14 Enforcement**What means of enforcement are available?**

Common means of enforcement include:

- writs of execution, including writs of seizure and sale, writs of possession (for immoveable property) and writs of delivery (for moveable property);
- garnishee proceedings to attach sums owing to the judgment debtor for the benefit of the judgment creditor;
- appointment of receivers over specific assets or property held by or coming due to be received by the judgment debtor for the benefit of the judgment creditor;
- stop notices or orders to prevent dealing in securities; and
- examination of the judgment debtor to discover information about his or her property, assets and debts to aid in enforcement.

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 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.

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

The general rule is that actions by writ are adjudicated by a single judge in open court. Originating summonses, 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.

16 Costs**Does the court have power to order costs?**

The court has full discretion to order costs, whether in principle or amount. In general, successful parties in civil proceedings will be awarded their costs of the action. Courts may also make costs orders against non-parties, such as a director found to be the directing mind of a company that is a party to the proceedings. Costs guidelines for costs awards in the Supreme Court may be found in the Supreme

Court Practice Directions. From 1 October 2016, the rules have been amended to enable the court to fix costs when approving settlements involving infants or persons under disability.

Costs may be agreed between parties, failing which it may be assessed by the court through the process of taxation. Party-to-party costs – the costs payable by one party to the other – are usually assessed on a standard basis, where any doubt as to the costs incurred would be resolved in favour of the party paying costs. However, where special reasons exist, such as where a successful claimant obtains a judgment that is better than an offer to settle made by him or her to the defendant earlier in the proceedings, the court may order that costs be assessed on an indemnity basis – where any doubt as to the costs incurred would be resolved in favour of the party receiving costs.

A claimant may be ordered to provide security for costs in civil proceedings if he or she is ordinarily resident out of the jurisdiction; if he or she is suing as a nominal plaintiff for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant; or if he or she has misstated or omitted his or her address in the writ or changed address during the course of proceedings with a view to evading the consequences of the litigation.

17 Funding arrangements

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 such as ‘no win, no fee’ agreements are prohibited under professional conduct rules. However, based on recent case law, there may be a limited carve-out from the prohibition where a lawyer acts for an impecunious client knowing that he would likely only be able to recover his appropriate fees or disbursements if the client succeeds in the claim or obtains a costs order against the other party.

An agreement for the funding of litigation by a third party who has no interest in the proceedings or an agreement where the third party funding the litigation shares in the proceeds from the claim may constitute ‘maintenance’ or ‘champerty’ respectively, and save for permitted categories, are illegal, contrary to public policy and unenforceable. From 1 March 2017, Singapore law allows third-party funding in court proceedings (such as jurisdictional challenges, applications to set aside arbitral awards or for stay of court proceedings) and mediation proceedings related to international arbitration proceedings provided, among other things, the third-party funder meets certain prescribed criteria. Maintenance or champerty may also be permitted in appropriate circumstances in the context of insolvency. For example, the court has recently 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).

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.

18 Insurance

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 and may be purchased after a legal dispute has arisen.

19 Class action

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, and is provided for under Order 15, Rule 12 of the Rules of Court. There have not been any recent developments in Singapore regarding class actions.

A representative action may be brought where the represented group consists of ‘numerous persons’ who have the ‘same interest’ in the proceedings unless the court otherwise orders. 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.

20 Appeal

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.

The Court of Appeal, as the highest appellate court, hears appeals from any judgment or order of the High Court (including the SICC). 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).

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. Whether an appeal may be brought depends on a number of factors, such as the quantum of the claim, the specific issue that was decided or the type of order that was made. For example, no right of appeal lies to the Court of Appeal where a judge makes an order giving unconditional leave to defend an action or setting aside unconditionally a default judgment, or an order refusing to strike out an action, a pleading or part of a pleading.

For SICC proceedings, parties may contractually exclude or limit the right of appeal against a judgment or order of the SICC.

21 Foreign judgments

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 (Chapter 264) (RECJA), the Reciprocal Enforcement of Foreign Judgments Act (Chapter 265) (REFJA) or the Choice of Courts Agreements Act 2016 (No. 14 of 2016) (CCAA), or enforced under the common law by way of commencing an action on the judgment itself.

The RECJA and REFJA applies 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, judgments 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.

22 Foreign proceedings

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 proceedings in another jurisdiction is governed by the Evidence (Civil Proceedings in Other Jurisdictions) Act (Chapter 98) and Order 66 of the Rules of Court.

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

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

In Singapore, both the Arbitration Act (Chapter 10) (AA) and the International Arbitration Act (Chapter 143A) (IAA) form part of the arbitration law.

Domestic arbitrations are generally 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 is largely based on the UNCITRAL Model Law and gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Under the AA and the IAA, an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship. An arbitration agreement may be in the form of a separate agreement or an arbitration clause in a contract. To be enforceable, it must be in writing, in that its content must be recorded in any form, including electronic communications.

25 Choice of 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?

Under both the AA and the IAA, in the absence of agreement between the parties, there shall be a single arbitrator. If the parties cannot agree on the arbitrator, the arbitrator shall be appointed by the President of the Court of Arbitration of the Singapore International Arbitration Centre (SIAC).

The appointment of an arbitrator may only be challenged on the grounds set out in the AA and the IAA – that is, such challenge is limited to circumstances giving rise to justifiable doubts as to the impartiality or independence of the arbitrator, or his or her possession of the qualifications agreed to by the parties.

26 Arbitrator options

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 well 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.

27 Arbitral procedure

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, and 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 which the arbitral tribunal may rely on in making its decision shall be communicated to the parties.

28 Court intervention

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.

29 Interim relief

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, 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, or 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.

30 Award

When and in what form must the award be delivered?

Subject to the agreement of parties and any written law, there is no specified time frame for when an award must be rendered. For example, the SIAC Arbitration Rules 2016, which came into force on 1 August 2016, provide that for emergency arbitrations, the emergency arbitrator must make his or her interim order or award within 14 days from the date of his or her appointment, unless, in exceptional circumstances, an extension of time is granted, and for non-emergency arbitrations, the tribunal must submit the draft award to the registrar not later than 45 days from the date on which proceedings closed.

An award under the AA and the IAA must be in writing and signed by the arbitrator or a majority of the arbitrators (provided that the reason for any omitted signature of any arbitrator is stated), and must set out the date of the award and place of arbitration and, unless the parties have agreed to dispense with such, the reasons upon which the award is based.

31 Appeal

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

Under the AA, a party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the court on a question of law arising out of an award made in the arbitration proceedings. The appeal should only be brought with the agreement of all the other parties to the proceedings or with the leave of court. The court will only grant leave to appeal if 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 decide;
- on the basis of the findings of fact in the award, the decision was obviously wrong or the question is one of general public importance and the decision was at least open to serious doubt; and
- it is just and proper for the court to determine the question.

However, parties may exclude the court's jurisdiction to hear appeals by agreeing to dispense with the reasons for the arbitral tribunal's award.

Under the IAA, there is no right of appeal against an arbitral award.

Both the AA and the IAA provide for the setting aside of awards if it can be shown that there are substantive defects affecting the award, such as:

- a party to the arbitration agreement was under some incapacity or the arbitration agreement was not valid under the applicable law;
- the party making the setting aside application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or falling within the terms 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;
- the making of the award was induced or affected by fraud or corruption;
- there was a breach of the rules of natural justice; and
- the subject matter of the dispute was not arbitrable, or the award is contrary to public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

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 which 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.

33 Costs

Can a successful party recover its costs?

Subject to the agreement of the parties, the arbitral tribunal may order costs against a party to the arbitration proceedings. In general, the successful party will be awarded his or her costs of the arbitration. Failing an agreement between the parties on any costs ordered or the fixing of costs by the arbitral tribunal, costs of an arbitration subject to the AA shall be taxed by the court and costs of an arbitration subject to the IAA shall be taxed by the SIAC.

Under the SIAC Rules 2016, which came into force on 1 August 2016, the costs of the arbitration include, among other things, the tribunal's fees and expenses, the SIAC's administrative fees and expenses, and the costs of any expert appointed by the tribunal. The tribunal may take into account any third-party funding arrangements in apportioning the costs of the arbitration.

Update and trends

Recommendations on changes to the litigation process

The civil litigation rules and processes are expected to receive a major overhaul towards the end of 2017 as the Civil Justice Commission completes a comprehensive review of the Rules of Court that govern civil procedure in the courts, and makes its recommendations for reforms aimed at simplifying and updating the rules, improving efficiency through the elimination of certain procedural steps and use of technology, and allowing greater judicial control of the litigation process.

Reforms to medical litigation

A committee has been set up to review the procedures relating to medical litigation, with the aim of encouraging consensual settlement, and refining disclosure processes and the use of expert evidence with the aid of medical assessors. Proposals will also be made to shift the present adversarial model to a more judge-led process to improve fact finding. The reforms are expected to be finalised and implemented in 2017.

Alternative dispute resolution

34 Types of ADR

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

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 Centre for Dispute Resolution 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 (Chapter 30B) 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 SIAC and SIMC, whereby 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.

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 new Mediation Act (MA) was passed by Parliament on 10 January 2017. The MA applies to mediations conducted partly or wholly in Singapore, or where the mediation agreement stipulates 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. The MA is expected to come into force shortly.

35 Requirements for ADR

**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 State Courts Practice Directions raise a 'presumption of ADR' in all civil claims before the State Courts to encourage ADR as 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 (see question 4). 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 chooses to opt out of ADR. The court may take into account a party's refusal of ADR when making subsequent costs orders.

For Supreme Court cases, the Supreme Court Practice Directions provide that a party who wishes to attempt ADR should file and serve on all relevant parties an ADR offer. Within 14 days after service of the ADR offer, the relevant parties should file and serve a response to the ADR offer. The court may take into consideration the ADR offer and the response thereto when making subsequent costs orders. The Supreme Court Practice Directions also state that it is the professional duty of solicitors to advise their clients about ADR and provide guidelines on the same.

Miscellaneous

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

Singapore offers a complete suite of dispute resolution services, namely, litigation, arbitration and mediation for disputes both domestic and international. 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, as well as its long history of an open economy, have given its judiciary a highly international perspective.

BraddellBrothers
1883

Edmund J Kronenburg
Tan Kok Peng

ej.kronenburg@braddellbrothers.com
kokpeng.tan@braddellbrothers.com

11 Beach Road #04-01
Singapore 189675
Singapore

Tel: +65 6499 9490
Fax: +65 6499 9499
www.braddellbrothers.com

Spain

Javier Izquierdo and Marta Maciá

Gómez-Acebo & Pombo Abogados, SLP

Litigation

1 Court system

What is the structure of the civil court system?

The Spanish civil court system may be divided into four levels:

- At the municipal level, the first instance courts, the justice of the peace courts and certain specialised courts deal with all civil disputes. Civil specialised courts include commercial courts, courts specialised in foreclosure proceedings and Community trademark courts. A single judge sits in all of them. Their judgments may be appealed before the provincial courts.

The commercial courts, which are the most relevant specialised courts, hear cases related to insolvency, industrial and intellectual property, antitrust, advertising, transport regulations and class actions under the rules on general terms and consumer protection, among others. They are governed by the same rules as first instance courts except for insolvency proceedings, which have their own procedural rules.

- At the provincial level, the provincial courts of appeal issue decisions over appeals filed against the first instance and commercial courts' judgments. They comprise one president and two or more judges. Their decisions are subject to limited review by the Spanish Supreme Court or the High Courts of Justice.
- The High Courts of Justice have jurisdiction over appeals filed against the provincial courts of appeal's judgments on regional civil law where applicable (ie, Catalonia). They also have jurisdiction to hear actions to set aside arbitral awards, the appointment and removal of arbitrators and the recognition of foreign arbitral awards or other decisions. The High Courts of Justice are divided into three divisions: civil and criminal, administrative and social. In the civil and criminal division, there is a president of the High Court, a president for the division and a number of judges established by the law applicable to each division. Their judgments may not be appealed.
- Division I of the Supreme Court hears appeals from the provincial courts in cases of national civil law. There is a president and a number of judges determined by the law applicable to each division. Their judgments may not be appealed, except in some particular cases, and are binding for all lower courts.

Civil litigation proceedings may be divided into ordinary proceedings and special proceedings. Ordinary proceedings are the proceedings by default related to any subject matter whatsoever and any claim exceeding €6,000. Some of the most relevant special proceedings are the following:

- Oral proceedings for disputes not exceeding €6,000, eviction, unpaid rent, and prohibitory action to protect consumers' collective and diffused interests.
- Order for payment procedure, seeking an order for payment of invoices or other documents providing for unpaid amounts. If the debtor challenges the claim, ordinary proceedings will commence.
- Negotiable instruments: cheques, promissory notes and bills of exchange are subject to expedited proceedings.
- Recognition of foreign judgments (exequatur), which may be dispensed by European regulations or international treaties.

- Enforcement of enforceable documents under Spanish law (public deeds, commercial agreements signed by the parties and a commercial broker, recognised judgments and awards, etc).
- Action to set aside arbitration awards.

2 Judges and juries

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

The role of the judge is to apply the law to the case, considering the facts and means of evidence submitted and to decide on the matters brought by the parties. Although, as a rule, judges must act upon request by the parties and are bound by any parties' agreement, they also act as guardians of public policy and may take or may have to take some decisions relevant to the proceedings ex officio, such as filing a case for lack of jurisdiction or analysing whether there are unfair terms that would prevent an enforceable title from being enforced.

Access to the judicial profession is based on the principles of merit and capacity to perform judicial duties. Entry is possible through any of the three levels that make up the judicial profession: Supreme Court magistrate, magistrate or judge. The first two categories may be accessed by qualified jurists with more than 15 or 10 years of professional experience, respectively. Access to the judicial profession as a judge requires passing an open competition process and theoretical and practical course training in the Judicial School.

Pursuant to section 125 of the Spanish Constitution, juries are only available in some criminal proceedings, so in civil litigation there are no jury trials.

3 Limitation issues

What are the time limits for bringing civil claims?

The most common limitation periods for bringing civil claims are set out in the Spanish Civil Code. Notwithstanding, there are many exceptions to general terms of limitations set out in the corresponding special rules (eg, IP law, insolvency, corporate law, certain regional rules - ie, Catalonia). The general rule, which applies for personal actions that have no specific time limit, is that the claimant has a five-year period from the date on which fulfilment of the obligation could be requested to submit the complaint. Other relevant time limits laid down in the Spanish Civil Code are:

- 20-years for foreclosure of a mortgage;
- one year for civil tort liability; and
- four years for an action for annulment.

The law distinguishes between limitation and prescription periods. While prescription periods may be interrupted by bringing an action before the courts, by an out-of-court claim or by any act of acknowledgement of the debt by the debtor, limitations cannot be extended. While personal actions, mortgage actions and tort liability are subject to prescription periods, actions for annulment are subject to limitation. This is also the case for the five-year time limit for enforcing awards and other titles. As per the obligations regarded as null and void there is no time limitation.

4 Pre-action behaviour

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

Even though, in general, no specific actions are required before bringing civil actions, the Spanish Civil Procedure Act (SCPA) provides for some pre-action instruments, different from interim measures, aimed at preparing the claim, gathering evidence and examining the means of evidence in advance.

Preliminary proceedings

Their purpose is to obtain specific information or documents necessary for the preparation of the proceedings. For example, section 256 of the SCPA sets out that a hearing may be prepared by (i) an application for the exhibition of the insurance policy by those who consider themselves damaged by an event that may be covered by civil liability insurance; (ii) an application for the exhibition of a deed of last will by whomever who consider themselves to be an heir, co-heir or legatee; or (iii) by an application by a party intending to bring legal action for IP rights for the exhibition of documents or information of the person against whom possible action may be addressed.

Examining evidence in advance

Before the commencement of the proceedings the party intending to initiate them, or any of the parties during the course of the proceedings, may request the court to examine evidence in advance, provided that there is a grounded fear that, due to the persons or state of things, the taking of evidence cannot take place at the usual procedural time (section 293 et seq of the SCPA).

Taking of evidence

Prior to the commencement of any proceedings the party intending to initiate them, or any of the parties during the course of the proceedings, may request the court to adopt measures to preserve things or situations or put on record their actual existence and characteristics to prevent it becoming impossible to carry out the required taking of evidence at the designated time (section 297 et seq of the SCPA).

5 Starting proceedings

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 start with the filing of a writ of claim drafted in Castilian or another Spanish language. The claimant must include a full description of the facts under dispute, attach relevant pieces of evidence, duly translated into Spanish, and indicate the legal grounds supporting the claim. The claimant's statement of claim sets the framework of the dispute, which may not be modified after the submission of the statement of defence. Further submission of evidence or inclusion of new relevant facts or legal grounds is only permitted in exceptional circumstances.

After examining the claim, the court clerk issues an order admitting the claim, which includes a preliminary analysis on the capacity of the claimant to take part in legal proceedings, the jurisdiction of the court and the type of proceedings to be conducted. The claim must be personally served on the defendant, either by a court agent of the claimant or the appointed court clerk.

Courts' caseload is distributed using a rotation system, which courts cannot change. Notwithstanding the above, they have some discretion to set hearings and formal deadlines to issue judgments and other decisions, which are usually extended.

6 Timetable

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

Ordinary proceedings comprise four stages: (i) filing of a claim (referred to in the previous question); (ii) the statement of defence; (iii) a preliminary hearing; and (iv) a trial.

Statement of defence

By means of the order admitting the claim the defendant is granted a 20-working-day term to answer as from the service of the claim. The

statement of defence must also include the factual background of the dispute, the legal grounds and all relevant documents, provided that the exceptions for further submission of evidence and facts applicable to the claimant also apply to the defendant.

The statement of defence may only request the dismissal of the claim or the offset of amounts and must raise any procedural exceptions that would prevent the valid processing of the action, such as:

- lack of legal standing;
- *lis pendens* or *res judicata*;
- inappropriateness of the proceedings;
- a defective claim; or
- lack of due joint litigation (request that a third party be called as a co-defendant).

It is also possible for the defendant to totally or partially accept the claim at the time of filing the statement of defence. Procedural issues regarding jurisdiction and competence must be raised by filing a preliminary plea within 10 days as from service of the claim. In that event, the 20-working-day term granted to submit the statement of defence is interrupted until the decision on the jurisdiction and competence is issued.

When responding to the claim, the defendant may file a counterclaim if there is a connection between the motions set out in the claim. The counterclaim must meet the same requirements as the claim and the answer to the counterclaim must meet the same standards as the statement of defence.

Preliminary hearing

After the filing of the statement of defence or the answer to the counterclaim a preliminary hearing is held (section 414 et seq of the SCPA). At such hearing the court:

- asks the parties whether it is possible to settle the dispute. If the parties have reached a settlement, they may ask the court to judicially approve it so as to obtain an enforceable decision;
- decides on the procedural exceptions raised by the defendant;
- gives the parties the opportunity to raise additional arguments without changing the subject of the dispute, clarify any plea, add additional complementary pleas and allege relevant facts for the dispute coming out after the filing of their writs (usually subject to narrow interpretation);
- gives the floor to the parties in order to challenge the documentary evidence proposed by the opposing party in the writ of claim and the statement of defence;
- requests the parties to establish the facts under dispute. The court may outline the most relevant facts, on the basis of the allegations submitted by the parties in the claim and in the statement of defence;
- decides on the admission and challenge of the means of evidence to be produced at the trial. The court may point out further means of evidence if it considers that the evidence proposed by the parties is insufficient. Spanish courts are reluctant to order discovery; and
- sets a date for trial in the event witnesses or experts are to be examined. If only documentary evidence is to be produced, the court may not arrange a date for trial and discretionally order the parties to submit final conclusions (orally or in writing).

Trial

At the trial, the admitted means of evidence are produced, such as the examination and cross-examination of witnesses and experts. Parties will make closing statements. In the event there is evidence that cannot be examined at the trial (eg, a witness cannot attend the hearing), the parties may request the court to set a final hearing to examine that particular piece of evidence.

After producing all admitted means of evidence, the court will issue a judgment, which may be appealed before the provincial court of appeal within 20 working days upon service thereof.

The duration of ordinary civil proceedings at the first instance varies considerably depending on the court's workload. A time frame of 12 months as from the filing of the particulars of claim could be regarded as a reasonable period of time to obtain a judgment (excluding any possible procedural issues that may lengthen the proceedings).

7 Case management

Can the parties control the procedure and the timetable?

Even though the timetable is set by the court, notwithstanding some statutory limits, the parties may apply for a postponement of the hearings or a stay of the proceedings under certain circumstances, particularly if they are conducting negotiations to reach a settlement agreement.

8 Evidence – documents

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 duty to preserve documents and other evidence pending trial in the SCPA. Notwithstanding the foregoing, such duty may be laid down in other laws, such as the tax and corporate regulations or even in certain criminal laws.

The burden of proof usually rests on the claimant, although availability of the evidence for each party will be taken into consideration. There is no obligation to share relevant documents with the other parties so the parties usually decide on the evidence they want to submit to the court. However, at the preliminary hearing the exhibition by the other parties of any documents relating to the matter under dispute may be proposed as evidence. This possibility is strictly interpreted and it is usually far from the discovery procedure. Non-litigant third parties or public bodies may be also required by the court, upon a party's request, to exhibit particular documents or to answer to specific questions in writing.

9 Evidence – privilege

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

Documents and information exchanged between the lawyers and their clients are privileged, as well as the communications between the parties' legal counsel (there is a right and a duty of confidentiality). Advice, documents and communications exchanged with an in-house lawyer are not privileged.

10 Evidence – pretrial

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

As far as witnesses are concerned, it is uncommon and there is no legal regulation on it. Conversely, experts' reports must be submitted to the court together with the claim or the statement of defence. Should this not be possible (which is usually the case for the defendant given the short time the defendant has to answer to the claim), there is an additional term expiring five days prior to the preliminary hearing or, in the event the issuance of such report is agreed upon at the preliminary hearing, five days before the trial.

11 Evidence – trial

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

Witnesses usually give oral evidence. Experts give oral evidence if requested at the preliminary hearing by any of the parties should the court understand that there are questions addressed in their reports to be clarified or if it is considered appropriate in view of the complexity of the case.

The plaintiff's evidence is examined first, followed by the examination of the defendant's means of evidence. In both cases, this must follow the legally prescribed order, which is: (i) examination of the parties, (ii) examination of witnesses, (iii) examination of experts, and (iv) sound or video recording. Counsel are free to ask questions of their own choice and the court then decides whether or not to allow these questions, depending on the relevance and usefulness for clarifying the facts under dispute. The court could also ask questions under certain circumstances laid down in the law. If the legal representatives of the witnesses do not speak Spanish, they can either request the court, with sufficient advance notice, to designate an interpreter or attend the trial with their own interpreter (the latter being the most common option).

12 Interim remedies

What interim remedies are available?

There is a wide range of interim remedies available in civil jurisdiction. In accordance with section 726 of the SCPA, the main characteristics of interim remedies are:

- Instrumentality. Precautionary measures are accessory to the main proceedings they seek to protect. They must be exclusively aimed at guaranteeing the effectiveness of the protection that may be granted in a favourable judgment for the claimant so that such judgment cannot be set back or hampered by any circumstances arising while the relevant proceedings are still under way.
- Proportionality. It essentially means that a relevant precautionary measure may be replaced by another one, should it prove to be equally effective or less onerous or detrimental for the defendant.
- Temporary nature. They must be temporary, provisional and may be reviewed by the court that granted it if the circumstances of the case change.

The general test for any interim relief requires compliance with three requirements:

- Periculum in mora (or danger in delay). The applicant for interim relief must provide the court with reasonable evidence in order to support that if the interim measure is not granted, the main judicial protection would be endangered as a result of the development of the proceedings.
- Fumus boni iuris (or presumption of sufficient legal basis). The applicant also needs to prove that the main judicial protection sought has a chance of success. In this regard, it is necessary to provide all means of evidence in order to convince the court to issue a provisional and circumstantial judgment favourable to the request, without pre-judging the merits of the main case.
- Granting a bond. Finally, the applicant must offer the constitution of a bond in order to ensure compensation in a speedy and effective manner for any potential damages that the interim relief may cause to the defendant and that may be claimed after the lifting of the interim measures.

There is no limitation as to the number of interim remedies as long as the interim relief requested complies with the above-mentioned requirements. Some of the remedies specifically referred to in the SCPA are the following:

- freezing of property;
- intervention or court-ordered receivership of productive assets;
- deposit of moveable assets;
- the drawing up of inventories of assets;
- preventive annotation of ongoing legal actions at the relevant registries, and other relevant annotations;
- court resolutions ordering (i) cessation of a certain activity, (ii) refraining from certain conducts, or (iii) a prohibition on interrupting certain provisions that have been carried out;
- the intervention and deposit of incomes deriving from illicit activities; and
- the temporary deposit of originals, objects or assets allegedly produced under breach of intellectual property rules.

Applications for interim measures are ordinarily submitted together with the main claim. However, they may be exceptionally requested before and after the submission of the claim in main proceedings. They are usually granted after hearing the parties, unless the case is of extreme urgency.

Interim remedies are also available to the parties to an arbitration agreement prior to the arbitration proceedings or to anyone who proves to be a party to the pending arbitration in Spain or, in institutional arbitration, anyone who may have duly filed an application or commission to the relevant arbitral institution, according to their regulations.

13 Remedies

What substantive remedies are available?

Spanish courts may grant damages, specific performance, or the performance of the obligation in question by a third party, at the defendant's expense, and issue declaratory judgments confirming or denying the existence of a right. Interest may be payable on judgments

ordering payment. Punitive damages are not available in Spanish civil proceedings.

14 Enforcement

What means of enforcement are available?

Under section 517 of the SCPA, only the following instruments are enforceable:

- final judgments, court decisions approving or confirming court settlement and arbitration awards of Spanish courts or arbitral courts;
- certain notarial documents (ie, first demand guarantee, mortgage, pledge);
- certain securities; and
- other court decisions and documents which by virtue of the SCPA or another law are enforceable (ie, foreign judgments, decisions and arbitral awards).

Enforcement may involve a request by the plaintiff for the return of a certain amount of money, or the right to ask the defendant to do something or to refrain from doing something:

- Monetary enforcement. With some exceptions, all moveable and immoveable property, as well as claims and real state property rights, are subject to enforcement. Some means of enforcement available are attachment of property and rights, preventive attachment entries of real state property and other assets or rights subject to registration, setting up receivership and, particularly, the realisation of the attached assets. This may include the direct handover to the party seeking enforcement of any assets for their nominal value (cash, balances of current accounts, convertible foreign currencies, among others), the disposal of shares, bonds or other securities admitted to trading in a secondary market, judicial or notary public auctions or the disposal through a specialised person or organisation.
- Non-monetary enforcement. Where an enforceable right should include a penalty or an affirmative or negative obligation or an obligation to hand over something other than an amount of money, the court dealing with the enforcement will require compliance with whatever may be set forth in the enforceable instrument. In the event of disobedience, the court may impose coercive fines, use the aid of public law enforcement forces, or charge the disobedient party with contempt of court.
- Decisions that are merely declaratory or constitutive judgments are not enforceable. Only decisions that contain a conviction are enforceable. Merely declaratory or establishing judgments (those that create a new legal status, such as divorce judgments) may be registered and modifications may be made in public registries with no need for enforcement to be carried out.

15 Public access

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

As a general rule, court hearings are held in public. Exceptionally, for reasons of public policy or of protection of public rights and freedoms, the courts may limit the scope of their publicity, stating the grounds for this decision.

Only the parties and third parties with legitimate interest may have access to the books, files and judicial records that are not restricted, as provided for by law on their exhibition, testimony or certification.

16 Costs

Does the court have power to order costs?

In Spain, the general rule on litigation costs is that the 'loser pays' unless the court reasonably decides that the case was solved with serious doubts about the facts or the applicable law. The party who has been unsuccessful must usually bear all costs that are included under the concept of '*costas*' (procedural reimbursable costs), as well as the fees of the lawyers or expert witnesses and any other costs reasonably incurred during the proceedings. There is a limit of one-third of the amount of the claim payable for all fees that are not subject to special tariffs (as lawyers' fees), unless the court declares the recklessness of the party ordered to pay costs. If the upholding or dismissal of the plea

is partial, each party shall bear its own costs and the common costs shall be equally shared.

17 Funding arrangements

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 are permitted under Spanish law. They were prohibited until 2008, when the Supreme Court confirmed that the prohibition then in force that prevented a client and a lawyer from freely fixing the fees of the latter was a restraint to free competition, and declared any regulation to the contrary null and void.

Third-party funding of litigation is permitted, as well as agreements to share litigation risks. In particular, over the past few years, sales of non-performing loans (mortgage loans and consumer credits) by Spanish financial institutions have become very common. In these contracts of sale, the subject matter may be the acquisition of the full ownership of the portfolio's loans or of its results. Whether there is an acquisition of the full ownership of the rights of the claim, the buyer will have to communicate the transfer of the credit to the debtor and will have to act as the successor of the seller in the legal proceedings to collect the debt-claims. If the investor only acquires some rights depending on the results of the proceedings, there will be no need to communicate such agreement to the court and it will only have effects between the parties to it.

18 Insurance

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

Legal expenses insurance is available, including potential liability for an opponent's costs. Pursuant to the Insurance Contract Act, insurance to cover legal costs must be the subject of an independent agreement and must include the insured person's right to freely choose the court clerk and lawyer who should represent him or her in legal proceedings.

19 Class action

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

The collective litigation phenomenon has been a very important part of the legal landscape in Spain in recent years, in particular due to the big impact of some Supreme Court judgments favourable to consumers in 2010.

The statutory rules governing 'class' litigation are mainly laid down in the SCPA (referring to consumers' and users' rights and to effective equality between men and women) and in the statutory rules about consumers' and users' protection.

Although the SCPA does not provide for special proceedings for collective group litigation, it does contain some specific procedural rules.

Thus, on the one hand, ordinary instruments of joinder of claims or proceedings or consolidation of claims provided for by sections 71 to 80 of the SCPA may apply. They allow several parties to jointly claim whether the facts or the basis of the claims are the same. Sections 76(2)(1) and 78(4) specifically refer to the joinder of proceedings brought by consumer organisations seeking the protection of collective and diffuse interests.

And, on the other, there are some specific rules regarding the enforcement of group and diffuse interests of consumers which enable proper collective actions to be taken. For example, section 11 recognises the standing for the defence of the rights and interests of consumers distinguishing between (i) 'collective' or 'group' interests (referring to consumers or users identified beforehand or easily identifiable) and (ii) diffuse interests, affecting a number of consumers or users not identified or not easy to be identified (section 11(2) and (3) respectively).

The most common remedies are injunctions and actions for damages. Also, there are some specific provisions concerning standard terms in contracts that provide for three particular remedies only available in class actions: (i) injunctions aimed at preventing the defendant

from keeping using particular standard terms in its contracts, (ii) claims seeking a judgment that orders the defendant to rescind a recommendation to use some standard terms, and (iii) actions for the court to declare that a particular clause must be considered a standard term in contracts and be registered in the Registry of Standard Terms in Contracts (available through the Registry of Moveable Goods).

20 Appeal

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

The SPCA states that parties may appeal courts' decisions and court clerks' decisions negatively affecting them.

In general, any first instance judgments may be appealed before the provincial courts of appeal except for judgments rendered within oral proceedings not exceeding € 3,000.

Judgments issued by provincial courts of appeal may be appealed before the Spanish Supreme Court or High Courts of Justice (from the corresponding autonomous community). Notwithstanding, it should be noted that as long as the ordinary jurisdiction does end with the second instance judgment, there is no proper 'third instance' in Spain, so appeal proceedings conducted before the High Courts of Justice or the Supreme Court are quite limited. On a general basis, extraordinary legal remedy before the Supreme Court or the High Courts of Justice comprises two kinds of appeals, namely an extraordinary appeal for infringement of procedure and an appeal in cassation:

- An extraordinary appeal for infringement of procedure must be based on the following grounds:
 - a breach of rules on objective and functional jurisdiction and competence;
 - a breach of procedural rules governing the judgment;
 - a breach of rules governing procedures and safeguards of the proceedings; and
 - a violation of fundamental rights regarding the fundamental right of defence.
- An appeal in cassation may be only grounded on a breach of the rules that apply to decide on the merits of the case and may be only lodged:
 - where the judgment in the second instance is issued to protect fundamental rights other than those recognised by section 24 of the Spanish Constitution (right of defence);
 - when the amount of the proceedings exceeds €600,000; and
 - where the amount of the proceedings does not exceed €600,000 or the proceedings have been conducted due to their subject matter, provided that in both cases the decision on the appeal has reversal interest.

The appeal will be deemed to have reversal interest when the judgment subject to appeal:

- contradicts the Supreme Court's case law;
- decides on points and issues about which contradictory case law from the provincial courts exists; or
- there is no case law on previous rules with similar content.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

For EU member states, pursuant to Regulation No. 1215/2012 (known as 'Brussels I recast'), judgments from member states regarding general civil and commercial cases are easily recognised and enforced, without any declaration of enforceability being required. Recognition or enforcement of a judgment may only be refused if (i) it is contrary to public policy in the member state addressed; (ii) the judgment was given in default of appearance, if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him or her to do so; or (iii) the judgment is irreconcilable with a judgment given between the same parties in the state addressed or with an earlier judgment given by another state, if the earlier judgment complies with the requirements for recognition in the member state addressed (sections 45 and 46). The Lugano Convention, ratified by the EU and Switzerland, Norway and

Iceland, seeks to achieve the same level of enforcement and recognition between the EU member states and those states.

For judgments other than those referred to above, other EU regulations and international treaties will apply. In the absence of those, the Spanish Act on International Cooperation in Civil and Commercial Matters provides specific rules for proceedings aimed at granting executory of final judgments and arbitral awards or, in the event they grant interim relief, if the non-recognition implies the infringement of the right of defence, provided that the other party was heard before adopting it.

22 Foreign proceedings

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

For EU member states, 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 allows Spanish courts to directly request the competent court of another member state to take evidence or to take evidence directly in another member state.

Spain has signed the Hague Convention of 1970 on the taking of evidence abroad in civil or commercial matters with minor declarations and reservations. In the absence of particular treaties or rules, the Spanish Act on International Cooperation in Civil and Commercial Matters also provides for rules to obtain evidence in other jurisdictions effective in Spain.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes. The Spanish Arbitration Act is based on the UNCITRAL Model Law with few changes.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be in writing in a document signed by the parties or in an exchange of letters, telegrams, telexes or any other means of communication that provides a record of the agreement. There is also considered to be an arbitration agreement when one party alleges its existence and the other does not deny it.

The validity of international arbitration agreements is subject to the requirements established by the rules of law chosen by the parties to govern the arbitration agreement, or the legal rules applicable to the merits of the dispute or Spanish law (section 9 of the Spanish Arbitration Act).

25 Choice of 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?

The Spanish Arbitration Act provides that parties are free to determine the number of arbitrators as long as there is an odd number. If there is no agreement to that effect, in ad hoc arbitration the procedure agreed upon by the parties will be followed and if it is not possible to appoint arbitrators by that procedure, any of the parties may request the competent court to nominate arbitrators or to adopt the measures to that effect. In that event, the court will make a list of three names for each arbitrator to be appointed, after which appointment is made by drawing of lots. In institutional arbitration, the rules of the corresponding institution will apply.

An arbitrator may be challenged if there are justifiable doubts as to his or her impartiality or independence or in the event the arbitrator does not fulfil the qualifications agreed upon by the parties.

Parties may agree as to the procedure for challenging arbitrators. In the absence of such agreement, the challenging statement must be made within 15 days from the date the party becomes aware of the acceptance of the appointment or the existence of the circumstances that, from its view, justify said challenge. Unlike the Model Law, the

Update and trends

In recent years, judicial practice has been characterised by the increasing role of consumer litigation in the legal landscape fuelled by several Supreme Court judgments and decisions of the Court of Justice of the European Union favourable to consumers regarding general terms included in mortgage loans. This resulted in important amendments to the SCPA in 2015, which introduced an expressed duty of the courts to analyse ex officio the existence of unfair terms and the resulting possible non-application thereof.

In particular, two clauses commonly inserted in loan contracts with consumers have had a paramount role in the legal scene: floor clauses, on the basis of which the applicable interest rate has a floor limit, so the financial entity ensures it receives a minimum amount of interest; and early termination clauses, included in most mortgage loans, which stated that default in any amount would enable the bank to terminate the agreement early.

In its ruling of 21 December 2016, the Court of Justice of the European Union held that Spanish case law placing a temporal limitation on the effects of the invalidity of 'floor clauses' included in mortgage loan contracts in Spain is incompatible with EU law. The Spanish Supreme Court, in its judgment of 9 May 2013, held that some floor clauses could be unfair under particular circumstances.

Nonetheless, it decided to limit the temporal effects of the declaration of invalidity of those clauses, so that they would have effect only in the future, as from the date of delivery of the above-mentioned judgment. The Court of Justice of the European Union judgment resulted in the Spanish government passing Royal Decree 1/2017 on floor clauses, which introduces a voluntary ADR process to facilitate the filing of complaints against financial institutions by consumers.

Regarding the early termination clause, which allows for the early termination of the agreement in the event of default of any amount due, the Supreme Court has referred the matter to the Court of Justice of the European Union, basically, to clarify whether national courts may facilitate foreclosure by appreciating the unfairness of the part of the clause referring to 'any amount'. In the meantime, many courts, in particular the provincial courts of Madrid and Castellón, have decided to suspend foreclosure proceedings in such cases until the European Court renders a decision on the matter.

Finally, another term in mortgage loans that is expected to increase the number of lawsuits in the following years is the one setting out that any expenses derived from the contract must be paid by the borrower, which was declared null and void in a Supreme Court judgment issued on 23 December 2015.

Spanish system does not allow a party whose challenge has been refused to submit the challenge to the courts for review, although it may be brought in the appeal proceedings to set aside the award.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Parties are free to agree upon the procedure for the appointment of the arbitrators, as long as the principle of equality is respected. In arbitrations that are not decided in equity, unless otherwise agreed, if there is a sole arbitrator, such person must be a jurist. When the arbitration is to be resolved by three or more arbitrators, at least one has to be a jurist.

27 Arbitral procedure

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

The parties must be treated equally and be given a full opportunity to present their cases. The parties, the arbitral tribunal and, where the case may be, the arbitral institution, have a duty of confidentiality.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The Spanish Arbitration Act provides that no court will intervene in cases governed by the Act except where so provided under the Act. Section 8 of the Act, under the title 'Courts competent for assistance and supervision of the arbitration', sets out the jurisdiction of the judges and courts to provide arbitration support. Thus, while High Courts of Justice have jurisdiction to appoint and remove court-appointed arbitrators, to hear actions to set aside arbitral awards and recognition of foreign arbitral awards and other arbitral decisions (see question 1), first instance courts have jurisdiction to provide assistance in taking of evidence, to adopt interim measures and compulsory enforcement of arbitral awards and other arbitral decisions.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Yes. Unless otherwise agreed by the parties, arbitrators have jurisdiction to grant interim relief.

30 Award

When and in what form must the award be delivered?

Unless the parties have provided otherwise, the arbitral tribunal must deliver the award within six months as from the date of the submission of the statement of defence or the expiry of the submission deadline.

Unless otherwise agreed, this period may be extended by two months by means of a reasoned decision.

The award must be in writing, signed by the arbitrators and state the reasons on which it is based.

31 Appeal

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

An award may be set aside only on the following grounds:

- if the arbitration agreement does not exist or is invalid;
- if the claimant was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was unable to present its case;
- if the arbitral tribunal decides on questions beyond its jurisdiction;
- if the appointment of the arbitrators or the arbitral procedure did not respect the agreement of the parties or the Spanish Arbitration Act, unless such agreement was contrary to an imperative rule;
- if the arbitral tribunal decides on questions that cannot be subjected to arbitration; or
- if the award is contrary to public policy.

The application for setting aside the award must be made (i) before the High Courts of Justice where the award is delivered, and (ii) within two months of the date of which the party making the application received the award or, if there was a request for clarification or supplement of the award, since the reception of the decision on that request or since the date on which making a decision concerning that request expired.

The arbitral award has *res judicata* effect and is only subject to a request for review in accordance with the provisions of the SCPA concerning final judgments. Such a request constitutes an extraordinary remedy to remove the *res judicata* effect where there are exceptional circumstances that, if they been known at the moment of delivering the judgment or award, may have justified a different decision by the court or tribunal: (i) if new decisive documents are obtained, (ii) if the award was issued on the grounds of documents declared false in criminal proceedings, (iii) if the ruling was issued on the grounds of a witness or expert testimony found guilty of false testimony, or (iv) if the award was rendered through bribery, violence or fraudulent conspiracy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Domestic awards are enforceable in the same way as court decisions. Pursuant to section 45 of the Spanish Arbitration Act, an arbitral award is enforceable even when an action to set it aside has been filed. In that event, the party against whom the enforcement is requested may apply for the suspension of the enforcement, provided that it offers security for the amount granted in the award, as well as the damages derived

from the delay in the enforcement. First instance courts have jurisdiction for enforcement.

Foreign arbitral awards must be recognised in a judicial decision, by means of exequatur proceedings. Section 46 of the Arbitration Act sets forth that the exequatur is to be regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 1958 or by any other international treaty more favourable to its granting. Pursuant to section 8.6 of the Spanish Arbitration Act, the court with jurisdiction to hear the recognition of foreign awards is the High Court of Justice of the region where the party against whom enforcement is sought has its registered office or place of residence or, subsidiarily, where enforcement should take place or the award should produce its effects. No appeal may be filed against the decision on recognition. Jurisdiction for the enforcement of foreign awards relies on the first instance courts pursuant to the aforementioned criteria. Once recognised, the decision will be deemed domestic, so enforcement will be subject to the Spanish law. An appeal may be filed against the decision on the enforcement.

33 Costs

Can a successful party recover its costs?

Pursuant to section 37(6) of the Spanish Arbitration Act, unless otherwise agreed by the parties, arbitrators must decide as to the costs of the arbitration, including their own fees and expenses and, if appropriate, the fees and expenses of the defence or representatives of the parties, the costs of the services rendered by the institution that administered the arbitration and any other costs derived from the arbitration proceedings (eg, experts' fees, translations, etc).

Alternative dispute resolution

34 Types of ADR

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

Mediation and conciliation are the most well-known ADR processes in Spain, which are increasingly common.

35 Requirements for ADR

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 cannot be imposed on the parties, although they may agree to submit their dispute to a particular ADR process of any kind before arbitration or litigation.

Miscellaneous

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

No.

G A _ P

Gómez-Acebo & Pombo

Javier Izquierdo
Marta Maciá

jizquierdo@ga-p.com
mmacia@ga-p.com

Castellana, 216
28046 Madrid
Spain

Tel: +34 915 829 100
Fax: +34 91 582 92 94
www.gomezacebo-pombo.com

Sweden

Erik Wernberg and Fredrik Forssman

Advokatfirman Cederquist

Litigation

1 Court system

What is the structure of the civil court system?

The main legislation of civil litigation in Sweden is the Swedish Code of Judicial Procedure.

There are three types of courts in Sweden: general courts, administrative courts and special courts.

General courts handle criminal and civil cases, as well as family-related cases. The hierarchy of the general courts is (i) district courts, (ii) appellate courts, and (iii) the Supreme Court. The principal rule is that three legally trained judges compose the district court in civil cases, unless otherwise prescribed. When the court considers it sufficient, with regard to the extent and difficulty of the case, it is sufficient for one legally qualified judge to constitute quorum. In the appellate courts, the number of judges depends on how many judges ruled in the district court. If only one judge ruled in the appealed case, three judges compose the appellate court. If three judges ruled in the district court, the appellate court will consist of four judges. The Supreme Court normally consists of five judges.

Commercial disputes are primarily heard by the general courts, while the jurisdiction of the special courts is restricted to cases where the dispute relates to special parts of substantive law, such as labour law, patent and trademark law, competition and market law and environmental law.

The administrative courts primarily handle cases relating to disputes between a public authority and a private party. These courts are also structured in a three-tier system with (i) administrative district courts, (ii) administrative courts of appeal, and (iii) the Supreme Administrative Court.

2 Judges and juries

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

If the claimed amount is less than a half of the so-called price base amount (an amount calculated annually in accordance with the Swedish National Insurance Act), only one judge is sufficient to rule in civil proceedings, otherwise there are three judges ruling. The civil proceedings are adversarial and the judge generally has a passive role. This means that the parties are responsible for presenting the material that the party wants the court to consider in its ruling and the judge(s) cannot adjudicate on any circumstance that has not been brought up during the main hearing.

There is no jury in Swedish civil proceedings.

Legally qualified judges have to be Swedish citizens, and must have passed the professional examinations prescribed for qualification for judicial office. This includes having a master of laws and having gone through the required training to become a judge. However, lawyers who are members of the Swedish Bar Association, professors, associated professors and prosecutors can be adjunct judges for a designated time.

3 Limitation issues

What are the time limits for bringing civil claims?

The Swedish Limitations Act stipulates the principal statutory limitation under Swedish law, namely that a claim not invoked within a period of 10 years from its accrual is time-barred.

However, there are rules stipulating a shorter period of limitation. For example, there is a time limit of three months to challenge a shareholders' meeting and a three-year limit in a consumer-to-business relationship. In commercial relationships, parties are free to agree on amendments of the stipulated limitation rules, such as to agree on a shorter or longer period of limitation, to change the criteria for interrupting the time bar or to amend the subject of limitation.

It should be noted that, in some cases, there is a formal requirement to instigate litigation in order to interrupt the time bar, while in other cases it may be sufficient to deliver a notice to the opposing party.

4 Pre-action behaviour

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

There are no rules in the Swedish Code of Judicial Procedure stipulating any requirements prior to the commencement of formal proceedings. Procedural agreements generally do not preclude the parties from bringing an action to court, unless there is an explicit exception stated in law. Therefore, a contractual obligation to resolve the dispute through mediation or a settlement not confirmed in judgment does not prevent the parties from litigating in court. An exception stated in law, which precludes court proceedings, is an agreement between the parties to resolve the dispute by arbitration.

However, pursuant to the rules of the Swedish Bar Association, a legal action against an opposing party must not be taken unless the opposing party is given a reasonable period of time to either settle the claim or state the position thereto. This main rule is usually met by virtue of a letter from the party requesting the fulfilment of the opposing party's obligations under an agreement, for example, payment of an amount due (or any other relevant remedy), or damages for breach of the agreement. A reasonable period of time is, as a main rule, two to three weeks.

If a party initiates an action in court without the opposing party having given cause for it, the initiating party may be held liable for the opposing party's litigation costs, even if the party succeeds with the action.

5 Starting proceedings

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 an application in writing to the court for a summons. The application of summons shall state:

- a distinct claim;
- a detailed account of the circumstances invoked as the basis of the claim;
- a specification of the means of evidence offered and what shall be proved by each means (this is in practice, however, commonly deferred to a later stage of the proceedings); and
- the circumstances rendering the court competent, unless this is apparent from what is otherwise stated.

If the plaintiff has any requests as to the disposal of the case, the plaintiff should state such requests in the application.

When a summons is issued by the competent court, it will be served upon the defendant together with the summons application and the documents annexed thereto. The issuance of summons by the court constitutes the formal commencement of the proceedings, even though an application of summons shall be deemed to have arrived on the date it was filed (which, for example, will be the decisive date for assessing whether a claim has been brought within the limitation period).

From time to time, criticism has been raised against Swedish courts for not being able to adjudicate disputes in a timely manner, mostly due to a heavy caseload. For time being, there are no proposals to ease capacity issues. However, the main rule that the district court shall consist of three legally qualified judges in civil cases was amended in 2016 and it became possible for the district court to only consist of one legally qualified judge when the court considers it sufficient with regard to the extent and difficulty of the case. This change was motivated to make court proceedings more efficient, with less time taken to reach a judgment.

6 Timetable

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

The defendant shall be afforded a reasonable time to provide a statement of defence (normally two to three weeks, but the defendant can apply for a longer time) and the statement of defence shall contain any procedural objections, to what extent the plaintiff's claims are admitted or contested and the basis thereof together with the evidence invoked. In the event the defendant fails to submit a statement of defence within the time stipulated by the court, the plaintiff may, on request, have the claim granted in a default judgment.

It should further be noted that failure in the defendant's first statement of defence to the court to raise objections to certain procedural impediments, such as lack of jurisdiction of the court, precludes the defendant from invoking such objections later on in the course of the proceedings.

The main steps to trial are usually:

- issuance of summons by the court;
- preparation, which normally is effected by exchange of written submissions and one preparatory hearing;
- main hearing; and finally
- the court renders its judgment.

During the preparation stage, there may be procedural issues for the court to decide, for example, requests for production of documents, interim measures, allowance of claims and evidence.

The time for a case to reach trial depends on the complexity of the case and the workload of the court. Normally a commercial case will take approximately 12 to 18 months to reach trial in the first instance. In order to speed up the proceedings, the court is responsible for setting a timetable to trial together with the parties.

7 Case management

Can the parties control the procedure and the timetable?

The parties have limited opportunities to expedite the procedure and the timetable. However, if both parties consent thereto, the timetable set up for the case can be set with tight time frames.

If, on the other hand, a party in a commercial dispute delays the proceedings, the court may direct a party to finally determine its action or defence and to state the evidence (if any) that the party invokes. After expiry of the time for such statement, the party may not invoke new circumstances or new evidence unless it can be reasonably proved that there was a valid excuse for the previous failure to invoke the circumstances or evidence.

If no oral evidence is invoked, it is possible to request a judgment over the complete case without a main hearing. Generally, these types of judgments expedite the proceedings.

8 Evidence – documents

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 not normally obliged to retain documents before the start of litigation. However, if there is a risk that evidence may be lost or

difficult to obtain and no trial is pending, a court may take and preserve evidence for the future. A person obliged to produce documents may be compelled to do so under penalty of a fine. Destroying, rendering unserviceable or concealing documents after an application for preservation of evidence are actions sanctioned with a fine or imprisonment of up to four years. Concerning electronic documents, such a sanction is only possible when the document has a sign of origin that can be reliably controlled.

If one party is holding a document that can be assumed to be of importance as evidence in the particular case for the other party, the other party may request the court to order the first party to produce the evidence. The court would grant such a request for information only if it is proportionate. Thus, the court would have to balance the importance the documents might have as evidence against the opposing party's interest in not disclosing the documents. Parties are obliged to search for requested documents as long as the request is specified to a certain category of documents or to all documents that are relevant to a clearly described theme of proof. Under certain circumstances, even an expert opinion can be considered as documentary evidence subject to disclosure provided its significance as evidence cannot be achieved otherwise. The production of documents may also be ordered by the court in relation to third parties.

9 Evidence – privilege

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

Documents covered by legal privilege can be withheld from the opponent and the court. Legal privilege applies to documents that originate from, for example, advocates and their counsel, physicians, dentists, midwives, and trained nurses, and that contains information entrusted to, or discovered by, them in their professional capacity. In this respect it should be noted that a lawyer cannot be an in-house lawyer and simultaneously be a member of the Swedish Bar Association. Advice from in-house lawyers is not protected by privilege.

Furthermore, it is possible for a party to withhold documents that would involve disclosure of trade secrets, unless there is an extraordinary reason requiring disclosure of the document. As a general rule, personal notes produced exclusively for private use are also excluded. This principle has been extended in court practice to also include notes prepared exclusively for a company's internal use.

10 Evidence – pretrial

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

Witnesses

The Swedish Code of Judicial Procedure is based on the principle of orality. This means that the main rule is that witnesses do not provide the court with a written witness statement, but appear in person for the examination. In fact, written witness statements are only allowed under particular circumstances, namely:

- if it is specifically authorised by law;
- if the examination of the witness cannot be held at, or outside, the main hearing or otherwise before the court; or
- if there are special reasons with regard to the costs or inconvenience that an examination at, or outside, the main hearing can be assumed to imply, and also to what can be assumed to be attained by such an examination, the importance of the statement and other circumstances.

In addition, written witness statements may be allowed if the parties so agree and the court does not find this manifestly inappropriate. It should be noted that the courts tend to give written witness statements less value than an oral testimony before the court.

However, in case of an application for interim measures, written witness statements are always allowed and often relied on by the court. Instead of having written witness statements, the parties state in their submissions which witnesses they invoke, about what the witness will testify and what fact the witness shall prove. Except for the aforesaid, the content of the witness evidence does not have to be exchanged prior to examination of the witness at the main hearing.

Experts

Experts shall, unless the court prescribes otherwise, submit a written opinion to the court. After the opinion is submitted, it shall be held accessible to the parties. The expert's evidence shall cover the task assigned to him or her by the court or a party. There are no restrictions regarding what type of evidence the expert may give. However, the expert report must contain information that is relevant for the case.

11 Evidence – trial**How is evidence presented at trial? Do witnesses and experts give oral evidence?****Witnesses**

Witnesses give evidence orally at trial where they may be subject to cross-examination. The examination is left in the hands of the parties, starting with the party who has invoked the witness, followed by a cross-examination by the opposing party. The court may then ask additional questions to the witness, preferably only for clarification purposes.

At trial, the witness has to take an oath. A witness who refuses to take the oath may be fined or put in custody. Witnesses who give false information or withhold the truth may be sentenced to a fine or imprisonment (maximum four years).

It is possible to hear a witness via teleconferencing if the court finds it appropriate and the parties and the witness consent thereto.

Experts

An expert shall give evidence orally at trial if a party requests it and the examination of the expert is not plainly without importance, or if the court otherwise finds it necessary. If an expert gives evidence at trial, the same rules as for witnesses apply, hence the expert takes an oath, and so on (see 'Witnesses', above). It should be noted, however, that an expert cannot not be held in custody for refusing to take an oath, but he or she may be fined.

12 Interim remedies**What interim remedies are available?**

If a party shows probable cause that a monetary claim is or can be the basis of judicial proceedings (or determined by another similar procedure), and if it is reasonable to suspect that the opposing party, by absconding, removing property, or other action, will evade payment of the debt, the court may order that the opponent's property shall serve as security for the claim.

If the claim is other than monetary, and the plaintiff shows probable cause for the claim in dispute, the court may make an order for measures suitable to secure the applicant's right. Such an order requires that it is reasonable to suspect that the opposing party – either by (i) carrying on a certain activity, (ii) performing or refraining from performing a certain act, or (iii) by other conduct – will hinder or render more difficult the exercise or realisation of the applicant's right or substantially reduce the value of that right. Such interim measures may include a prohibition from carrying on a certain activity or performing a certain act or an order to respect the applicant's claim. In both examples, the court order may be sanctioned with a fine.

The court may also order the immediate restoration of possession or other immediate redress in a pending proceeding concerning the superior right to a certain property, if it is shown that one of the parties has unlawfully disturbed the opposing party's possession, or has taken any other unlawful measure regarding the property.

Applications for security measures are normally not granted unless the opposing party has been given an opportunity to respond, but may be granted immediately (ex parte) if a delay would place the applicant's claim at risk.

A prerequisite for a court to grant interim measures is that the applicant provides sufficient security – usually a bank guarantee – for the loss the opposing party may suffer should the applicant's main claim be denied.

In many cases it is also possible to obtain injunctions. The more specific conditions for such remedies are regulated separately in the different fields of law. The normal procedure for granting an injunction is to let the opposing party respond, but in some fields of law it is possible to get injunctions without giving notice to the other party.

Following case law, an interim measure must also meet a test of proportionality between the potential results of the security measure or injunction and the consequences it has for the opposing party.

13 Remedies**What substantive remedies are available?**

In civil proceedings, the court may either give a judgment of performance or a declaratory judgment. The judgments of performance available are orders to, inter alia, pay a specified amount (such as a contractual sum) or to pay damages for breach of contract, or decrees of specific performance compelling the defendant to perform an act (for example, to comply with contractual obligations) or refrain from it.

Regarding declaratory judgments, a party may ask for a declaratory relief regarding whether or not a certain legal relationship exists between the parties. For example, the court may assess the validity of an agreement between the parties or the meaning of a certain clause thereto. However, it should be noted that it is within the court's discretion to allow a claim for declaratory relief. There are also certain prerequisites under Swedish law that must be at hand in order for the court to be able to allow such a claim. If a party could request a judgment of performance, declaratory relief is in principle not available, subject to certain exemptions.

Interest is payable on monetary awards only if the plaintiff has asked for interest to be awarded and it is included in the judgment. However, interest on litigation costs is always payable from the date of the judgment until payment has been made and does not require that the parties have requested the award of interest.

Punitive damages are not recognised as a general remedy in Swedish law.

14 Enforcement**What means of enforcement are available?**

If a party fails to voluntarily comply with a judgment, the counterparty can apply for enforcement at the Swedish Enforcement Authority. A judgment can also constitute the legal basis for an application for bankruptcy (given that the other prerequisites for insolvency are at hand). The enforcement can comprise both monetary claims and specific performances.

The court may, in its judgment, order that the judgment is enforceable before it has gained legal force, if the court finds that there are reasons to do so. However, the court may require the favoured party to provide a guarantee for the damages for which the favoured party may be liable, if the judgment is reversed by the court of appeal. A judgment can also be enforceable before it has gained legal force by default, due to a specific provision in the substantive law.

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

Court hearings in civil proceedings are usually held in public. Exceptions can be made, for example, if it can be assumed that information presented or disclosed during the hearing is covered by secrecy under the Public Access to Information and Secrecy Act or the Act on the Protection of Trade Secrets.

All court documents and documents produced and submitted in litigation are accessible to the public unless the court decides otherwise. Documents submitted in the proceedings that, for example, fall under the Act on the Protection of Trade Secrets are usually covered by secrecy. The court may also decide that secrecy should only apply to certain parts of a document that is otherwise public. If covered by secrecy, the document (or parts thereof) can be withheld from the other party and from the public.

16 Costs**Does the court have power to order costs?**

The main rule under the Swedish Code of Judicial Procedure is that the losing party shall reimburse the winning party for all of its litigation costs. These costs include, inter alia, costs for counsel, witnesses and experts, as well as the party's own costs. Litigation costs always have to be reasonable and fair (see question 18). Thus, the court may at its own

discretion decrease the costs claimed by the winning party. However, this is usually done only upon request by the opposing party. Allocation of litigation costs among the parties may more or less be made pro rata to the outcome of the case.

The rules of allocation of litigation costs may not be circumvented by the use of a limited liability company that is deliberately underfunded to bear the opposing party's litigation costs. If the limited company has no other business operations than the litigation, this can be reason enough for piercing the corporate veil and make the shareholders personally responsible for the litigation costs.

In certain circumstances a deviation from the general rule is made and the winning party is ordered to cover costs of the losing party. Such may be the case if, for example, the winning party has been careless with regard to procedure or if the legal action was commenced without any cause (for instance, if the defendant agrees to comply with the request and would have been willing had the defendant been asked before the initiation of the claim).

If a foreign legal person or a foreign citizen that does not have residence in the EU or the EEA wants to bring a legal action before a Swedish court against a Swedish citizen, resident or legal person, the plaintiff shall provide security for the opposing party's future litigation costs. In order for the court to determine such an order, the defendant has to make a request for it in its first pleading. The security shall cover the costs the defendant can be expected to be awarded if the plaintiff's claim is rejected.

Furthermore, a general prerequisite applicable to applicants requesting interim measures is that the applicant provides sufficient security (see question 12).

17 Funding arrangements

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?

Pursuant to the rules of the Swedish Bar Association, a lawyer must charge clients a reasonable and fair amount. These rules are in line with what the court may establish in a judgment under the Swedish Code of Judicial Procedure. Moreover, payment can only be made with normal methods of payment such as cash, and not by, for example, stock shares in a company.

Swedish lawyers usually charge their clients on an hourly basis. It is unusual for lawyers to charge fixed fees for a particular assignment or scope of work. Pursuant to the rules of the Swedish Bar Association, 'contingency fees' are not allowed. The amount that the lawyer charges the client must not, unless specifically agreed upon, be higher than the claim being litigated. The rules of the Swedish Bar Association also forbid conditional fee agreements, unless there are special circumstances (eg, class action suits, cross-border cases with procedures outside of Sweden, and if it is necessary in order for the client to be able to have 'access to justice').

It is permissible for a lawyer to accept compensation from a third party, and it is common for litigation to be funded by, for example, insurance companies as a consequence of the party being insured. Although not prohibited, third-party funding in the sense of particular 'funds' or 'investors' is still rarely, if ever, used in Swedish litigation. Neither is it prohibited per se for a third party financing the proceedings to take a share of any proceeds of the claim.

18 Insurance

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

There are certain company and liability insurance policies that may come into play in funding litigation. It often depends on the scope of the insurance policy and the type of claim at hand. In order to utilise such funding, notice must be given to the insurance company prior to, or in connection with, the commencement of the proceeding. Most insurance policies also have a maximum ceiling and charge excess, usually amounting to 20 per cent of the litigation fees. Failure to notify

the insurance company prior to the commencement of the proceeding may result in the party not being able to utilise the insurance.

19 Class action

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

A class action proceeding under the Swedish Class Action Act occurs when a plaintiff represents several persons, each and every one dependent on the outcome of the first case and for whom the prejudicial case will have legal consequences. Class action suits may be individual class action cases, actions by organisations or public class actions. A class action case may cover claims that can be addressed by a general court in accordance with the rules of the Swedish Code of Judicial Procedure.

An individual class action may be invoked by anyone who has a legal claim that is comprised by the class action. An organisation class action can be invoked by an unincorporated association that looks after consumers' and wage earners' interests. An authority that, depending on the subject of the dispute, is suitable to represent the group may invoke a public class action. A group trial may also be brought pursuant to the specific provisions in the Swedish Environmental Code.

A class action can be taken to trial only if:

- the claims are based on circumstances that are mutual for the members in the class;
- a class action does not seem inappropriate because some group members' claims differ significantly from other claims;
- a majority of the claims are not equally suitable to be invoked by each of the group members;
- the group is deemed appropriate with regard to size, delimitation and other circumstances; and
- the plaintiff is deemed suitable to bring a class action with respect to the plaintiff's interest, economic conditions and other circumstances.

A class action involves all group members that, within a certain period, have notified the court that they want to be included in the group (a so-called 'opt in' proceeding). The court is responsible for notifying and informing about the class action suit.

With regard to the procedure, overall, the same rules apply for civil claims and class actions. However, a class action differs from ordinary proceedings in a number of aspects. For instance, the court may designate a person as plaintiff if the original plaintiff no longer is deemed to be suited for the task. A person that has been designated as a plaintiff to bring a class action has the right to receive compensation from public funds for litigation costs. The group members have no responsibility for the litigation costs in the proceedings. Exceptions to this main rule can be made in relation to a group member who negligently inflicts costs. In addition, and unlike the case in ordinary litigation, the plaintiff's counsel may enter into a 'risk agreement' with the plaintiff in respect of costs. The risk agreement may include a success fee; however, it may not be based entirely on the value of the dispute. In order for a risk agreement to be valid, it must be in writing and ratified by the court.

20 Appeal

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

A judgment by the district court may be appealed unless otherwise stated. A party wishing to appeal a district court judgment in a civil case shall do so in writing within three weeks from the date the judgment was rendered. The appeal shall be submitted to the district court, which forwards it to the appellate court. A leave of appeal must be granted by the appellate court for it to hear the case. Leave of appeal shall be granted if:

- there is reason to question the rightness of the judgment of the district court;
- it is not possible to evaluate the rightness of the district court's judgment if leave of appeal is not granted;
- it is of importance with regard to the future application of the law that a higher court hears the case; or
- there are other particular reasons to grant the leave of appeal.

Judgments of the appellate court can be appealed to the Supreme Court within four weeks from the date of the judgment; however, this is also subject to a leave of appeal. Such a leave of appeal shall be granted only if:

- it is of importance with regard to the future application of the law that the Supreme Court hears the case; or
- there are other particular reasons to grant the leave of appeal.

It should be noted that the appellate proceedings should constitute a revision of the judgment and not a reconsideration of the case. Hence, the trial should, in principle, be based on the same circumstances and the same evidence as in the district court. Consequently, a party is precluded from invoking new circumstances and new evidence in the court of appeal, unless said party presents valid reasons for it.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The enforcement of a foreign judgment in Sweden requires an applicable treaty in this matter between Sweden and the foreign state. Such treaties exist between the EU and EFTA member states. The most common treaties and regulations that Sweden is a party or subject to are the following:

- Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I-Regulation of 2000);
- Regulation (EU) 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 (the Brussels I-Regulation of 2012);
- the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Jurisdiction Convention);
- the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the New Lugano Convention); and
- the EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (the Lugano Convention).

In order for a judgment to be enforceable in Sweden, it must involve a matter of civil law. In most cases, a formal decision of a competent authority (a court, or in the case of judgments governed by the Brussels I-Regulation of 2012, the Swedish Enforcement Authority) is required before a judgment may be enforced.

A judgment that is in conflict with Swedish public policy can never be enforced in Sweden.

In the event the state where the foreign judgment was rendered is not part of a treaty of enforcement with Sweden, and is not party to the above-mentioned conventions and regulations, the judgment is not enforceable in Sweden. However, such foreign judgments may still be recognised and enforced *de facto*, if the parties have an agreement that claims or matters such as those adjudicated by the foreign court should be subject to litigation in that foreign jurisdiction. In such a case, a Swedish court will simply accept the foreign judgment (to the extent it does not violate Swedish public policy) and deliver a judgment that replicates the foreign judgment, which then would be enforceable as any other domestic judgment. In addition to the above, it should also be mentioned that a foreign judgment that is not enforceable is admissible as evidence in legal proceedings. Foreign judgments cannot be enforced under the principle of reciprocity in Sweden.

22 Foreign proceedings

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

EC Regulation No. 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters applies in Sweden in civil or commercial matters where a court in one member state, in accordance with the national legislation, requests that a competent court in another member state take evidence or when it requests permission to take evidence directly in another member

state. Swedish courts that take evidence on behalf of a court in another member state shall as a main rule apply the regulations in the Swedish Code of Judicial Procedure. Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

If the above-mentioned EU regulation and procedure for taking evidence is not applicable, the provisions in the Swedish Act on the taking of evidence for a foreign court of law governs the taking of evidence for a foreign court. A request for taking of evidence in a civil case or matter is submitted by the foreign court to the central authority in Sweden, which forwards it to the competent Swedish court that is to perform the taking of evidence. However, a request from one of the other Nordic states is sent directly to the competent Swedish court. The measures that may be required with regard to taking evidence are listed in the Act. The list of measures is, however, not exhaustive.

If the foreign court has specific wishes with regard to the procedure, they will be accommodated insofar as they are not contrary to Swedish law. Heed must also be paid to restrictions in procedural law in the foreign state. Foreign judges have the right to be present when the evidence is taken.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Swedish Arbitration Act is not based on the UNCITRAL Model Law, but follows it at large. The most important distinctions between the Arbitration Act and the UNCITRAL Model Law are (i) that the Arbitration Act applies to both domestic and international arbitral proceedings, (ii) that it is not required that the arbitral agreement be in writing, and (iii) that the arbitrators' dismissal of a claim due to lack of jurisdiction can be subject to review by a court.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

For an arbitral agreement to be valid in Sweden (i) the parties to the agreement must have legal capacity to enter into the arbitral agreement, (ii) the arbitral agreement must be valid according to Swedish contract law, (iii) the arbitration agreement must refer to disputes arising from a specific contractual relationship or to a specific dispute, and finally (iv) the matter must be 'arbitrable'. Formally there is no requirement that the arbitration agreement be in writing.

25 Choice of 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?

The Arbitration Act states that there ought to be three arbitrators. Each party appoints one arbitrator and the two arbitrators subsequently appoint the third arbitrator (and the third arbitrator is the chairman of the arbitral tribunal). If a party does not appoint an arbitrator, the other party may request the district court to appoint the arbitrator. If the two appointed arbitrators do not appoint a third arbitrator, a party can apply for the district court to appoint the third arbitrator. If the parties have agreed so, and a party requests it, a court may appoint all of the arbitrators.

An arbitrator shall, after the request of a party, be discharged from his or her assignment as an arbitrator in the event there is a circumstance that may bring into question the arbitrator's impartiality. Such request has to be made to a court within 15 days, commencing on the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance. An arbitrator always lacks impartiality or independence if:

- the arbitrator or a person closely associated to them is a party to the dispute at hand or otherwise may expect material benefit or detriment as a result of the outcome of the dispute;
- the arbitrator or a person closely associated to them is a director of a legal entity that is a party or otherwise represents a party or

any other person who may expect material benefit or detriment as a result of the outcome of the dispute;

- the arbitrator has taken a position in the dispute as an expert or otherwise has assisted a party in the preparation or conduct of its case in the dispute; or
- the arbitrator has received or requested compensation in accordance with an agreement not made with all parties.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Any person with full legal capacity (who reigns over themselves and their property) is qualified to act as an arbitrator. Arbitrators are required to be impartial and independent.

27 Arbitral procedure

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

The arbitral proceeding is initiated when a party requests arbitration in writing. Besides this rule, the parties are in general free to agree on the applicable procedure, and the arbitrators must act in accordance with what the parties agree. However, there are a few general rules that are mandatory. These rules mainly serve to safeguard the fundamental interests of the parties and the state.

The mandatory rules are:

- the parties must be treated equally;
- the arbitrators must afford the parties an opportunity to present their respective cases in writing or orally to the extent necessary;
- a party shall be given the opportunity to get access to all the material that concerns the dispute and that has been handed over to the arbitrators; and
- the parties cannot empower the arbitral tribunal to use certain procedural measures that are exclusively reserved to the courts (eg, imposition of fines or hear a witness under oath).

28 Court intervention

On what grounds can the court intervene during an arbitration?

A court does not have a general right to intervene in an arbitral proceeding. However, a court can be involved in the proceedings upon a request by a party.

In addition to the answers in questions 3 and 7, a party may request that a court determine the arbitral tribunal's jurisdiction (for further information, see question 36).

Moreover, a party may, after obtaining permission from the arbitral tribunal, request a court to assist in the taking of testimonies (under oath) from witnesses or parties (under oath) and otherwise in the taking of evidence (such as producing written documents or objects).

29 Interim relief

Do arbitrators have powers to grant interim relief?

If the parties have not agreed otherwise, the arbitral tribunal may, at the request of a party, decide that the other party must undertake a certain measure to secure the claim that the arbitral tribunal is adjudicated. The arbitral tribunal may prescribe that the requesting party provide reasonable security for the damage that may occur as a result of the interim measure.

It should be noted, however, that an interim measure granted by an arbitral tribunal is neither enforceable the same way as court measures, nor can it be sanctioned with a fine. A party may therefore also request a district court to grant interim measures, which are enforceable. A district court may grant interim measures both before and during arbitral proceedings.

30 Award

When and in what form must the award be delivered?

According to the Arbitration Act an arbitral award must be in writing and signed by the arbitrators. If the arbitrators have left out their

signatures by oversight, they may correct the arbitral award by adding the missing signatures. If the majority of the arbitrators sign the arbitral award, it is sufficient for the reason why not all arbitrators have signed the award to be noted in the award. The parties may decide that the chair of the arbitral tribunal alone is to sign the award.

The award must be delivered to the parties promptly but the Arbitration Act does not regulate in what manner the award is to be delivered to the parties.

31 Appeal

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

An award cannot be appealed in the same way as a judgment. However, a party can seek nullification of the award and the award can be challenged on material grounds.

An award is null and void if (i) it includes determination of an issue which is not arbitral according to Swedish law; (ii) the award, or the circumstances in which it was rendered, are incompatible with the fundamental principles of the Swedish legal order; or (iii) the award does not fulfil the requirements with regard to the written form and signature.

The award may be challenged and set aside by a court if:

- the arbitration agreement is invalid;
- the arbitrators have rendered the award after the expiry of the period decided on by the parties, or the award exceeds the mandate of the arbitrators;
- the arbitral proceedings should not have taken place in Sweden;
- an appointment of an arbitrator was made contrary to what the parties agreed according to the Arbitration Act;
- there is a lack of capacity or impartiality of an arbitrator; or
- there are other procedural irregularities that may be presumed to have influenced the outcome of the case.

A party may not invoke a circumstance that the party may be deemed to have waived by participating in the proceedings without objection or otherwise. A party who wants to challenge the award must do so within three months after receiving the award.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

For a foreign award to be enforced in Sweden, a party must file an application of recognition and enforcement of the award at the Svea Court of Appeal. Recognition and enforcement is regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Sweden is a party.

A domestic award may, after the application by a party, be enforced by the Swedish Enforcement Authority. In order for the Enforcement Authority to enforce the award, it must have gained legal force and fulfil the formal requirements of being in writing and signed.

33 Costs

Can a successful party recover its costs?

The parties are jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. If the parties have not agreed otherwise, the arbitrators may, upon request by a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The arbitrators' order may also include interest, if a party has requested that.

Normally all kinds of costs attributable to the arbitral proceedings can be recovered, provided that the cost is reasonable.

Alternative dispute resolution

34 Types of ADR

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

In general, ADR processes are not frequently used in Sweden. Mediation is the most commonly used type of ADR process in. In addition, there are dispute boards in Sweden, rendering non-binding judgments, which can be appointed to solve a dispute. Also the National

Board for Consumer Disputes can hear claims in disputes between consumers and business operators but cannot render a binding judgment. Furthermore, it is stipulated in the Code of Judicial Procedure that the court shall, if the matter is suitable for an out-of-court settlement, work with the parties to reach a settlement.

35 Requirements for ADR

**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 cannot compel the parties to use ADR. However, if the matter is suitable for an out-of-court settlement, the court shall work with the parties to reach such settlement as long as it is not inappropriate considering the nature and circumstances of the case. A judge handling the case may quite extensively try to mediate, or settle, the case without risking his or her impartiality. Further, if more specialised mediation is more appropriate and the parties consent thereto, the court can direct the parties to appear at a mediation session before a mediator appointed by the court. The court shall then also state when the mediation shall be concluded, but it can extend this time limit where particularly needed. Special mediation is typically more appropriate when it can be used to avoid significant costs and time-consuming litigation in the court. While the choice of mediator is at the discretion of the court, due regard should be taken to the requests of the parties. The parties are jointly and severally responsible for the costs of special mediation, though the costs can be allocated as litigation costs if the mediation does not result in a settlement.

Such ADR as described above can be used at all stages of the litigation, and it is not unusual for the court, at the main hearing, to try to settle the dispute or direct the parties to special mediation.

Miscellaneous

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

Swedish law does not set out any particular requirements (such as regarding qualifications, domicile or nationality) for legal counsel or other legally trained persons in order to participate in a Swedish litigation or arbitration or to appear before the courts. In spite of this, in the event of a legal dispute, legally trained persons (lawyers, corporate lawyers and so on) usually represent the parties.

There are, in general, no restrictions in Swedish law as to what evidence can be invoked by the parties. If evidence has been gathered contrary to a legal rule or principle, the consequence is that its evidential value can be reduced. This principle of free submission of evidence is not absolute and there are certain exceptions. For instance, the court can reject an item of evidence if it finds it to be without importance or unnecessary, or evidently should be of no effect. The court can also reject an item of evidence if the evidence can be presented in another way with considerably less trouble or cost.

The doctrine of separability applies in Swedish arbitration, meaning that an arbitral clause may be considered valid even if the rest of the contract in which it is embedded is invalid (section 3 of the Arbitration Act). Furthermore, the Arbitration Act does not stipulate any provisions on confidentiality. If the parties have not expressly agreed not to, a party can disclose information about the arbitration without risking any legal sanctions (with the exclusion of trade secrets, the disclosure of which may be sanctioned with damages under the Swedish Trade Secrets Act). Bear in mind, however, that any counsel member under the Swedish Bar Association is under a duty to observe confidentiality in respect of information obtained in respect of the client-legal counsel relationship.

CEDERQUIST

Erik Wernberg
Fredrik Forssman

erik.wernberg@cederquist.se
fredrik.forssman@cederquist.se

Hovslagargatan 3
PO Box 1670
111 96 Stockholm
Sweden

Tel: +46 8 522 065 00
Fax: +46 8 522 067 00
www.cederquist.com

Switzerland

Roman Richers and Roman Baechler

Homburger AG

Litigation

1 Court system

What is the structure of the civil court system?

Switzerland is a civil law jurisdiction in which the federal government has legislative authority in the field of substantive and procedural civil law whereas the states (or cantons as they are called) are responsible for the organisation of the courts and the administration of justice unless the law provides otherwise.

The Swiss court system is thus generally not divided into federal and state courts. Rather, the cantonal courts also have jurisdiction over cases involving federal civil law. An important exception to this rule is patent law, where the Federal Patent Court has been appointed as court of first instance.

In the cantons, the local conciliation authorities are competent to decide cases with an amount in dispute of up to 2,000 Swiss francs if the claimant so requests. Apart from that, the cantonal courts of first instance (mostly designated as regional or district courts) have first instance jurisdiction in civil matters.

Cases with an amount in dispute of up to 30,000 Swiss francs are handled in simplified proceedings. Furthermore, specific matters such as interim measures, enforcement of judgments, or debt enforcement and bankruptcy are dealt with in summary proceedings. The remaining disputes are treated in ordinary proceedings.

The composition of the courts in the different types of civil proceedings is governed by the cantonal laws on court organisation. Typically, simplified and summary proceedings are handled by a single judge, whereas ordinary proceedings are decided by a panel of three judges in the courts of first instance.

Several cantons have established specialised sections for labour and landlord-tenant disputes within their courts of first instance. The cantons of Zurich, St Gall, Argovia and Berne have further installed commercial courts acting as sole cantonal instances in commercial disputes with an amount in dispute of at least 30,000 Swiss francs.

Moreover, the cantons are obliged to designate a sole cantonal instance in, among others, intellectual property, antitrust and unfair competition matters. This judicial function has generally been assigned to the cantonal appellate courts (sometimes called high courts or cantonal courts) or to one of the four commercial courts.

In the commercial courts, the judicial panels are composed not only of one or two chief justices but also of two or three specialised commercial judges who are familiar with the industry from which the dispute in question stems. Appellate courts in Switzerland usually employ three or five judges for deciding each case.

Judgments of the courts of first instance may be appealed to the cantonal courts of appeal. The decisions of the courts of appeal (as well as first instance judgments of the commercial courts and the Federal Patent Court) may in turn be appealed to the Swiss Federal Supreme Court.

2 Judges and juries

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

The judges are responsible for the procedural management of their cases, the taking of evidence, and the assessment of the merits of the disputed claims. Juries do not exist in Swiss civil litigation. Instead, the

judges assess and decide by majority vote whether the claimant succeeded in proving the factual basis for the claim and what the law is. In doing so, the judges must apply the law regardless of whether it was invoked by the parties. In contrast, the judges are generally prohibited from taking into account any facts that none of the parties presented.

Switzerland enacted general legislation on gender equality more than 20 years ago. Being a judge also became more compatible with family life in recent years as many part-time positions were created in the courts. In the canton of Zurich, for example, the percentage of female judges has risen from 15 per cent in 1995 to 46 per cent in 2017.

3 Limitation issues

What are the time limits for bringing civil claims?

The limitation periods are governed by substantive law. Civil claims generally become time-barred after 10 years. This rule applies to most contractual claims. However, claims for rent, interest on capital and other periodic payments become time-barred after five years. The same is true for claims in connection with the delivery of foodstuffs, board and lodging, hotel expenses, as well as for claims for work carried out by craftsmen, doctors, lawyers, notaries and employees.

Tort claims and claims for the restitution of an unjust enrichment become time-barred one year from the date on which the injured party became aware of his or her claim and of the identity of the person liable, but in any event 10 years after the date on which the damage or unjust enrichment was caused. If an action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim.

Aside from limited exceptions, the statutory limitation periods start running as soon as a debt becomes due. The limitation periods are, however, interrupted and thereby caused to start anew if the debtor acknowledges the claim and in particular makes interest payments or partial payments. Furthermore, the limitation periods are interrupted if the claimant initiates debt enforcement proceedings, files an application for reconciliation, or submits a statement of claim to a court.

Generally, the statutory limitation periods may not be altered by contract. However, the time limits may be waived after a claim came into existence. It is therefore possible to enter into tolling agreements. Lastly, it is important to note that the courts may not consider any statute of limitation on their own accord. Instead, a debtor intending to rely on a statute of limitation must explicitly invoke this defence.

4 Pre-action behaviour

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

In principle, there are no particular steps a party must take before initiating court proceedings. For example, a defendant does not have to be notified in advance of a lawsuit. Likewise, there is no substantive obligation to answer warning letters of a prospective claimant.

It is, however, customary to communicate with the counterparty before entering into a lawsuit. Also, remaining silent to a warning letter might cause the claimant to issue unnecessary proceedings. This circumstance may lead the court to impose court costs on the defendant even if he or she prevails.

Swiss procedural law does not provide for US or UK-style pretrial discovery or disclosure proceedings. However, it is possible to request the precautionary taking of evidence in summary proceedings if substantive law grants a right to do so or if the applicant can show credibly that the evidence is at risk or that he or she has a legitimate interest.

To substantiate a legitimate interest, the applicant must show credibly that he or she would have a claim against the opponent if the evidence were to establish specific events. A claim is credible if the applicant presents objective indications that the factual requirements of the claim – other than those to be proven by the precautionary taking of evidence – are met.

5 Starting proceedings

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 initiate civil proceedings, the claimant generally first has to file an application for reconciliation with the cantonal conciliation authority. The application for conciliation must identify the defendant and include the prayers for relief as well as a short description of the dispute. The conciliation authority serves the application for conciliation on the defendant by registered mail or international judicial assistance and summons the parties to a hearing.

At the hearing, the conciliation authority attempts to settle the dispute. To facilitate this endeavour, the parties have to appear in person, and the statements made during the hearing are confidential and may not be used in the further proceedings. If no agreement is reached, the conciliation authority grants the authorisation to proceed with the competent court. Based on this writ to proceed, the claimant is entitled to file the action in court within three months from the issuing of the authorisation.

In some instances, it is not required to complete conciliation proceedings before filing the action with the courts. This is, for example, the case with summary proceedings, divorce proceedings, certain debt enforcement actions, counterclaims, as well as with proceedings before a commercial court or another sole cantonal instance. The parties may further agree to waive any attempt at conciliation if the amount in dispute is at least 100,000 Swiss francs. If the defendant is domiciled abroad or has no known residence, the plaintiff may waive conciliation unilaterally.

An action is brought before the competent court by filing a statement of claim. This statement must contain the designation of the parties and their representatives, the prayers for relief, a statement on the amount in dispute, the factual allegations, and notice of the evidence offered for each assertion. The available physical records the claimant offers as evidence have to be filed together with the statement of claim.

Having received the statement of claim, the courts usually request the claimant to pay an advance on court costs. The defendant is then served with the statement of claim by registered mail and is given a deadline for filing the statement of defence. If the defendant is domiciled outside Switzerland, the statement of claim is again served through international legal assistance channels.

The civil courts in Switzerland do not experience serious capacity bottlenecks. There are legislative efforts to relieve the Supreme Court of some of its workload; however, this project mainly concerns criminal and administrative proceedings.

6 Timetable

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

The proceedings before the cantonal conciliation authorities usually do not last longer than three months. If the claimant thereafter files a statement of claim, the courts usually request an advance on court costs to be paid within 10 to 30 days. Some courts already serve the statement of claim on the defendant when they ask for the payment of the advance; other courts only serve the statement of claim after having received the advance on court costs.

Once the advance has been paid, the defendant is set a deadline of about 60 days to file the statement of defence. Thereafter, the courts often invite the parties to an instruction or settlement hearing in which they provide a preliminary assessment of the case and try to settle the matter. It may happen that the parties are invited to orally present their

reply and rejoinder at the instruction hearing. Usually, it takes three to five months to summon the parties to and complete the instruction hearing.

If the parties are not summoned to an instruction hearing, or if they were not given the opportunity to present their reply and rejoinder at such hearing, the claimant is given a deadline of approximately another 60 days to file his or her reply, and the defendant is finally invited to file the rejoinder usually within another 60 days. Once the exchange of written submissions is closed, the parties are summoned to the main hearing, and the court proceeds to take the evidence. Lastly, the court provides a written decision on the merits.

Overall, it usually takes between one and two years from the filing of the claim to the rendering of a first instance judgment. Appeal proceedings in civil matters in the cantonal courts of appeal take approximately six months. A civil appeal to the Supreme Court is on average decided within less than five months. Consequently, in a civil litigation the parties can usually expect to receive a final and enforceable judgment after no more than three years.

7 Case management

Can the parties control the procedure and the timetable?

Under Swiss procedural law, the management of civil cases lies within the responsibility of the courts. The parties only have very limited influence on case management issues. However, deadlines for the filing of briefs may sometimes be extended. Many courts, for example, initially set a deadline of only about 20 days to file the statement of defence but follow the practice that such deadline may be extended twice. If a party is interested in accelerating the proceedings, it can file its briefs early.

Some courts also take into consideration whether the parties are interested in having an instruction hearing or not. If one of the parties declares that it does not wish to take part in a settlement hearing, it is likely that the court will refrain from summoning the parties to such a hearing. In that case, the court will also not provide its preliminary assessment of the case, which is normally rendered at the instruction hearing. From the defendant's point of view, this can be advantageous if the claimant missed important points in the statement of claim.

8 Evidence – documents

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

Swiss substantive law provides for a duty to retain certain documents such as accounting records and vouchers, tax-related documents and commercial banking records for a duration of 10 years. Criminal law further prohibits the withholding of documents which the owner may not dispose of alone. Aside from that, a party to a dispute pending with the courts is not legally required to preserve documents and other evidence until the litigation is over.

Both the parties to a litigation and third parties have a duty to cooperate in the taking of evidence and in particular to produce physical records. If a party refuses to cooperate without valid reasons, the court takes this into account when appraising the evidence. If a third party refuses to cooperate, the court may impose disciplinary fines, threaten criminal sanctions or order the use of compulsory measures.

Moreover, a party applying for ex parte interim measures has the duty to share with the court any relevant documents it may have even if they do not support its request.

9 Evidence – privilege

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

Correspondence (including letters, emails, draft agreements or briefs, memoranda, and the like) between a party or a third party and a Swiss lawyer or a lawyer from a member state of the European Union or the European Free Trade Association who is acting in his or her capacity as a professional representative is privileged and does not have to be produced in court proceedings. The same privilege applies to correspondence with a licensed Swiss patent attorney.

The attorney-client privilege is, however, limited to the typical professional activities of attorneys. In contrast, correspondence with a

lawyer who is, for example, acting as a mere investment adviser or as a member of the board of a company is not privileged. Likewise, advice from in-house counsel is not privileged.

10 Evidence – pretrial

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

The parties are required to file any documentary evidence supporting their assertions together with their briefs. However, as a general rule, there is no exchange of witness statements. Witnesses must be questioned by the court, whereas written statements of witnesses are not admissible as evidence. The filing of a witness statement might even impair the value of that witness' testimony because he or she might be considered biased. Moreover, the bar rules in Switzerland prohibit attorneys from exerting any influence on potential witnesses. Witness statements are therefore used in exceptional cases only, for example, in summary proceedings during which witnesses are not heard because of time constraints.

Sometimes the parties hand in expert opinions. However, pursuant to settled case law, privately obtained expert opinions are not formally admissible as evidence either. Rather, such statements in principle have no more value than an assertion by one of the parties. However, expert opinions obtained by the parties are nevertheless used quite often to better substantiate the parties' assertions and because they might somehow impress the court. Very detailed assertions based on a privately obtained expert opinion also have to be contested in a substantiated manner. Otherwise, they are deemed as acknowledged.

11 Evidence – trial

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

Witnesses are typically summoned to the main hearing or to an evidentiary hearing. They are advised of the criminal consequences of perjury before being questioned by the court. The parties may request that additional questions be put to the witness, or, with the consent of the court, they may themselves ask such questions. The essential details of the witnesses' statements are put on record, but no verbatim record is made.

Likewise, experts are appointed by the court after having heard the parties. They, too, are advised of the criminal consequences of perjury and may be questioned at a hearing or asked to provide a written opinion. In most cases, courts commission written expert opinions. If the court intends to rely on the expertise of one of its members, it must inform the parties of the expert judge's opinion so that they may comment on it.

12 Interim remedies

What interim remedies are available?

A party may apply for interim measures either while a Swiss or foreign action on the merits is pending or before such action is filed. The courts will order interim measures if the applicant shows credibly that a right to which he or she is entitled has been or is about to be violated and that this threatens to cause harm to the applicant that is not easily repairable. A claimed violation of a right and the harm resulting from it is deemed credible if the applicant provides objective indications that his or her assertions are true.

The court may order any interim measure suitable to prevent the imminent harm, in particular: an injunction prohibiting to do something, an order to remedy an unlawful situation, an order to a register authority or to a third party, performance in kind, or (in exceptional cases provided by the law) the payment of a sum of money. If the applicant applies for the specific performance of a claim by way of an interim measure, he or she usually has to meet stricter requirements as regards the credibility of the claim and the imminent harm.

A party may also apply for ex parte interim measures if he or she can demonstrate that there is a special urgency. Whoever has reason to believe that an ex parte interim measure against him or her will be applied for may set out his or her position in advance by filing a protective letter. The protective letter remains valid for a duration of six months and will only be served on the counterparty if proceedings for an ex parte interim measure are initiated.

Monetary claims generally have to be secured by requesting an ex parte freezing order pursuant to the Debt Enforcement and Bankruptcy Act (DEBA). The court at the place where the assets are located will issue such freezing order if the creditor can show credibly that he or she has a claim against the debtor, that there exists a ground for the freezing order, and that there are assets at hand belonging to the debtor. The creditor has to provide prima facie evidence for the existence of the assets to be attached.

The creditor may invoke grounds for a freezing order if the debtor has no fixed domicile, is concealing his or her assets, is absconding, is passing through, belongs to the category of persons who visit fairs and markets, or lives outside Switzerland (the latter provided that the claim has a sufficient connection to Switzerland). An application for a freezing order is also deemed justified if the debtor is in possession of a written acknowledgement of debt or an enforceable judgment.

13 Remedies

What substantive remedies are available?

Swiss courts may grant affirmative or declaratory relief. In judgments providing affirmative relief, the defendant is ordered to pay money, to do, to refrain from doing, or to tolerate something. A declaratory judgment establishes that a particular right or legal relationship does or does not exist. A claimant may only apply for a declaratory judgment if he or she has a legitimate interest in the declaration. Such interest is normally denied as long as affirmative relief is available.

Aside from limited exceptions in labour law, punitive damages are not available in Switzerland. Instead, an aggrieved party is merely entitled to actual damages. In addition, in cases of homicide, personal injury, or injury to personality rights, the courts may award the victim or its relatives an appropriate sum as compensation for personal suffering. Furthermore, a debtor of a pecuniary debt must pay default interest of 5 per cent per year.

14 Enforcement

What means of enforcement are available?

Judgments ordering a party to pay money are enforced pursuant to the DEBA. To commence debt enforcement proceedings, the creditor must apply for a payment order with the competent debt enforcement office. If the debtor objects to the payment order, the creditor has to have the objection set aside in summary proceedings. Thereafter, the creditor may request with the debt enforcement office that assets of the debtor be seized or (in case of a corporation) that bankruptcy proceedings be initiated.

Other affirmative judgments are enforced by the courts in summary proceedings. In order to force the defendant to act, refrain from acting or tolerate something, the enforcement court may issue a threat of criminal sanctions, impose a one-time disciplinary fine of up to 5,000 Swiss francs, issue a disciplinary fine of up to 1,000 Swiss francs for each day of non-compliance, order a compulsory measure (such as taking away a moveable item or vacating immovable property), or order performance by a third party. The enforcement court may request assistance of other authorities.

15 Public access

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

Court hearings (as well as any oral passing of judgment) are generally conducted in public. Likewise, court decisions are made public. However, the public may be excluded when required by public interest or by the legitimate interests of an involved person. Moreover, family law proceedings are not conducted in public. The deliberations of the court are public only in the Supreme Court as well as in the cantons of Berne and Basle. Court documents are not available to the public.

16 Costs

Does the court have power to order costs?

Procedural costs comprise court costs and party costs. They are both calculated based on tariffs, which primarily depend on the amount in dispute. The courts may, and normally do, request that the claimant makes an advance payment up to the amount of the expected court

costs. The claimant may further be ordered to pay an advance on the defendant's party costs if he or she has no residence in Switzerland (or in a country that entered into a treaty with Switzerland excluding such advances), if he or she appears to be insolvent, if he or she owes costs from prior proceedings, or if there is a considerable risk that the compensation will not be paid for other reasons.

Procedural costs are generally charged to the unsuccessful party. If the action is not admitted by the court or is withdrawn, the claimant is deemed to be the unsuccessful party; in case of acceptance of the claim it is the defendant. If no party is entirely successful, the costs are allocated in accordance with the specific outcome of the case. If a claim becomes moot while the proceedings are pending, the courts normally take into consideration which party caused the litigation, which party caused the matter to become moot, and which party would likely have succeeded had the claim not become moot. In extraordinary circumstances, the courts may diverge from the above principles of cost allocation.

17 Funding arrangements

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 rules prohibit lawyers from entering into fee agreements according to which the lawyer's remuneration exclusively consists in a share of the proceeds of the claim or according to which the lawyer waives his or her fee claims if the case is lost. Usually, lawyers charge their clients on an hourly basis. However, as long as the requirements set out above are met, they are free to enter into alternative fee arrangements, including flat fees and premiums in case of success.

Litigation funding is permissible. Furthermore, litigation funding companies are not bound by the bar rules. They may, for example, take a share of the proceeds of the claim and in return promise to cover the procedural costs if the action is dismissed.

18 Insurance

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

Legal expense insurance is widely available and popular. Almost 60 per cent of the population has taken out such insurance. The coverage of legal expense insurance depends on the details of each policy. Normally, however, these insurances cover the legal costs of the insured, court costs and a possible compensation for party costs.

19 Class action

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

Two or more parties may jointly file an action or be sued as joint defendants if their rights and duties result from similar circumstances or legal grounds and if their individual cases are subject to the same type of procedure. In contrast, actual class actions (ie, proceedings in which one of the parties is a group of people who are represented collectively by a member of that group) are not known in Switzerland.

Recently, the Federal Council proposed to introduce a type of class action in draft legislation on banking services. However, the feedback from the interested circles was predominantly negative. Therefore, the respective provision in the suggested legislation was cancelled. However, the Federal Council announced that it may propose a general provision on collective actions in the future.

20 Appeal

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

Judgments of the cantonal courts of first instance may be appealed to the cantonal courts of appeal within 30 days on grounds of incorrect establishment of the facts or incorrect application of the law if the amount in dispute is at least 10,000 Swiss francs. Judgments below this

threshold and procedural decisions may only be objected within 30 days (or 10 days in case of summary decisions and procedural orders) for incorrect application of the law or obviously incorrect establishment of the facts.

Decisions of the courts of appeal may be further appealed to the Supreme Court within 30 days if the amount in dispute reaches 30,000 Swiss francs (or 15,000 Swiss francs in labour and landlord-tenant matters). Judgments of sole cantonal instances (eg, the commercial courts) and of the Federal Patent Court may be appealed to the Supreme Court regardless of the amount in dispute. The Supreme Court reviews most cases appealed to it for legal and gross factual errors. However, preliminary relief decisions may only be appealed for the violation of constitutional rights.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Switzerland entered into several bilateral and multilateral treaties on the recognition and enforcement of foreign judgments, the most important being the Lugano Convention (LugC), a parallel convention to the Brussels Regulation. The LugC applies in civil and commercial matters (except for inheritance matters, bankruptcy, social security and arbitration). Pursuant to the LugC, judgments rendered in a member state of the European Union or in another contracting state to the LugC are generally recognised and enforced in Switzerland. However, a foreign judgment is not recognised if mandatory provisions on international jurisdiction set up in the LugC are violated, if the judgment's recognition would manifestly violate public policy, if it was rendered in default and the defendant was not served with the document that instituted the proceedings, or if the decision it is irreconcilable with a Swiss judgment between the same parties.

If no international treaty applies, foreign judgments are recognised according to the provisions of the Private International Law Act (PILA). Pursuant to the PILA, foreign judgments are recognised if the authorities rendering the decision had jurisdiction, if no ordinary appeal can be lodged against it, and if there are no special grounds for refusal such as a violation of public policy. A foreign court is deemed to have jurisdiction if a provision of the PILA provides so, or, in the absence of such provision, if the defendant was domiciled in the state in which the decision was rendered, if the parties entered into a valid choice of forum agreement establishing jurisdiction of the foreign authority, or if the defendant proceeded to the merits without objecting to jurisdiction in the foreign proceedings.

22 Foreign proceedings

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

Switzerland is a signatory state to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (HEC). According to the HEC, judicial authorities of another contracting state may request the competent Swiss authority, by means of a letter of request, to obtain evidence. However, Switzerland made a reservation that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries if the requested documents are not directly and necessarily connected to the underlying proceedings abroad, if a party or third person is asked to indicate which documents relating to the dispute are in its possession, or if other legitimate interests are endangered.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Swiss arbitration law is not based on the UNCITRAL Model Law but does not fundamentally deviate from it either. Arbitrations held in Switzerland in which at least one of the parties is domiciled outside Switzerland are governed by the PILA. Domestic arbitrations are governed by the Civil Procedure Code.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be made in writing or in any other form allowing it to be evidenced by text, for example in email correspondence. It should, however, be noted that the interpretation of an arbitration clause is not limited by the wording of the written agreement. Rather, other circumstances evidencing the parties' intentions may also be taken into account.

25 Choice of 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 about the number of arbitrators, the tribunal will consist of three members. Each party may appoint one arbitrator. The chosen arbitrators then have to agree on a chairperson. If the parties fail to choose a single arbitrator or to appoint a plurality of arbitrators or if the arbitrators fail to agree on a chairperson, each party may request the courts at the seat of the arbitral tribunal to appoint the arbitrators and/or the chairperson.

A member of the tribunal may only be challenged if he or she lacks the qualifications required by the parties' agreement, if there is a ground for challenge in accordance with the rules of arbitration adopted by the parties, or if there is reasonable doubt as to his or her independence or impartiality. Should the challenged arbitrator dispute the challenge, the matter may be referred to the competent body designated by the parties or, if no such body has been designated, to the courts.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Switzerland is one of the most popular venues for international commercial arbitration, and there is a large community of lawyers specialising in the field both as party counsel and arbitrators. Many arbitrators have significant experience in specific fields of the law and in particular industries. It is therefore safe to say that there are numerous options for choosing highly qualified arbitrators in Switzerland.

27 Arbitral procedure

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

The parties are free to determine the procedure to be followed by the tribunal. In particular, they may either agree on individually designed rules, refer to a set of arbitration rules, or agree on a procedural law of their choice. The law does not contain mandatory procedural rules other than that the parties must be treated equally and that their right to be heard must be respected.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Compared with other jurisdictions, there is only very limited room for court intervention in a Swiss arbitration. The courts can intervene in an arbitration as regards the appointment and removal of arbitrators. Moreover, the courts may assist an arbitral tribunal in the taking of evidence and the enforcement of preliminary measures. Lastly, for the limited grounds outlined below, arbitral awards may be appealed to the courts. In international arbitration proceedings, however, the parties may in writing exclude any right of appeal if none of the parties is domiciled in Switzerland.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Unless otherwise agreed, the arbitral tribunal may grant interim measures at the request of one of the parties. If the ordered measures are

Update and trends

The Supreme Court Act as well as the chapter on international arbitration in the PILA are currently being revised. Proposals for revised laws have already been drafted and presented to the public. However, it is not yet clear whether and when the revised legislation will be enacted. Furthermore, the government indicated that it intends to introduce general rules on collective actions and that it might present a respective proposal in the course of this year.

not complied with, the arbitral tribunal may seek the assistance of the courts at the seat of the tribunal in executing its order.

30 Award

When and in what form must the award be delivered?

The award must be delivered in writing and be signed at least by the chairperson. The law does not require the tribunal to render its decision within a particular time period.

31 Appeal

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

Arbitral awards may be appealed to the Supreme Court within 30 days. In domestic arbitration, the parties may also agree that the award is appealable to the court of appeal at the seat of the tribunal. There is no right of further appeal. An award may only be appealed for the following reasons:

- the single arbitrator was appointed or the arbitral tribunal was composed in an irregular manner;
- the arbitral tribunal wrongly declared itself to have or not to have jurisdiction;
- the arbitral tribunal decided issues that were not submitted to it or failed to decide on a prayer for relief;
- the principles of equal treatment of the parties or the right to be heard were violated;
- in domestic arbitrations: the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity;
- in international arbitrations: the award is irreconcilable with public policy; and
- only in domestic arbitrations: the costs and compensation fixed by the arbitral tribunal are obviously excessive.

In a domestic arbitration, a party may further request the court of appeal at the seat of the tribunal to exceptionally review the award if:

- it subsequently discovers significant facts or decisive evidence that could not have been submitted in the earlier proceedings (excluding facts and evidence that arose after the arbitral award was made);
- if it can be proven that the award was influenced by a felony or misdemeanour;
- if it is claimed that the acceptance, withdrawal or settlement of the claim is invalid; or
- if the European Court of Human Rights determined that the European Charter of Human Rights has been violated, compensation is not an appropriate remedy, and review is necessary to remedy the violation.

There are no statutory provisions on the review of international arbitral awards. However, the Supreme Court recognises that revision is also available in international arbitration proceedings.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Swiss arbitral awards are enforced like judgments of courts. Awards of arbitral tribunals seated outside Switzerland are recognised and enforced if the prerequisites of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met.

33 Costs**Can a successful party recover its costs?**

Swiss law does not address cost allocation in arbitration proceedings but it is generally recognised that the arbitral tribunal may also decide on such costs. The parties may agree on rules on cost allocation or refer the question to a given set of arbitral rules. In the absence of any agreement, arbitral tribunals in Switzerland usually follow the rule that the unsuccessful party must bear the tribunal's costs and reimburse the counterparty for its legal costs.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

The most common type of ADR in Switzerland is conciliation proceedings before the cantonal reconciliation authorities. Apart from that, mediation is gaining popularity in more complex disputes where the parties feel that their ongoing relationship should be preserved as well as in matrimonial matters.

35 Requirements for ADR**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 most cases before state courts, the parties have to complete conciliation proceedings with the reconciliation authorities before they may file their action in court. Once the litigation is pending in court, the parties may no longer be compelled to participate in an ADR process. However, the court may recommend mediation to the parties at any time. Furthermore, in many proceedings the court may at some point during the litigation summon the parties to an instruction or settlement hearing at which the judges try to arrange an amicable settlement of the dispute.

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

Based on case law of the European Court of Human Rights, the courts in Switzerland have adopted the practice that the parties are entitled to comment on any statement of their respective counterparty. Therefore, even if the court does not invite a party to file further comments but merely serves a statement of the counterparty on it, that party has the right to file a reply within 10 days. Sometimes, this may lead to lengthy exchanges of briefs.

Homburger

Roman Richers
Roman Baechler

roman.richers@homburger.ch
roman.baechler@homburger.ch

Prime Tower, Hardstrasse 201
8005 Zurich
Switzerland

Tel: +41 43 222 10 00
Fax: +41 43 222 15 00
www.homburger.ch

Turkey

Sidika Baysal, Mustafa Basturk and Gizem Oner

B+B Law Firm

Litigation

1 Court system

What is the structure of the civil court system?

In the Turkish judicial system, together with an amendment introduced in July 2016, civil courts have been established in three degrees: first instance courts, regional courts of appeal and the Court of Appeals. The regional courts of appeal that have been integrated into the civil court system are designed as a second-tier court to review objections to judgments of the first instance courts.

A party who wishes to appeal against a decision of the first instance court must submit its objection to the regional court of appeal. Furthermore, decisions of regional courts of appeal can be brought before the Court of Appeals as a final appeal court. The three-level judicial system was introduced in Turkey with the intention of improving the quality of judicial decision making and to reduce the workload of the Court of Appeals. The organisational structure of the regional courts of appeal is the same as the Court of Appeals and any investigations related to such courts are conducted by an assembly of civil chambers.

The first instance courts are subdivided into general and special courts in accordance with Act No. 6100 (the Code of Civil Procedure). The general courts are in charge of proceedings concerning personal rights and property in accordance with article 2 of the Code of Civil Procedure while the special courts were established to resolve disputes regarding labour law matters, intellectual and industrial property rights, consumer rights and commercial matters.

The number of judges in the first instance varies from one to three depending on the nature and value of the case while the regional courts of appeal and the Court of Appeals are constituted by three and five judges, respectively.

2 Judges and juries

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

The jurisdiction of the courts is designated by article 1 of the Code of Civil Procedure and accordingly the judge has the authority to intervene for jurisdiction at every stage of the trial. The passive role of the judge involves the evaluation of claims, arguments, evidence and other documents that are submitted to the court by the parties. On the other hand, in accordance with the principle of preparation of the case by parties, the judge does not investigate the matters that are not requested or declared by the parties, hence does not conduct *ex officio* research or evaluation on the matter. The role of the judge varies greatly depending on the kind of dispute (ie, while the judge has a more passive role for commercial disputes, he or she has a more active role in disputes involving custody of a child).

The Turkish judicial system does not have any jury involvement for either civil or criminal cases.

3 Limitation issues

What are the time limits for bringing civil claims?

The statute of limitations is regulated under the Turkish Code of Obligation No. 6098. Accordingly, each claim is subject to a 10-year statute of limitations unless otherwise regulated within the relevant

law. The statute of limitations is not taken into account by judges unless declared or objected to by the parties. The statute of limitations is five years for receivables that are mentioned below:

- periodic incomes;
- accommodation and food and beverage charges;
- debts arising from the retail sales of small enterprises;
- debts arising from a partnership agreement and based on a relationship between the partners or between the partners and the company;
- debts arising from commission contract or agency contract; and
- debts arising from a construction contract, except when the contractor does not perform his or her obligations.

The time limits are mandatory by law and they cannot be suspended by the agreement of the parties.

4 Pre-action behaviour

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

Although in most cases the Turkish judicial system does not require a pre-action consideration, some specific actions may be required by law and the most notable example is the default process that must be initiated as a pre-action. On the other hand, the Turkish judicial system allows voluntary pre-action considerations such as provisional seizure, provisional injunction and determination of evidence.

5 Starting proceedings

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 in the Turkish judicial system begin with the submission of the lawsuit petition to the court.

The court receives the petition and sends it to the defendant together with the preliminary proceedings report. The preliminary proceedings report includes the trial procedure and the hearing start date.

With the aim of finding effective solutions for the increasing workload of the courts, the Strategy Planning Report for 2015-2019 was published by the Ministry of Justice on 15 July 2015.

In order to provide an efficient information system and litigation process for judicial authorities, government bodies, attorneys and their clients, the Ministry of Justice has introduced the International Judiciary Network Information System (UYAP), which has been fully operational since 2005. With the UYAP system, all types of judicial activities can be carried out and monitored electronically. The UYAP system allows electronic signatures to be used. This has accelerated the judicial system and contributed to a reduction in the courts' workload.

6 Timetable

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

In accordance with the Code of Civil Procedure, there are three phases, after the stages of bringing a lawsuit and exchanging of petitions: the preliminary examination phase, the investigation phase and the judgment phase.

During the preliminary examination phase, a series of operations are performed, which are: examination of the causes of action, examination of preliminary objections, taking necessary actions for submission and collection of evidence, precise determination of the legal disputes, and preliminary operations. The judge will encourage the parties to mediate or settle at this stage.

The investigation phase is the stage in which evidence is examined. The judge shall determine the accuracy of the allegations and defences of the parties and the facts alleged through an oral proceeding.

During the judgment phase, the judge shall render his or her final judgment in the material aspects within the scope of the evidence submitted and the defences of the parties.

The time frame for civil lawsuits varies depending on the action and the procedure used, but they usually take between one-and-a-half and three years.

7 Case management

Can the parties control the procedure and the timetable?

Civil proceedings are conducted in accordance with the provisions of the Code of Civil Procedure. The parties shall be bound by the periods determined by the law. However, in the event additional time is required due to the nature of the case, parties may request an extension from the court. If such request is considered appropriate by the judge in this regard, the time for response can be extended by two weeks. In addition, in order to expedite the litigation process parties may agree on some matters within the judgment process. The agreed matters are accepted at the judge's own discretion by considering whether such agreements are valid and binding for both parties.

8 Evidence – documents

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

Pursuant to article 219 of the Code of Civil Procedure, the parties are obliged to submit all documents that are stated in the list of evidence. Electronic documents may also be submitted with hard copies to the court on condition that such documents are recorded properly to the electronic environment being used for examination upon request. With respect to the documents that are constantly used, such as accounting records, only the certified copies of the relevant parts of them are required to be submitted to the court. Therefore, the parties are required to keep such documents, and submit them to the court.

9 Evidence – privilege

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

Pursuant to the Code of Civil Procedure, all petitions and documents submitted to the court are received by the court. The parties may review the court file under the supervision of the court and obtain copies of the documents from the court file. This is stipulated by the right of defence. If there is a confidentiality order on the documents in the court, such documents may only be examined with the express consent of the judge.

In accordance with the Attorneys' Act, it is forbidden for lawyers to disclose information about the files that they have received. Lawyers can only serve as witnesses in a case with the consent of their clients. Even if such consent is given, the lawyer may abstain from acting as a witness.

10 Evidence – pretrial

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

In the Turkish judicial system, parties are not able to exchange written evidence from the witnesses prior to trial. However, article 9 of the Code of Civil Procedure allows requests for an expert opinion regarding the lawsuit to be submitted to the court. Therefore, the parties may obtain an expert opinion on their allegations and submit such opinion to the court.

11 Evidence – trial

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

In the Turkish judicial system, evidence to be presented to the court is submitted as a list. The documents listed as evidence may be submitted to the court in copies, provided that the originals are kept. The judge may request to review the original version of a document. The documents and witnesses declared in the evidence list may not be changed.

Witnesses attend the hearing and answer the questions of the judge with respect to the lawsuit and give an oral statement at the hearing. The oral statements of the witnesses are taken down in the minutes of the hearing and kept in writing. Pursuant to article 152 of the Code of Civil Procedure, the attorneys of the parties may directly ask questions to the witnesses, expert witnesses and the third parties invited to the hearing; however, the parties may ask questions only upon the permission of the judge.

Although it is possible for experts to give an oral statement, they may submit a written report to the court. The court may decide to seek the opinion of an expert, upon the request of a party or per se, in cases where specific and technical knowledge is required except for purely legal matters and queries.

12 Interim remedies

What interim remedies are available?

A preliminary injunction may be granted on the subject matter of the dispute in cases where there is a concern that an inconvenience or serious damage would occur as a result of a delay, or a change in the current situation, which would cause a difficulty or impossibility related to the exercise of a right. In accordance with article 391 of the Code of Civil Procedure, the court may decide on any kind of injunction that would prevent or remove the damage, such as protection of property or the right that is the subject matter of the injunction or safekeeping or taking or not taking an action.

The court may decide, when necessary, to keep records of the properties or rights or may make a sealing transaction on moveable or immovable property that is the subject of the dispute. The special provisions in other laws relating to temporary legal protection, such as provisional attachment, safeguard measures and the decisions of interim arrangements, are reserved.

13 Remedies

What substantive remedies are available?

In the Turkish judicial system, there are three main types of cases and judgments: an action for performance, a declaratory action, and constitutive lawsuits.

In the action for performance, the court shall request the defendant to give or do something or cease from doing something.

In a declaratory action the court is required to determine the existence or non-existence of a right or legal relationship or whether a document is false or not.

In constitutive lawsuits, the court shall create a new legal status or change the content of an existing legal status or remove it. These cases are also known as 'innovative cases'. Such cases are opened where it is prescribed by law.

In addition, if so requested and upon the ruling of the court, a default interest may be ordered on the actions of debt.

14 Enforcement

What means of enforcement are available?

In accordance with the provisions of the Execution and Bankruptcy Law No. 2004, the judgment of a civil court is enforced by the competent execution offices. The enforcement of the judgment of a case is conducted by the relevant execution office. The creditor of the case is entitled to confiscate the debtor's assets (via public sale or auction). Depending on the nature of the judgment, a defeated party that does not comply with the court judgment that is banned from performing certain acts or is ordered to perform a certain act may be imposed sanctions in accordance with the Execution and Bankruptcy Law.

15 Public access

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

In accordance with article 28 of the Code of Civil Procedure, court hearings are open to the public. However, due to reasons related to public morality or protection of personal rights, the courts may decide to conduct the hearings in a confidential manner. In a confidential hearing, the court warns the people attending the hearing not to disclose the information they have heard during the hearing and records such warning in the hearing minutes.

The parties and their lawyers have access to any and all documents regarding the lawsuit.

Lawyers are authorised to examine the lawsuit files by presenting their lawyer identity cards to the court.

16 Costs

Does the court have power to order costs?

Pursuant to the Code of Civil Procedure, it is envisaged that all fees, including court fees and the attorneys' fees of the counterparty, shall be borne by the defeated party. The attorneys' fees ordered by the court are calculated in accordance with the relevant legislation. If the requests of the plaintiff are partially successful, then fees and expenses shall be allocated between the plaintiff and defendant on a pro rata basis. Court expenses and fees are determined in accordance with the relevant legislation. Court fees are calculated based on the value of the subject matter of a dispute and paid by the party designated by the court.

17 Funding arrangements

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?

Lawyers' fees are regulated by the regulations organising the professional duties and obligations of the lawyers and in principle a 'no win, no fee' agreement is not accepted. All fee arrangements, including pro bono and conditional fee agreements shall comply with such regulations. Further, in accordance with the Code of Civil Procedure, the parties are not allowed to make arrangements with respect to court fees.

In accordance with Turkish law, there is no provision preventing the plaintiff party to obtain finance from third parties in order to initiate legal proceedings. However, financial assistance obtained from a third party does not enable such third party to be involved in the proceedings as a party.

As a rule, all risks that may be incurred by a defendant during the case shall belong to the defendant and consequently the defendant is not entitled to share the risk. However, in cases where the decision of the court may have an effect on a third party as well as the defendant, the third party may present his or her request to attend the lawsuit. In the event the court accepts, it is possible for the third party to become a party to the lawsuit.

18 Insurance

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.

19 Class action

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

Under article 113 of the Code of Civil Procedure, associations, societies and other legal persons can file a lawsuit, on their own behalf with the purpose of protecting the interests of their members or the individuals they represent. In such lawsuits, the plaintiff may seek compensation, reinstatement or protection measures against the defendant.

20 Appeal

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

Under the new three-tier appeal system the regional courts of appeal act as appeal courts against the decisions given by the courts of first instance. The Court of Appeal remains the final decision-making authority for appeals that have been made against regional court of appeal decisions.

In accordance with article 341 of the Code of Civil Procedure, the following can be appealed:

- final decisions of the courts of first instance;
- refusal decisions of precautionary attachments and preliminary injunction claims; and
- decisions made on objection in case of approval of precautionary attachments and preliminary injunction.

The circumstances that are not eligible for appeal are stated in the same article. Accordingly, decisions of actions concerning assets for amounts under 3,110 liras are non-appealable. The regional courts of appeal are the final judicial authority for the following decisions:

- decisions regarding cases the amount of which does not exceed 41,530 liras (including this amount);
- decisions regarding cases within the jurisdiction of the courts of first instance in specific laws;
- decisions given in a judicial locality in order to settle a dispute on authority and competence between the court of first instance and decisions related to the indication of the appropriate court;
- decisions regarding ex parte proceedings;
- decisions on the correction of the civil registry records of persons, excluding cases involving results on the lineage of a person;
- decisions on transfer of legal actions to another court in a judicial locality, if the judges of the courts of first instance in that judicial locality have any legal or factual obstacles to hear; and
- decisions on temporary legal protections.

The appeal period is two weeks for the regional courts of appeal and one month for the Court of Appeal.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The procedures on recognition and enforcement of a foreign judgment are regulated by the Turkish International Private and Procedural Law. Article 50 of the Law regulates the preliminary conditions for recognition and enforcement. Accordingly, there are three main conditions for a foreign judgment to be recognised and enforced: (i) existence of a foreign court judgment; (ii) it is required to be awarded in relation to the civil lawsuits; and (iii) the decision is required to be finalised pursuant to the acts of state rendering such decision.

On the other hand, the enforcement of foreign judgments is possible subject to the conditions provided in article 54 of the International Private and Procedural Law. These conditions are as follows:

- existence of an agreement, on a reciprocal basis between the Republic of Turkey and the state where the court decision is given or a de facto practice or a provision of law enabling the authorisation of the execution of final decisions given by a Turkish court in that state;
- the judgment must have been given on matters not falling within the exclusive jurisdiction of the Turkish courts or, on condition of being contested by the defendant, the judgment must not have been given by a state court that has deemed itself competent even if there is no real relation between the court and the subject or the parties of the lawsuit;
- the court decree shall not openly be contrary to public policy; and
- the person against whom enforcement is requested was not duly summoned pursuant to the laws of that foreign state or to the court that has given the judgment, or was not represented before that court, or the court decree was pronounced in his or her absence or by a default judgment in a manner contrary to these laws, and the person has not objected to the executatur based on the foregoing grounds before the Turkish court.

22 Foreign proceedings

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

Using oral or documentary evidence in civil proceedings in foreign countries is dependent on the mutual agreements signed with such countries. Since Turkey is a party to the Hague Convention on Civil Procedure and the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, it can be easily said that the scope of the execution area for such procedure is highly comprehensive. In addition, in the absence of any mutual agreement, the reciprocity rule shall be applied for foreign countries.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The International Arbitration Law No. 4686 (the Arbitration Law), which entered into force on 21 June 2001, was prepared with the influence of the UNCITRAL Model Law.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Article 412 of the Code of Civil Procedure in the case of domestic arbitrations and article 4 of the Turkish International Arbitration Code in the case of international arbitrations set out the definition and formal requirements for the validity of an arbitration agreement. An enforceable arbitration agreement must be:

- executed between the parties with the aim of resolving all or part of the disputes that have arisen or that may arise from the legal relationship between them, whether from a contract or not;
- in writing. It can be an arbitration clause in a contract or a separate agreement. This requirement is considered fulfilled if there is a written document signed by the parties; written communications between the parties confirming agreement (eg, letter, telegraph, telex, fax or electronically); no objection to the petition for arbitration claiming that there is a written arbitration agreement; or reference to a document containing an arbitration clause, provided it is part of the main contract; and
- accord with the rules of the jurisdiction agreed by the parties. In the absence of an agreement on jurisdiction, it must be valid in accordance with Turkish law.

25 Choice of 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?

The parties are free to determine the number of arbitrators in the agreement provided that an odd number of arbitrators is appointed.

The Turkish International Arbitration Law No. 4686 regulates the number of arbitrators and their appointment process in the absence of provision in the agreement. Within that scope the Law introduces that in the event the number of arbitrators is not determined by the parties, three arbitrators shall be appointed. In addition, pursuant to the Law, unless otherwise agreed by the parties, the following principles are applicable to the appointment of the arbitrators:

- only natural persons can be appointed as arbitrators;
- 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 civil court of first instance;
- 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 an 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 civil court of first instance. The third arbitrator appointed shall be the chair of the arbitral tribunal; and

- in an arbitration with more than three arbitrators, the arbitrators who will appoint the last arbitrator shall be appointed by the parties in equal numbers in accordance with the procedure set forth in the above paragraph.

In accordance with the same article (article 7) an arbitrator may be challenged if: he or she does not possess the qualifications that were agreed upon by the parties or if there exists a reason for challenge in accordance with the arbitration procedure agreed by the parties, or if the existing circumstances give rise to justifiable doubts as to his or her impartiality or independence.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Under Turkish law, arbitrators must be a natural person and in the event that the number of appointed arbitrators is more than one, at least one of them must be a lawyer with at least five years' experience in a relevant field.

27 Arbitral procedure

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

According to article 424 of the Code of Civil Procedure, the parties may freely decide on the rules, save for the mandatory provisions by the Code, for the proceedings to be applied by the arbitrator or the arbitral tribunal, or they may simply refer to specific arbitration rules. If there is no such agreement between the parties, the arbitrator or the tribunal shall carry out the arbitral proceedings in most appropriate way considering the Arbitration Law. Under the Arbitration Law, basic principles of international arbitration are accepted such as the equal treatment of parties and the equal right to submit evidence.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Appointment of the arbitrators may be executed by the court upon a request by one of the parties. Recourse to a court against an arbitral award may be made only by an application for setting aside the award. Such recourse must be made before the civil court of first instance. The regulation highlights that the application for recourse must be given priority and will be handled expeditiously.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Pursuant to article 414 of the Code of Civil Procedure, the parties have the right to apply to the arbitral tribunal with a request for interim relief or recording of evidence relating to the matter in dispute before or during the arbitral proceedings. However, interim measures granted by the arbitrators are enforceable neither by courts nor by other authorities. Moreover, such measures have no effect on third parties. However, the court may decide on enforceability of the measure granted by the arbitrator or tribunal upon the request of the parties if there is a valid arbitration agreement.

If the arbitrator or arbitral tribunal or another person to be appointed by the party cannot act on time or effectively, one of the parties may apply to the court for interim relief or recording of evidence. The interim relief awarded by the court may be changed or removed by the arbitrator or arbitral tribunal.

30 Award

When and in what form must the award be delivered?

Unless otherwise agreed by the parties, the arbitral tribunal may decide by majority vote. Unless otherwise agreed by the parties, an award shall be rendered within one year, in the case of a sole arbitrator, from the date of his or her appointment or, in where there is an arbitral tribunal, from the date when the minutes of the tribunal's first meeting are made.

The arbitral award must contain:

- the names and surnames of the arbitrator or the arbitral tribunal members;
- the names and surnames of the parties and their representatives' (if any) names, titles and addresses;
- the legal grounds on which the decision is based;
- the rights and obligations imposed on the parties in a clear and definite manner;
- the costs of proceedings;
- the place of arbitration; and
- the date of the award.

The name, signature and a dissenting opinion, if any, of the arbitral tribunal and an indication that an action for setting aside the award could be brought must be added to content of the award.

31 Appeal

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

Awards may be filed to the court for an annulment action within one month. This period commences from the date on which the arbitral award or adjudication, correction or completion decision is communicated to the parties. Claims that may be raised to the court are restricted by law. Pursuant to the Turkish Arbitration Law, article 15, an arbitration award may be set aside:

- where the party reveals sufficient evidence 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 Turkish law;
 - the composition of arbitral tribunal is not in accordance with the parties' agreement, or, failing such agreement with the Law;
 - the arbitral award is not rendered within the term of arbitration;
 - the arbitral tribunal unlawfully found itself competent or incompetent;
 - 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;
 - the arbitral proceedings are not in compliance with the parties' agreement (as to the procedure), or, failing such agreement, with the Law provided that such non-compliance affected the substance of the award; or
 - the parties are not treated equally; or
- where the court decides that:
 - the subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or
 - the award is in conflict with Turkish public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign arbitral decisions must be recognised in Turkey in order to constitute a definite provision and to have an executive effect.

Turkey became a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Judgments. Thus relevant provisions of the Convention are being followed for the enforcement of foreign awards as a first option. The provisions of the Turkish International Civil and Procedure Law are applied in areas not covered by the New York Convention.

33 Costs

Can a successful party recover its costs?

Unless the parties agree otherwise, the defeated party shall bear the costs of the arbitration procedure. In cases where both parties are partially justified, all costs of arbitration, including the fees and costs of the arbitrators and the experts, including attorneys' fees, witnesses' travel expenses and the other costs incurred by the witnesses, are shared among the parties according to their justification status.

Alternative dispute resolution

34 Types of ADR

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

As an alternative dispute resolution method, mediation has been recognised by the Turkish legal system with the announcement of the Turkish Mediation Act on Civil Disputes dated 22 June 2012 (the Mediation Law), which entered into force on 23 June 2013. The scope of the long-awaited Law has been limited to civil disputes including those with a foreign element except as regards matters that are not at the parties' disposal. Within scope of the Law mediation is defined as voluntary dispute resolution, thus parties are entitled to apply for mediation before and during the proceedings.

According to the Mediation Law, the mediator must be independent and impartial in dealing with the parties. Further, the Law does not permit mediators to directly influence the parties' intentions during the mediation process; their role during the process is to facilitate negotiations between the parties and encourage them to reach a mutually satisfactory settlement.

Pursuant to the Law only a natural person of Turkish nationality with a degree in law and a minimum of five years' legal practice may practise as a mediator. In addition, completion of the relevant mediation education programme and success in the exams to be held by the Ministry of Justice is a requirement.

If the parties come to an agreement, they may request an annotation from the relevant court on the enforceability of this agreement. Such annotation gives the agreement the power of a court judgment.

B+B | HukukBürosu
StudioLegale
LawFirm

Sidika Baysal
Mustafa Basturk
Gizem Oner

sbaysal@bb-legal.com
mbasturk@bb-legal.com
goner@bb-legal.com

Maslak Meydan Sok. N.5
Spring Giz Plaza K.4 Sariyer
Istanbul
Turkey

Tel: +90 212 219 16 30
Fax: +90 212 219 16 32
www.bb-legal.com

The examination for enforceability will be limited to enforceability and suitability for mediation.

35 Requirements for ADR

**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?**

Within the scope of the current articles of the Mediation Law, the mediation process is completely voluntary. However, within the scope of articles 137, 140 and 320 of the Code of Civil Procedure, it has been determined that the judge may encourage the parties to mediation or reconciliation at any time during proceedings at its sole discretion.

Additionally, the Draft Law on Labour Courts was published in March 2016 and defines the mandatory mediation institution for reinstatement (re-engagement) and receivable claims of employees. In the event that such amendment enters into force, employees will be obliged to make use of the mediation process for cases involving reinstatement (re-engagement) and receivable claims before proceeding to litigation.

Miscellaneous

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

No.

Ukraine

Pavlo Byelousov and Oleksandr Mamunya

Aequo Law Firm

Litigation

1 Court system

What is the structure of the civil court system?

Ukraine is a civil law country of the continental legal system. The judicial system of Ukraine consists of: courts of general jurisdiction and a court of constitutional jurisdiction (the Constitutional Court of Ukraine).

As of April 2017 courts of general jurisdiction include general courts and specialised (commercial and administrative) courts. General courts consider civil, criminal, administrative and some specific matters (eg, recognition or enforcement of the foreign judgments and arbitral awards, setting aside the arbitral awards rendered in Ukraine, establishment of facts), while commercial and administrative courts consider only commercial and administrative disputes.

The procedures of the above courts differ, since they are regulated by specific procedural codes for each type of court jurisdiction. In particular, the 2004 Civil Procedural Code governs civil procedure (ie, private disputes involving individuals), the 1991 Commercial Procedural Code – any private, mostly commercial, disputes involving legal entities or individual entrepreneurs, and the 2005 Code on Administrative Proceedings – disputes arising out of public legal relations involving an official or a state body (eg, tax authorities).

Civil, commercial and administrative proceedings may include four levels: first instance (local) courts; courts of appeals (regional); courts of cassation (the Superior Court of Ukraine on Civil and Criminal Matters, the Superior Administrative Court of Ukraine or the Superior Commercial Court of Ukraine, accordingly) and the Supreme Court of Ukraine.

The decisions of local (first instance) courts may be appealed to the administrative, commercial and general courts of appeal accordingly. The decisions of the courts of appeal may be further appealed (via ‘cassation complaint’) to the relevant superior court. The last appeal option (on very limited grounds) may be filed to the Supreme Court of Ukraine.

Under a general rule, cases in the courts of first instance are heard by the sole judge, except for specific circumstances (eg, owing to an extraordinary complexity of the case) when a case be referred to a panel consisting of a judge and two people’s assessors (in general courts) or a panel consisting of three judges (in commercial and administrative courts). Courts of appeal hear cases by a panel of three judges, the courts of cassation – from three up to five judges, and the Supreme Court of Ukraine – by a collegium of not less than seven judges.

However, in the course of a pending judicial reform in Ukraine and following adoption of the Law of Ukraine on Amendments to the Constitution of Ukraine on Justice No. 3524 (the Justice Act), and on the Judicial System and Status of Judges, No. 4734 (the Judicial System Act), both dated 2 June 2016 and effective from 30 September 2016 (except for provisions on recognition by Ukraine of the International Criminal Court jurisdiction in accordance with the Rome Statute), the above-existing four-instance judicial system has been amended into three instances, which will include local courts, courts of appeal and the new Supreme Court (court of cassation). So, the powers of the Supreme Court will be strengthened, it being the highest court in Ukraine. In order to deal with particular specifics (specialisation) of the cases and to form respective jurisprudence, the Supreme Court will consist of five bodies: the Grand Chamber, the Administrative Court of Cassation,

the Civil Court of Cassation, the Commercial Court of Cassation, and the Criminal Court of Cassation. The new judicial system will start operating once the new Supreme Court is formed and active.

The Judicial System Act provides for establishment of specialised courts in Ukraine dealing with specific categories of cases as a first instance court, namely the High Court on Intellectual Property and the High Anti-Corruption Court.

2 Judges and juries

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

In practice, irrespective of the type of proceeding, the judge’s role is rather inquisitorial, and the judge is obliged to take certain steps for comprehensive consideration of the case having in this respect not only a duty to make sure that the substantive and procedural laws are respected, but also full powers to request any evidence and to call experts and witnesses.

The Judicial System Act has introduced a new procedure for appointing judges on the basis of public competition and qualification examination. Judges will be appointed for an indefinite period of time by the President (ceremonially) upon a proposal of the High Council of Justice. And Parliament will no longer participate in this appointment process as it did before. However, in order to prevent any abuse, the Judicial System Act extended grounds for dismissal and narrowed the scope of immunity. For example, a judge may be dismissed for a limited number of offences, such as a substantial disciplinary misconduct, gross or systematic negligence of his or her official duties, which are incompatible with the status of judge, or proves his or her professional inadequacy in the position held, as well as a failure to confirm the origin of income or assets. The minimum required age for judges was raised to 30 years, and a maximum age limit was set at 65 years.

In civil actions people’s assessors (jurors) may be involved under the Civil Procedural Code in the following cases only:

- restriction of individual’s civil capacity; recognition of an individual to lack dispositive legal capacity and renewal of civil capacity;
- recognition of an individual missing or a declaration of death;
- adoption;
- compulsory psychiatric treatment; and
- compulsory hospitalisation in a TB dispensary.

However, when involved in proceedings, people’s assessors have the same powers as a judge.

Pursuant to article 67 of the Judicial System Act a jury is selected on rotation, for a period not exceeding one month per year, except for particular cases. Such selection of the jury is defined by an automatic system of document circulation. The jury lists are formed by corresponding local councils from the list of citizens permanently residing in the territory under the corresponding court’s jurisdiction. Further, the jury lists are approved by respective territorial departments of the State Judicial Administration of Ukraine and submitted to the corresponding court.

3 Limitation issues

What are the time limits for bringing civil claims?

The statute of limitations is generally treated as a substantive law issue. The general limitation period is three years from the time when a claimant learned or could have learned of the infringement of its rights or when a claimant learned who infringed on its rights.

Specific limitation period in one year apply to the claims arising out of delivery and quality of goods, recovery of penalty (fine), for defamation in the media, termination of a gift contact, etc. In some circumstances, a limitation period may be suspended for a certain period or discontinued and then restart. There are also a few specific areas where no limitation period is applicable.

Extension of the statutory limitation period by an agreement of the parties is permitted. However, it is forbidden to reduce the statutory limitation period. Importantly, the limitation period does not prevent the claim from being accepted for consideration. The court will consider the case on the merits; however, if the limitation period has expired and a party makes a motion for application of the limitation period, the court should apply the limitation period and dismiss the claim on that ground.

In administrative proceedings, special terms for filing an administrative claim apply depending on nature of a dispute (from one to six months).

4 Pre-action behaviour

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

No specific action is required for referring a dispute directly to the competent court for consideration. However, there are several kinds of disputes (in commercial proceedings only) that may be directed to court only after completion of a specific pre-litigation procedure, which includes sending the purported defendant a claim (complaint) and receiving a reply therefrom within a definite period of time. Furthermore, other formalities may also be provided under a respective contract (eg, filing a formal request, negotiation or mediation).

And also prior to bringing an action, the parties may request interim measures (see below).

5 Starting proceedings

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 civil proceedings are commenced by filing a statement of claim to be accompanied by:

- documents supporting the claim and confirming the authority of a person signing the statement of claim, if applicable;
- evidence of court fees' payment; and
- copies of the statement of claim for a defendant and third parties, if any (in civil proceedings), or documents certifying that the statement of claim and attachments thereto have been duly sent upon defendants and third parties (in the commercial proceedings).

A judge is selected through the automatic random distribution of court cases according to the caseload of each judge. The caseload factor is established by dividing the number of all cases that were assigned to the judge from the beginning of the year by the number of working days when cases were allocated to the judge over the same period. While allocating the case, the system also takes into account the case complexity and administrative functions of the judge, if any.

Within three days of the receipt of the statement of claim and documents in support thereof, a judge renders a ruling on commencement of the proceedings and schedules a preliminary court session. The court must serve all parties through means of communication providing a record of the notification, such as: registered mail; facsimile notification; electronic notification (email); telephone notification; or telegram. The courts prefer using registered mail as a communication method, but on some occasions (though rather rare), they also use other methods. The deemed date of service is the day when a party receives a communication from the court.

International service (both service abroad of court proceedings in Ukraine and service in Ukraine of overseas court proceedings) is effected pursuant to the applicable international treaties of Ukraine: the Hague Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), on Civil Procedure (1954), and the Minsk CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, as well as number of bilateral agreements on legal assistance in civil and criminal cases. Depending on the applicable treaty, service abroad and from abroad may be arranged through the Ministry of Justice of Ukraine or directly through relevant courts.

Given the time constraints for considering and rendering final judgments (two to two-and-a-half months), local courts are often highly overloaded, which as a rule prevents lengthy and detailed hearings.

6 Timetable

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

There are no clear statutory time limits for exchanging documents further to the statement of claim. Normally, in his or her ruling on commencement proceeding a judge invites defendants and third parties, if any, to file a statement of defence or objections or comments to the claim, and claimant to provide any specific documents in support of the claim which a judge considers appropriate or necessary. Usually, the term for filing the above documents is set until the date of the first hearings (15–30 days after the date of ruling on commencement proceeding). Such documents will also be accepted by a judge on date of the hearing.

Furthermore, all participants in the proceedings may substantiate their case by additional explanations, comments or motions within consideration of the case by a first-instance court, which lasts approximately two to two-and-a-half months. However, in practice first-instance courts often fail to adhere to the procedural terms.

The procedural timetable is more strictly applied by judges in the appellate and cassation courts where consideration of the case should take between one and two months and between 15 days and one month, respectively.

7 Case management

Can the parties control the procedure and the timetable?

The parties do not have a sufficient influence on the procedure and the timetable, as they are determined by the judge or presiding judge (in case of a panel) solely. The procedure and the timetable may be affected by the parties to the certain extent by filing various interim applications (eg, motions for engagement of third parties, preliminary injunctions or orders, request for evidence, request for expert examination or opinion, summoning witnesses or motions for adjourning hearing or extending the time for the hearing for review the case materials, new submissions and provide additional comments thereto). However, such motions of the parties are decided by the judge's sole discretion.

8 Evidence – documents

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

Since the burden of proof rests with the claimant under a general rule, he or she shall have a duty to obtain and provide all relevant and admissible evidence in support of his or her claim or facts referred to therein. There is no particular obligation under Ukrainian law to preserve documents that may be of any relevance in court proceedings or to share documents with an opponent unless they are required to do so by the court or by law.

The parties may also request to provide particular documents directly or through the court as a pretrial remedy. A request for evidence can be considered *ex parte*, and a court may compel any person, notwithstanding whether it is a participant to the case or not, to produce necessary evidence. The interested party must specify the piece of evidence, substantiate why such piece of evidence is essential, and must inform the court who or what entity or institution most probably possesses such piece of evidence.

Although the court's order on providing the evidence is binding upon a respective party, there are no particular negative consequences for a party failing to provide such documents, if such party properly notifies the court on inability or impossibility to access or provide the documents. However, if a party is obliged to keep a particular document or evidence by law and intentionally refuses to provide it, this can be regarded as a breach of the court decision with all that implies (penalties and sanctions).

9 Evidence – privilege

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

Certain pieces of evidence cannot be requested from a party or a third party (eg those falling under the attorney-client privilege). Advice or correspondence given by an in-house lawyer is not privileged, unless it is defined and marked as classified or secret.

However, any piece of evidence filed with the court has no privilege. Any party is entitled to review the case file; any piece of evidence is stored in the case file.

10 Evidence – pretrial

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

There is no duty to provide any evidence prior to trial under Ukrainian procedural laws, so the parties would rarely exchange by any evidence, including witness or expert statements, unless it is required for pretrial negotiations or settlement.

11 Evidence – trial

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

In civil proceedings, the courts accept documentary and material evidence, including written explanations regarding the merits of the case submitted by the parties' representatives and other persons participating in court proceedings, witness statements and expert evidence as well as sound and video recordings.

In civil and administrative proceedings, a witness is obliged to testify unless such testimony is directly related to his or her person and interests, as well as to that of his or her relatives. The procedural rules permit interrogation and cross-examination of witnesses in court sessions. Representatives of the parties are allowed to interrogate the witness under the supervision of the court, who may dismiss some of the questions if they are not permissible or relevant. The court may also interrogate the witness. As a rule, only oral witness statements in the court session are permissible. Written witness depositions regarding the facts of the case as a rule are usually dismissed by the court.

Though witness evidence as such is not allowed in commercial proceedings, officers of legal entities, state and municipal bodies may appear before the court in order to provide explanations regarding the facts of the case.

Expert evidence is allowed in civil proceedings as written expert reports submitted by the experts appointed by the court. The report should answer the questions determined by the court. The parties are allowed to submit suggestions to the court regarding the experts to be appointed and the questions to be addressed to the experts. In civil proceedings, the parties may agree on the expert or experts who will provide the report. The court may upon the motion of the parties or upon its own discretion request the expert to orally explain his or her conclusions.

12 Interim remedies

What interim remedies are available?

Depending on a particular type of proceedings, interim remedies are available as a pre-action remedy or as a provisional injunction within court proceedings.

The Commercial Procedural Code provides for the exhaustive list of interim measures available in a commercial case as follows:

- attachment of the defendant's assets (funds or other property);
- prohibition of certain actions by the defendant;

- prohibition of certain actions in relation to the subject of the dispute by other persons; and
- suspension of recovery under the writ of execution or other documents in uncontested proceedings.

Apart from the above, the Ukraine's Civil Procedural Code provides for the following interim remedies available in civil proceedings:

- imposition of the duty to take certain actions for preventing damage or deterioration of the disputed property;
- prohibition for other persons to make payments or make a property over to defendant or exercise other obligations for him or her;
- suspension of the sale of the property if a claim for the release of such property from the attachment is filed; and
- transfer of the disputed property into the safe keeping of other persons.

Furthermore, in commercial proceedings, the available pre-action interim remedies include:

- request for evidence;
- search of premises relating to the infringement upon claimant's rights; and
- attachment of property or seizure of monetary funds.

In order to obtain for interim remedies, the interested party should file a motion with the commercial court. The above pre-action interim remedies may be granted by a court ruling where there are grounds to suppose that unless such remedies are granted, the evidence may be complicated or impossible to produce or the rights of the interested party are or may be infringed upon. A claimant must file a statement of claim within five days following the court ruling to grant pre-action interim remedies. If the claimant fails to do so, pre-action remedies shall be terminated by the court.

In civil cases, pre-action interim remedies are limited to preserving the evidence and measures aimed at preventing the intellectually property rights' violation. Interim remedies in support of foreign proceedings are not practically available in Ukraine.

13 Remedies

What substantive remedies are available?

Ukrainian law provides for the following substantive remedies available for a claimant:

- recognition of the right;
- rescission, invalidation, change or termination of a contract, transaction, or act;
- restitutio in integrum;
- enforcement of obligations in kind;
- debt and damages recovery;
- compensation of moral damages; and
- recognition of a decision, action or inactivity of state authorities as unlawful.

The above list is not exhaustive. Generally, the claimant is obliged to clearly indicate particular substantive remedies sought in his or her statement of claim. However, he or she may (before the court commences consideration of the case on the merits) amend its pleadings by either changing the request for relief or the cause of action.

A court may grant only compensatory damages in the amount of actual loss or lost profit, provided that those are confirmed by proper evidence. Ukrainian jurisprudence has very strict standards of proof in relation to damages. In particular, the court would grant damages only if there is evidence of the direct causation link between those damages and the defendant's violation of law and infringement upon the rights or interests of the claimant. Ukrainian law does not recognise a concept of punitive damages.

All issues concerning the claim, including the compensation of court expenses, must be resolved in the judgment on the merits. The courts may not award post-judgment interest on the awarded damages.

14 Enforcement

What means of enforcement are available?

As a rule, on the basis of a final judgment the court issued a writ of execution or an order which actually triggers the enforcement procedure.

A final judgment is enforced through the state enforcement (bailiff) service in accordance with to the Act of Ukraine 'On Enforcement Proceedings' (Enforcement Proceedings Act).

Should the judgment not be voluntarily executed by the debtor, the state enforcement officer would take coercive measures to enforce the judgment and recover a debt, including, but not limited to seizure of the debtor's funds or other assets, sale of the debtor's assets at a public auction, collection of any regular payments (eg, salary, profits, pension) as well as other measures set forth in the judgment. Any difficulties in the enforcement procedure can be referred to a judge.

Disobedience of court orders or resistance to the state enforcement officer exercising his or her duties may entail fines and criminal responsibility in the form of fine or arrest for a period of three to six months, or, in some instances, imprisonment for a period of up to two years.

15 Public access

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

Generally, all court proceedings are public in Ukraine. Thus, a court session may be attended by any person; court decisions are, in general, public as well. Court decisions and other procedural ruling are available also at the online unified state register of court decision (<http://reyestr.court.gov.ua>).

In civil proceedings, the court at the well-founded request of the interested party may rule to consider the case within closed proceedings. Closed court proceedings are allowed to protect state, commercial or bank secrets, and adoption secrets, etc. However, in practice, even the public court sessions might not be easily accessible.

16 Costs

Does the court have power to order costs?

The costs of civil proceedings consist of the state fee and other costs incurred in relation to a court hearing. As a general rule, there is no obligation of the claimant to provide security for the defendant's costs, however, where the court decides on interim measures, the court may require the party seeking such relief to provide a security.

Usually, the court orders the losing party to cover the court expenses of the winning one, including the court fees. Other expenses such as travel costs, witness travel costs, expert fees, lawyers' fees are rarely fully compensated.

All issues concerning the claim, including the compensation of court expenses, must be resolved in the judgment on the merits. The courts may not award post-judgment interest on the awarded damages.

17 Funding arrangements

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?

Any fee structure, including hourly rates, task-based billing, 'no win, no fee' arrangements, conditional or contingency fees is permitted in Ukraine. All these fee structures are used in practice. The law does not stipulate any particular amount of the fees or limit on the fees. However, it is impossible to have the legal fees and other litigation-related expenses compensated unless they are actually paid namely by the party to the proceedings and no later than the date of the court decision.

Ukrainian law provides no specific rules in respect of a third-party funding or other risk-sharing arrangements for investing the claims, and thus, the above practice is not prohibited as such. As rule, it is enough for the court that necessary fees were paid by the party to the proceedings and the acceptable evidence proving this fact was filed with the court. Furthermore, Ukrainian substantive law allows assigning of their claims except for certain, mostly personal, claims, and such assignment can be done even in the course of proceedings.

18 Insurance

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

Ukrainian laws do not restrict insurance companies in providing insurance covering of litigation costs and potential liability for an opponent's costs. To our best knowledge, such insurances are available in Ukraine on a voluntary basis.

19 Class action

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

The class action in Ukraine may be realised through the institute of joinder, according to which the claim can be jointly filed by a group of claimants. Each claimant acts independently to the defendant. Possibility to file a collective claim in civil proceedings is determined by the subject matter of a dispute which is homogeneous joint rights or duties of the claimants which have emerged of the same circumstance.

20 Appeal

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

Decisions of administrative, commercial or general courts of first instance may be appealed to a competent court of appeals within 10 days since issuing; rulings (if separate appeal thereof is permitted) must be appealed within five days. The above terms may be renewed by the court of appeals at the request of the appellant if a failure to meet the above terms was attributable to a good reason.

The grounds for appeal usually include:

- violation of substantive or procedural law by the courts when resolving the dispute;
- incomplete findings regarding facts of the case; and
- incorrect findings regarding facts of the case.

Should any of the parties be unsatisfied with the decision of the court of appeals, such decision (if necessary, together with the first instance court decision) may be further challenged by filing a cassation complaint to the competent Superior Specialised Court within 20 days from the announcement of the court of appeals judgment or ruling.

The grounds for cassation complaint are infringement of substantive or procedural law by lower courts in the given case.

The party who is not satisfied with the outcome of the case after it has been considered by the Superior Specialised Court may file a complaint on exceptional grounds with the Supreme Court of Ukraine. The grounds for such complaint are very limited; the usual ground is different application or interpretation of the substantive law by the Superior Courts in analogous cases leading to rendering different judgments in similar legal relationships.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Foreign court decisions are recognised and enforced in Ukraine if a duly ratified treaty of Ukraine provides so or on the principle of reciprocity, which is assumed to exist unless proven otherwise.

Ukraine is a party to both international (eg, the Minsk Convention on Legal Assistance and Legal Relations in Civil, Matrimonial and Criminal Cases of 1993 and the Kiev Convention on Settlement of Commercial Disputes of 1992) and bilateral treaties governing the issues of recognition and enforcement of foreign judgments, in particular with Bulgaria, China, Cyprus, the Czech Republic, Estonia, Georgia, Greece, Hungary, Korea, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, Turkey, Uzbekistan and Vietnam.

If there is no treaty setting forth the procedure and requirements for recognition and enforcement of a foreign court decision, the procedure and requirements, which are stipulated in the Civil Procedural Code, shall apply.

A party seeking recognition and enforcement of the foreign judgment shall file a respective motion with local general courts at the place of residence or location of the debtor. If the debtor does not have place

of residence or location in Ukraine, then a court at the location of the debtor's property in Ukraine will have jurisdiction. The said motion shall be accompanied by the following documents:

- a duly certified copy of foreign judgment;
- an official document certifying that the foreign judgment has entered into force (if the judgment itself does not expressly provide this);
- a document certifying that the party, against whom the foreign court judgment is rendered and who did not participate in the proceedings, was duly notified about the place and time of the hearings;
- a document identifying the portion or the time following which the foreign court judgment or decision is subject to enforcement (if it has previously been enforced);
- a document certifying powers of the applicant's representative; and
- a duly certified translation of the above documents into Ukrainian or other language as applicable under international treaty.

Having considered the motion for granting enforcement and objections thereto, if any, and heard the parties' arguments, a judge delivers a ruling on granting or refusing the permit for enforcement of the foreign judgment.

Under the Civil Procedural Code enforcement of a foreign judgment can be rejected only on one of the following grounds:

- if the foreign court decision has not become effective in accordance with legislation of the country where it was rendered;
- if the defendant was deprived of the possibility to take part in the proceedings in the foreign court because it was not properly served;
- if the award was rendered in a matter that is exclusively under the jurisdiction of Ukrainian court or another competent body according to the laws of Ukraine;
- if there is an already rendered judgment of the Ukrainian court in the case between the same parties, with the same subject matter and cause of action, which have become effective, or if the judicial proceedings in the case between the same parties, with the same subject matter and cause of action were already commenced in the Ukrainian court before initiation of the case in the foreign court;
- if the term for applying for the enforcement as provided for by the international treaties of Ukraine and the Civil Procedural Code (usually three years) has lapsed;
- if under the laws of Ukraine the dispute given its subject matter could not be decided within the judicial proceedings;
- if the execution of the award would threaten the interests of Ukraine; and
- in other cases envisaged by Ukrainian law.

The court order can be appealed to the appellate and cassation courts. After the enforcement is granted, the court issues a respective writ of execution triggering the enforcement procedure as mentioned in question 14.

22 Foreign proceedings

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

Should in the course of civil proceedings there appear a necessity to obtain evidence from abroad the court shall issue a legal assistance court order to be sent to a competent court of the state where such evidence shall be obtained. The procedural matters related to such court orders are governed by the Hague Convention on the taking of evidence abroad in civil or commercial matters (1970), the Kiev (CIS) Agreement on settlement of disputes related to the commercial activity (1992), the (1993) Minsk Convention on legal assistance and legal relations in civil family and criminal matters, as well as by respective legal assistance bilateral treaties of Ukraine.

The new 2017 Draft Act No. 6232 on amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislation (please see 'Update and trends', below) provides for new procedures for obtaining oral or documentary evidence for use in foreign courts or arbitral tribunals abroad. As of May 2017 the draft Act is under consideration by the Ukrainian parliament.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Act of Ukraine in International Commercial Arbitration (the ICA Act) is almost completely based on the 1985 UNCITRAL Model Law, with only a few differences.

The major difference is that instead of the definition of 'international arbitration' as provided in article 1(3) of the UNCITRAL Model Law, the ICA Act defines the particular disputes that may be referred to international commercial arbitration pursuant to an agreement of the parties (article 1(2) of the ICA Act), namely:

- disputes arising out of contractual and other civil matters in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; and
- disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine, except for the dispute referred to the exclusive jurisdiction of Ukrainian courts (article 4 of the ICA Act).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be in writing, whether in the form of an arbitration clause in the contract or in the form of a separate agreement. An arbitration agreement is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or 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 also 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.

An arbitration agreement shall provide the correct name of the particular arbitration institution or a precise reference to ad hoc arbitration, since any defects in this respect (eg, mistakes, omissions, typographical errors or differences between bilingual versions etc) may result in the arbitration agreement being recognised as invalid or not concluded, as well as in setting aside the arbitral award by Ukrainian courts.

25 Choice of 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?

Under Ukrainian law, the parties are free to decide on the number of arbitrators. Should the parties fail to determine the number of and procedure for appointing the arbitrators, three arbitrators shall be appointed in the following way: each party appoints one arbitrator and these two party-appointed arbitrators shall appoint the third (presiding) arbitrator. If a party fails to appoint an arbitrator or if the two party-appointed arbitrators fail to agree on the third arbitrator, the arbitrator is appointed by the president of Ukrainian Chamber of Commerce and Industry (the UCCI).

In international arbitration with a sole arbitrator, the president of the UCCI is also authorised to appoint the arbitrator, if the parties fail to agree on the sole arbitrator. The decisions of the president of the UCCI are not subject to any appeal.

The ICA Act provides for two main grounds for challenging or replacing an arbitrator:

- if there are any circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence; or
- if the arbitrator does not possess the qualifications agreed by the parties.

The parties may agree on the challenge procedure, otherwise the party challenging an appointment shall send a written notice providing for the reasons of the challenge to the arbitral tribunal within 15 days

Update and trends

The 2016 Justice Act introduced the so-called ‘attorneys’ monopoly’ in Ukraine, whereby after a gradual transitional period only attorneys admitted to the Bar will be entitled to represent clients in courts, except for labour, social, election procedure (ie, disputes regarding procedures and results of elections (eg, for Parliament) and minor legal disputes where other legal professionals will be allowed to represent clients. Thus, except for the mentioned exceptions, only prosecutors and attorneys admitted to the Ukrainian Bar will be entitled to represent clients in the Supreme Court starting from 1 January 2017, in the courts of appeals starting from 1 January 2018 and in local courts starting from 1 January 2019.

Following the adoption of the mentioned Justice Act and Judicial System Act, the renewal of the judicial staff is in progress in Ukraine. On 7 November 2016 the High Qualification Commission of Judges of Ukraine started a competition for appointment of 120 judges to the new Supreme Court, which is expected to be formed in June 2017.

In addition, 2017 may be a significant year with regard to changes to the judicial system and dispute resolution in Ukraine, as on 23 March 2017 a new Draft Act No. 6232 on amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislation was filed by the President of Ukraine with Parliament in the course of the judicial reform. Among others, Draft Act No. 6232 is aimed at

improving the efficiency of the judicial system, legal certainty and finality of judicial decisions, equal application of the law, harmonisation and unification of procedural law, the introduction of e-justice, as well as facilitating the support of international arbitration and foreign court proceedings by Ukrainian courts. Public and expert discussions of such amendments are in progress. In particular, the proposed amendments suggest a number of remedies to reduce the burden on the court system, including:

- jurisdictional rules providing for a clear distinction between jurisdictions of the courts of different specialisations: administrative, commercial and general;
- the introduction of an e-justice system;
- mechanisms preventing the abuse of procedural rights;
- new practical tools not previously available (disclosure, witnesses, document production in support for claims in Ukraine or abroad); and
- increasing and improving the role of alternative dispute resolution mechanisms.

Amendments to the procedural codes are expected to be adopted in June 2017, so that the new Supreme Court, once formed, will be able to exercise its jurisdiction.

after being notified of the composition of the arbitral tribunal, or having become aware of the circumstances that can serve as a reason for a challenge.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The ICA Act does not provide for any restriction on choosing and as to who may act as arbitrator in international arbitration provided that the impartiality and independence requirements are met. While acting as appointing authority under the ICA Act, the President of the UCCI shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. As regards the ‘nationality’ provisions in arbitration agreements, arbitrators are not ‘employees’ within the meaning of the Ukrainian labour legislation, and thus, the parties are free to stipulate the particular requirements for arbitrators.

However, certain qualification requirements and restrictions regarding the choice of arbitrators may be provided by the arbitration institution itself. As an example, the ICAC Ukraine limits the parties’ options to only those arbitrators who are included in the Recommendatory List of Arbitrators as approved by the Presidium of UCCI. At present the ICAC Recommendatory List of Arbitrators includes 120 recognised Ukrainian and foreign arbitrators.

In domestic arbitration the above requirements and restrictions are much stricter: the arbitrator must have no criminal record, the qualification agreed by the parties or provided under the respective arbitration rules, and a higher legal education (for a sole or presiding judge only). Additionally, the judges of the courts of general jurisdiction and the Constitutional Court of Ukraine are not allowed to serve as arbitrators in domestic arbitration.

27 Arbitral procedure

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

Ukrainian law allows the parties to agree upon any procedure to be followed. In the absence of such agreement, the tribunal shall establish such procedure as it considers appropriate provided that both parties are treated equally and have a full opportunity to present their cases.

Under Ukrainian law arbitral proceedings shall commence on the date of the receipt of a request for arbitration by the respondent, unless the parties have agreed otherwise. Rules of the permanent arbitration institutions in Ukraine (International Commercial Arbitration Court and Maritime Arbitration Commission at the UCCI) provide that the arbitration proceeding is initiated by the order of their president.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Under the general rule, a national court may not intervene in the arbitral proceedings, except for a very few exceptions provided by Ukrainian law. Generally, the arbitral tribunals may not request assistance from Ukrainian courts, except to request assistance in taking evidence.

In return, the parties may approach the courts only in the following matters:

- to request a state court to stay its proceedings and refer the parties to arbitration in disputes that are covered by an arbitration agreement;
- to request a competent court to decide the issue of arbitral tribunal jurisdiction;
- to request a court, before or during arbitral proceedings, to order interim measures of protection and for a court to take a decision granting such measures;
- upon approval by the arbitral tribunal to request from a competent court the assistance in taking evidence;
- to request a competent court to enforce the arbitral award in Ukraine; or
- to request a competent court to set aside the arbitral award rendered in Ukraine.

The above list is considered to be exhaustive, and the parties are not entitled to limit or override the above court’s powers.

29 Interim relief

Do arbitrators have powers to grant interim relief?

The ICA Act empowers the arbitral tribunal to order interim measures at the request of a party, unless otherwise agreed by the parties. The arbitration rules of the International Commercial Arbitration Court (ICAC) and Maritime Arbitration Commission (MAC) at the UCCI vest the arbitral tribunal with the powers to determine the amount and the form of the security for the claim (eg, to preserve assets).

Although the arbitration rules of ICAC and MAC directly provide that arbitral order for security of the claim is binding upon the parties and shall be in force until a final arbitral award is made, the enforcement of such arbitral order for the security of the claim is rather doubtful and practically impossible under the current Ukrainian procedural legislation. As an exception from the above rule, the Merchant Shipping Code allows a vessel to be arrested in Ukraine under the decision of the MAC president.

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

The arbitral award shall be made in writing and signed by the majority of the arbitral tribunal. The award shall state the reasons for the decision, whether the claim is granted or rejected, the amount of the arbitration fee and costs and their apportioning, and also the date and the place of arbitration.

In arbitration proceedings with more than one arbitrator any decision of the arbitral tribunal is made by a majority of all its members, unless otherwise agreed by the parties. If any signature is omitted, the arbitral award shall state the reasons for the omission, which does not affect the validity of the award.

The ICA Act sets forth only a general rule providing that the award being dated and signed by the arbitrators shall be delivered to each party, while the exact time limits for the delivery of the award are not provided.

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

Both international and domestic arbitral awards rendered in Ukraine may be set aside by the local (first instance) court at the place of arbitration if the respective motion for setting aside is filed within three months from the date of award or receipt of the award and if any of the following grounds exist:

- grounds for setting aside of international arbitral awards:
 - 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 Ukraine;
 - the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
 - the award was made regarding 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;
 - 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 the ICA Act from which the parties cannot deviate, or failing such agreement, was not in accordance with the ICA Act;
 - the subject matter of the dispute is not capable of settlement by arbitration under the law of Ukraine; or
 - the award is in conflict with the public policy of Ukraine; and
- grounds for setting aside domestic arbitral awards:
 - the dispute resolved by the domestic arbitral tribunal is not arbitrable under Ukrainian law;
 - the award of the arbitral tribunal was made regarding a dispute not contemplated in the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement;

- the arbitration agreement is recognised by the court as invalid;
- the composition of the arbitral tribunal was not in accordance with the Ukrainian law; or
- the arbitral tribunal decided on the rights and obligations of parties that did not participate in the arbitration case.

There are following levels of appeal for the international arbitral award rendered in Ukraine:

- arbitral awards may be challenged by the first instance court of general jurisdiction at the place of arbitration;
- the ruling of the court of first instance whether setting aside the arbitral award or rejecting the challenge, may be further appealed in the respective appellate court;
- the appellate court's ruling may be subject to cassation appeal to the Superior Specialised Court of Ukraine on Civil and Criminal Matters; and
- the last appeal option is a review on very limited grounds of a ruling of the Superior Specialised Court of Ukraine by the Supreme Court of Ukraine.

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

Foreign and international arbitral awards rendered in Ukraine are enforced under by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the 1961 European Convention on International Commercial Arbitration, the ICA Act and the Civil Procedural Code under the procedure almost identical to the one for the foreign judgments' enforcement as detailed in question 21. A motion for enforcement may only be considered within the specific limits as set forth by the New York Convention and the ICA Act providing that the competent courts may not examine correctness of the award, nor may they introduce any changes therein.

Domestic arbitration awards are enforced under a simplified procedure set forth by the Domestic Arbitration Act and respective provisions of the Civil and Commercial Procedural Codes, depending on the status of parties involved into the disputes (ie, legal entities or individuals).

33 Costs**Can a successful party recover its costs?**

Unless the parties have agreed on a particular allocation of costs or respective arbitration rules provides otherwise, the tribunal shall decide on the allocation of costs related to arbitration. As a rule, arbitration fees and costs are charged to the losing party. However, if the claim is granted partially, the arbitration fees shall be allocated between the parties by relevant proportions of the granted claims. As regards the costs and expenses of the winning party, including legal fees, they may be charged to the losing party to the extent that the arbitral tribunal finds the amount of such costs reasonable and confirmed.

AEQUO

Pavlo Byelousov
Oleksandr Mamunya

byelousov@aequo.ua
mamunya@aequo.ua

Vector Business Centre, 6th floor
52 Bohdana Khmelnytskogo St
Kiev 01030
Ukraine

Tel: +380 44 233 65 99
Fax: +380 44 237 77 69
www.aequo.ua

In practice, there have been reported no cases in Ukraine where third-party funding costs have been claimed or granted.

Alternative dispute resolution

34 Types of ADR

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

Apart from arbitration, other alternative dispute resolution methods are practically out of use in Ukraine. Mediation is emerging in Ukraine, but is rarely used. While negotiations are generally recognised as a helpful means of informal dispute resolution, Ukrainian businesses are mostly reluctant to involve a third person (a mediator) into the negotiations process.

35 Requirements for ADR

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 may only invite the parties to consider options for amicable settlement of the dispute, but is not entitled to refer the parties to ADR, except for arbitration. The arbitral tribunal would not refer parties to any ADR methods unless it is provided under the respective agreement between the parties.

Miscellaneous

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

Litigation remains the most common and prevailing method of dispute resolution in Ukraine, although arbitration both in Ukraine and abroad is also widely used, especially, in the field of international trade.

Court decisions (jurisprudence) are generally not recognised as source of law, except the judgments of the Constitutional Court of Ukraine interpreting the law and recognising certain pieces of legislation as constitutional or unconstitutional, and the decisions of the Supreme Court of Ukraine on the unified application of law by the courts.

However, in practice Ukrainian courts usually tend to consider the jurisprudence of higher courts as guidelines. Moreover, the superior courts from time to time prepare and make public overviews of their jurisprudence ('overview letters') and recommendations as to proper application and interpretation of law in certain types of cases to be followed by the lower courts. Such overview letters and recommendations are often quoted in the lower courts judgments.

United Arab Emirates

Faridah Sarah

Galadari Advocates & Legal Consultants

Litigation

1 Court system

What is the structure of the civil court system?

The legal system in the UAE is based on the Constitution of the United Arab Emirates, which established a federation of seven emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al Khaimah).

The Constitution allows emirates to 'opt out' of the federal judicial system and allows the application of their own local judicial systems; for example, Dubai and Ras Al Khaimah have independent judicial systems.

The federal laws have supremacy over the laws of the individual emirates, but the individual member emirates have sovereignty over their own territories in all matters that are not the exclusive jurisdiction of the UAE as set out in the Constitution.

Both the UAE federal and the local judicial systems consist of:

- the Court of First Instance;
- the Court of Appeal; and
- the Court of Cassation.

Ras Al Khaimah is the exception, as it only has a Court of First Instance and a Court of Appeal.

The UAE Federal Supreme Court (the UAE Supreme Court of Cassation) in Abu Dhabi is the highest court in the federal judicial system. However, the local judicial systems, for example in Dubai, have their own courts of cassation, separate to the Supreme Court of Cassation.

The UAE operates a civil law system and statutes are the primary source of law. There is no doctrine of binding precedent, and judgments of the higher courts are not binding upon the lower courts (although they can be a useful guide as to how a court may react in cases with similar issues). Generally, each case is decided on its own facts and merits.

If a civil claim is below the limit of 500,000 dirhams, the claim will be heard by one judge. If the civil claim is above this threshold, the matter will be heard by a bench of three judges. The courts are sub-divided into different sections depending on the type of case. There are also specialist judicial bodies to consider specific matters, for example, the Dubai World Tribunal, which hears claims solely in relation to Dubai World and its subsidiaries pursuant to Decree No. 57 of 2009 and rent committees that have been set up to deal with the resolution of tenancy disputes in Abu Dhabi, Dubai and Sharjah.

There are no specialist commercial/financial courts within the onshore courts. All commercial cases are heard by the civil courts.

Finally, in addition to the above judicial systems, the Dubai International Financial Centre (DIFC) has its own body of laws with an independent judicial authority. The Abu Dhabi Global Market (ADGM) has specialist financial courts to support the increase in complex and high-value commercial transactions and related liquidation. The DIFC and the ADGM courts and procedures are not discussed in this chapter.

2 Judges and juries

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

The judicial system in the UAE is generally inquisitorial in nature, and submissions are usually written. The judge will investigate the facts and

deal with each case on its merits. If the judge has any questions, he or she will pose them directly to the witness. Judges at first instance have wide-ranging case management powers. There is no concept of jury trial in the UAE.

The Ministry of Justice appoints judges and the Supreme Court maintains five judges appointed by the President of the UAE after approval by the Federal Supreme Court. There have been recent moves to promote diversity on the bench and in Dubai over the past few years, and a number of females have been appointed as judges, public prosecutors and assistant public prosecutors.

3 Limitation issues

What are the time limits for bringing civil claims?

The general rules relating to time limits are set out in UAE Federal Law No. 5 of 1985, the Civil Transaction Law. Time limits do vary. Several statutes contain different limitation periods depending on the type of dispute. The primary limitation period for traders is 10 years from the date that the obligation should have been settled (article 95 of the Law of Commercial Procedure, Federal Law 18 of 1993); however, in general, the limitation long-stop is 15 years. The limitation long-stop is three years for insurance disputes, three years for tort claims and one year for employment disputes.

Limitation periods can be suspended for good cause under article 481 if there is a lawful reason that the claim could not be brought.

4 Pre-action behaviour

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

Unlike some common law jurisdictions, such as the United Kingdom, there are no pre-action protocols in the UAE judicial system. There is no obligation on a party to exchange documents prior to commencing proceedings. However, reconciliation committees are becoming more and more prevalent in the UAE, their aim being to encourage the parties to settle disputes amicably without resorting to litigation in the courts. If the matter cannot be resolved amicably, the dispute is then referred to the court of first instance. ADR is discussed later in this chapter.

Pre-action disclosure orders are not available in the UAE.

Actions against an emirate government can only be brought before the courts after the expiry of a mandatory settlement period.

5 Starting proceedings

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 in the UAE courts are commenced when the claimant files a statement of claim in the relevant court office and pays the court fee. Payment of fees can only be deferred in exceptional circumstances. The statement of claim must be in Arabic and should include details of the claimant, details of the defendant, the cause of action relied upon and the relief sought. Documents used as evidence in support of the claim must be translated into Arabic by a certified translator and appended to the claim.

The summons is then issued by the court and listed for a hearing. A court officer will serve the summons, the statement of claim and the documents attached to the statement on the defendant, and the defendant is asked to sign an acknowledgement. Article 8(2) of Federal Law No. 10 (2014) provides for the service of documents to any other person at the party's residence including spouses and relatives. In the event a defendant is a company summons can be served on any employee.

If the court officer is unable to serve the summons on the defendant before the hearing date, the court will adjourn the hearing to another date. If service is not possible, service is pronounced by publication by newspaper. If authorised by the court the plaintiff or the plaintiff's lawyer can serve the proceedings by any modern means as identified by the Ministry of Justice.

If the summons is to be served abroad, this will be done through diplomatic channels unless the parties have agreed otherwise by special agreement. In the event there is a special agreement notification can take place by any means as agreed by the parties. In the event diplomatic channels are being utilised, the court will do this by forwarding the documents through the UAE Ministry of Justice and the UAE Ministry of Foreign Affairs to the UAE embassy in the country where the defendant resides. The documents will then be served on the defendant in accordance with the laws of that jurisdiction. The UAE court will require proof that the summons has been validly served upon the defendant.

Lawyers appearing in the courts on behalf of clients must be authorised to appear and act by a duly executed power of attorney signed before a court notary.

Recently the courts have put in place measures to help speed up litigation and assist with capacity issues. The Ministry of Justice has transformed 95 per cent of its services into electronic services, such as being able to search for the status of a case, viewing hearing schedules online and e-filing, all of which have had the effect of improving capacity and efficiency.

6 Timetable

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

Once the summons has been served and a hearing date given, the defendant is required to file a statement of defence and, if appropriate, a counterclaim no later than three days before the hearing. If the defendant or his or her authorised lawyer fails to attend the hearing date, the court could issue a judgment in absentia.

Adjournments of two to four weeks are commonplace and are granted if the court deems it appropriate, for example, so that memoranda can be filed by the parties. Once the case has been properly pleaded, the court will reserve the matter for judgment. Cases normally take six months to a year to be dealt with by the court of first instance. If the case is appealed, proceedings may take two years or longer.

7 Case management

Can the parties control the procedure and the timetable?

The timetable of the UAE courts is largely dictated by the courts, and neither party has much control over the pace of the timetable or procedure.

8 Evidence – documents

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 process of disclosure and inspection of documents in the UAE. Each party simply files the documents that it wishes to rely on to support its case, and there is no obligation on a party to disclose a document that is potentially damaging to its case.

It is possible for a party to request specific disclosure of a document if it believes it is in the other parties' possession and it can show that the document has a significant bearing on the case. However, specific disclosure orders are rare.

There is no specific law in the UAE imposing an obligation to preserve evidence, although the UAE Commercial Code does require commercial entities to keep proper business records for a period of three to five years.

9 Evidence – privilege

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

Communications between lawyer and client are privileged. However, 'without prejudice' is not recognised in the UAE. Correspondence marked 'without prejudice' brought into existence in an attempt to settle the case can be filed in court and relied upon. Any admissions of offers made in correspondence may therefore be prejudicial. It is therefore common for settlement discussions to be oral and not in written form.

10 Evidence – pretrial

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

The parties can exchange written evidence from witnesses prior to the trial. The use of expert evidence is also commonplace in the UAE, but rather than party-appointed experts (which are not permitted in the UAE), the court will appoint experts from a court-maintained list to assist with resolving the issues in dispute. It may do this by agreement of the parties or exercise its discretion in the event agreement cannot be reached. The appointment of experts is governed by Law No. 8 of 1974.

11 Evidence – trial

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

Proceedings in civil matters in the UAE are heavily based on written submissions, supported by documentary evidence. The court does not hear oral arguments from the parties' lawyers. Written statements may be filed, but in practice, they hold little evidential value.

Oral evidence is rare, and if a party wishes to call a witness, an application to the court is made. If granted, the witness can be cross-examined under the supervision of the judge who will control the cross-examination.

12 Interim remedies

What interim remedies are available?

Federal Law No. 11 of 1992, the UAE Civil Procedure Code (CPC), provides for summary judgment procedure in the following circumstances:

- a creditor's entitlement to payment is confirmed or admitted in writing;
- the claim is for a specific sum and based on a commercial document such as a cheque or promissory note; and
- the claim is against a guarantor.

An application must be made to the court at least five days after a written demand for payment from the defendant. If granted, the defendant has 15 days to have the judgment set aside detailing the grounds for setting aside. If it is set aside, the matter will be heard at trial.

Security for costs is not a remedy available to parties in the UAE.

Petition upon order application is a summary judgment procedure where parties to a dispute will be able obtain an order without the need to inform the other party of its existence. Examples of such orders include travel bans, precautionary attachments, performance orders and delivering passport orders.

The courts have the power and jurisdiction to make orders attaching assets to secure a claimant's claim under article 252 of the CPC. These are commonly referred to as precautionary attachment orders.

The orders can be made following an ex parte application. The court must be satisfied that there is a prima facie case against the defendant, and that there is a risk that the defendant will dissipate his or her property to avoid payment of a debt.

The onus is on the claimant to prove the need for attachment, and evidence is required to show there is an imminent danger of assets being removed so that any judgment subsequently obtained would be difficult to enforce.

The application must detail the assets sought to be attached. Certain assets are exempt; for example, wages exceeding half of the basic wage.

If the attachment order is granted, the substantive claim must be started within eight days of the order. The main proceedings do not necessarily have to be within the jurisdiction of the UAE.

The claimant may be liable for damages if the order was obtained maliciously or in bad faith. This is very difficult to prove in practice.

13 Remedies

What substantive remedies are available?

The main remedy available in commercial disputes is damages. The court can also make orders confirming a party's entitlement (eg, the return of property).

Damages are evaluated by taking into account actual loss, loss of profit, moral damages and loss of opportunity, but each case is generally decided on its own merits. The loss suffered must be foreseeable and there must be certainty of the likelihood of damage. Injunctive relief, other than for Orders such as precautionary attachment described in question 12, is not available, and the UAE courts generally do not make orders for declaratory relief.

The UAE courts can also award interest by way of punitive damages, usually at a rate of 9 per cent per annum on the total amount awarded or 12 per cent per annum in relation to commercial transactions.

14 Enforcement

What means of enforcement are available?

A judgment obtained in the UAE courts can be enforced in the following ways:

- a charge over property;
- attachment of assets;
- execution against assets;
- the appointment of a receiver; and
- in exceptional circumstances, the defaulting debtor can be imprisoned on a short-term basis.

15 Public access

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

All court hearings in the UAE are held in public unless the court orders otherwise in order to preserve public order or to observe morals or for family propriety under article 76 of the CPC. Court documents are only available to those who hold a valid power of attorney.

16 Costs

Does the court have power to order costs?

The UAE courts have the power to order costs in favour of the successful party; however, in general these tend to be limited to disbursements such as court fees and experts' fees. Professional legal fees tend to not be recoverable in full, and if they are awarded, they are minimal.

The UAE courts do not recognise the concept of security for costs. There are no new rules governing how the courts rule on costs.

17 Funding arrangements

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 on a 'no win, no fee' basis are not allowed in the UAE. It is common for lawyers in the UAE to charge a percentage of the total value of the claim and counterclaim. Other payment arrangements include charging on an hourly rate with a success fee to be paid, if applicable.

18 Insurance

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

Insurance to cover a party's legal costs is not available in the UAE.

19 Class action

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

There is no mechanism for class actions in the UAE. Each case must be filed separately. There have been no developments in the jurisdiction regarding class actions.

20 Appeal

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

In the UAE, it is possible to appeal a finding of fact or a point of law from the court of first instance to the Court of Appeal within 30 days of the judgment of the lower court. It is possible to introduce new evidence at the appeal stage. It is also possible to appeal a decision of the Court of Appeal to the Court of Cassation, but only on points of law, within 60 days of the Court of Appeal judgment. The minimum monetary threshold for the jurisdiction of the Court of Cassation is 200,000 dirhams.

The ruling of the Court of Cassation is final and not subject to any further appeal other than in exceptional circumstances (eg, fraud).

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments and orders may be enforced in the UAE provided certain conditions are satisfied. These conditions are set out in article 235 of the CPC:

- the courts of the UAE do not have jurisdiction over the dispute underlying the foreign judgment or order, and the foreign court was competent to hear the dispute in accordance with its own laws;
- the judgment or order was made by a competent court in accordance with the laws in force in that country;
- the parties to the litigation in which a foreign judgment is passed have been properly served and represented;
- the judgment has acquired 'res judicata' status according to the law of the court that passed the judgment; and
- the judgment does not conflict with a judgment previously issued in the UAE courts and is not contrary to UAE public policy.

The conditions will not apply if any bilateral or multilateral international conventions between the UAE and other states for reciprocal enforcement and recognition exist. In such cases, the judgment will not be open for review since the foreign judgment is directly enforceable. However, where UAE federal law is invoked, the UAE courts must be satisfied that the UAE courts did not have jurisdiction over the substantive dispute as a matter of UAE law.

Procedurally, if a party wishes to enforce a foreign judgment, an application is made to the court of first instance of the emirate where the foreign judgment or order is to be executed. The application must attach a certified Arabic translation of the relevant judgment to be enforced. The judgment must also be notarised in its country of origin, legalised by the Ministry of Foreign Affairs and authenticated by the UAE embassy of that country.

The court will notify the defendant of the application who will then be allowed to make submissions in defence. The court will then decide whether to recognise the judgment or order for execution in the UAE. The court's order at first instance is subject to appeal before the Court of Appeal and the Court of Cassation.

22 Foreign proceedings

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

There are no procedures under UAE law for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions.

Arbitration

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

There is currently no standalone Arbitration Law in the UAE; however, a UAE Federal Arbitration Law (Draft Law) is currently pending enactment. Arbitration in the UAE is primarily governed by articles 203–218 of the UAE Civil Procedure Law.

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

Under UAE law, arbitration agreements are subject to the following requirements:

- arbitration clauses contained within insurance policies are required to be 'contained in a special agreement separate from the general printed conditions in the policy of insurance' (CPC 1028(1)(d));
- the arbitration agreement must be evidenced in writing ('An agreement on arbitration may only be proved if it is written' (CPC 203(2)). For a 'belt and braces' approach, it is better to have both parties sign the page that contains the arbitration agreement; and
- capacity – the agreement is only valid if 'made' by someone with 'capacity to act' (CPC 203(4)).

Where a party is a company, capacity depends upon the type of company. For a limited liability company, the Cassation Court (in case 220/2004) decided that capacity is held by the manager who 'is solely entitled to agree to arbitration in the name of the company unless he empowers another person by virtue of a special Power of Attorney'.

The board of a public joint stock company may not agree to arbitration unless:

- (i) to do so is expressly permitted under the company's articles; or
- (ii) the contract by its nature forms part of the company's objects; if (i) or (ii) does not apply, then:
 - the decision to do so must be approved by the general assembly (shareholders); and
 - a chair's signature is deemed to be that of the board of directors, and he or she may assign power to a fellow board member (articles 103 and 104 Commercial Companies Law No. 8 of 1984).

25 Choice of 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?**

In such circumstances, the UAE court will appoint the arbitrators on application and the number of arbitrators appointed will be as agreed by the parties (CPC 204(1)) or, if more than one, an uneven number (CPC 206(2)). This appointment ruling may not be contested (CPC 204(2)), but the court may appoint a substitute arbitrator in cases where the arbitrator continues to neglect his or her duties despite written notification by a party, or fails to comply with his or her mandate under CPC 207(3). Other grounds considered by the courts for challenge of the appointment of an arbitrator include bias, some form of intimate or professional relationship with one of the parties or if a conflicting interest exists.

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

The parties are free to determine the number of arbitrators and the procedure for appointing arbitrators. Normally, the procedure will be for a body such as the ICC to appoint arbitrators from their panel. If the parties have failed to specify an arbitrator or the procedure for appointing one, under article 204 of the Civil Procedure Code, either party can move for the appointment of an arbitrator (or arbitrators) by the UAE courts.

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

The CPC does contain some procedural requirements, in particular:

- the arbitrator's consent to the appointment must be in writing (CPC 207);
- the arbitrator is to notify the hearing date within 30 days of accepting nomination (CPC 208);
- any investigative procedures must be undertaken jointly by the arbitrators, and each must sign the records under (CPC 208(3));
- the dispute shall be discontinued if a discontinuation event occurs (CPC 209(1));
- if there is any issue beyond the authority of the arbitrator or arbitrators) (eg, forgery, criminal proceedings), the arbitrators shall suspend their work until a final ruling is issued (CPC 209(2));
- where recourse to the court is required (for imposing penalties against non-attending witnesses, disclosure of documents, application for legal assistance), the arbitrator shall suspend the arbitration (CPC 209(2));
- witnesses are to be sworn on oath (CPC 211); and
- the ruling of the arbitrator shall be in accordance with the principles of the law unless he or she is authorised to make settlement, in which case he or she is bound only by the principles relating to public order (CPC 212(2)).

28 Court intervention**On what grounds can the court intervene during an arbitration?**

The Civil Procedure Law allows the court supervisory jurisdiction over the arbitration to intervene in some circumstances. The court can appoint the arbitral tribunal in the absence of agreement between the parties, and it can also hear applications to remove arbitrators (see question 25).

The court can also impose penalties on any witness who has been summoned to attend an arbitral hearing but does not attend, make an order requiring third parties to disclose documents or respond to any application made by an arbitral tribunal for assistance.

The court's powers cannot be overridden by the parties under articles 22 and 24 of the CPC.

29 Interim relief**Do arbitrators have powers to grant interim relief?**

There is no specific provision for an arbitral tribunal to make interim relief orders under UAE law. However, some institutional arbitration rules are more specific and will allow the arbitral tribunal to adopt certain interim measures once the arbitration has commenced.

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

In the absence of agreement of a time limit, an award is to be rendered within six months (CPC 210). Extensions can be agreed explicitly or implicitly under CPC 210(2). In addition, the arbitrator or a party can request that the court grant an appropriate extension of time. Further:

- the award must be issued within the UAE or it is considered to be a foreign award (CPC 212(3));
- the award must be issued by majority opinion and be transcribed with any dissenting opinion; and
- the award must include a copy of the arbitration agreement, a summary of the statements of the parties and their documents; provide reasons and dispositive portion; the date, place and signature of the arbitrators, mentioning if there is a dissenting opinion of a non-signing arbitrator; and be in Arabic, unless agreed otherwise.

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

Once a domestic award is made, it must be ratified by the courts under UAE law. This is usually the time when awards are challenged. Any challenge must be on procedural grounds only and could include arguments that:

- there is no valid arbitration agreement between the parties; for example, the agreement was concluded by persons who did not have capacity;
- the award was issued by arbitrators who have not been properly appointed;
- the time limit for the tribunal to render its award has expired;
- there is a procedural irregularity in the award; or
- there has been or there is a potential violation of UAE public policy.

If the challenge is successful, the judgment refusing ratification is appealable. Alternatively, the matter could be referred to the UAE courts by filing a separate action.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

As stated above, domestic awards must be ratified by the local courts before execution. There is no time limit for the commencement of the ratification process, but enforcement of the award is suspended pending completion of the ratification process. The relevant provisions of the CPC are Chapter (IV) 'Execution of Foreign Judgments (articles 235-238) and Chapter (V) 'Execution Procedures' (articles 239-246).

Foreign arbitral awards can be enforced under UAE civil procedure law in the same way as foreign judgments (see question 14).

The UAE is also a signatory to a number of conventions on enforcement, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Gulf Cooperation Council Convention and the Riyadh Convention. Generally, if an award is made in a contracting state to these Conventions, an award should be enforced against assets in the UAE provided that it is final, appropriate for enforcement in its country of origin and is not contrary to UAE public policy.

Awards made in the DIFC are recognised and enforced in the UAE by a DIFC court order and are likely to be enforced as a foreign judgment. A 2009 Memorandum of Understanding signed between the Dubai courts and the DIFC courts allows for the recognition and enforcement of DIFC awards before the Dubai courts.

Enforcement procedures have not been affected by changes in the political landscape.

33 Costs

Can a successful party recover its costs?

An award of costs in a valid arbitration award is recoverable (as part of the award) as expressly provided for by CPC 218.

The CPC provides that 'costs follow the event' ('A ruling shall be made for costs in the case against the adversary against whom the ruling was made' (article 133(2)).

However, as stated above, the courts choose not to exercise this discretion in court proceedings beyond token awards of costs. The costs of the enforcement of an arbitration award will therefore be rendered effectively irrecoverable.

No rules have been implemented in relation to third-party funding.

Alternative dispute resolution

34 Types of ADR

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

The UAE courts may facilitate ADR between the parties if the parties request it and if the court considers it appropriate.

Mediation or conciliation is becoming an increasingly popular way to resolve disputes. Parties may provide within their commercial agreements for a tiered form of dispute resolution so that mediation or conciliation takes place followed by arbitration or litigation in the event that a settlement is not reached.

Any settlements reached through mediation or conciliation are contractual in nature and can be enforced as contracts before the UAE courts.

35 Requirements for ADR

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?

Abu Dhabi courts have a mandatory conciliation phase prior to the commencement of substantive proceedings, and in September 2009, the Dubai government passed a law establishing a new Centre for Amicable Settlement of Disputes, affiliated to the Dubai courts. The law makes it compulsory for parties to refer disputes to the Centre that would otherwise be heard by the Dubai courts. Cases may only proceed to the Dubai courts once the parties have been unable to reach settlement at the Centre within one month of referral.

Miscellaneous

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

The fact that there is no doctrine of binding precedent is particularly interesting. The requirement for all documents to be translated into Arabic may mean that documents (eg, a contract) can sometimes be interpreted in an entirely different way, once translated.



محامون ومستشارون قانونيون
ADVOCATES & LEGAL CONSULTANTS

Faridah Sarah

faridah@galadarilaw.com

PO Box 7992

Tel: +971 4 393 7700

Dubai

Fax: +971 4 393 7755

United Arab Emirates

www.galadarilaw.com

United States – California

Peter S Selvin

TroyGould PC

Litigation

1 Court system

What is the structure of the civil court system?

In the US, there are parallel state and federal court systems, consisting in each case of a trial court, an intermediate appellate court and a Supreme Court. While there are a number of 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 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, among other trial courts, the Los Angeles superior courts.

Each appellate district may be further sub-divided 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. 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 California court system does not include specialist commercial or financial courts.

2 Judges and juries

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 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).

Judges who sit on the state court’s trial bench (the Superior Court) may in some cases be appointed by the Governor or compete in a general election for ‘open’ seats. As to those judges who are appointed by the Governor, there is strong impetus for the appointment of ‘diverse’ candidates.

3 Limitation issues

What are the time limits for bringing civil claims?

California’s CCP sets out the limitations 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 CCP section 337.

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 are tolled during the time such an agreement remains in effect.

4 Pre-action behaviour

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 either because of the nature of the claim or the underlying agreement.

Some kinds of civil claims, including those against governmental 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.

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 subsequently amended, documents or witnesses not disclosed by a party through this means may be excluded at trial.

5 Starting proceedings

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.

6 Timetable

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 are set.

In Los Angeles Superior Court, the timeline to reach trial is approximately 16 to 18 months after the filing of a civil complaint.

7 Case management

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.

8 Evidence – documents

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 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. Such 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, eg, Formal Opinion No. 2015-193 of the Standing Committee on Professional Responsibility of the California State Bar.

9 Evidence – privilege

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.

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 to 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.

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)).

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.

10 Evidence – pretrial

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. Parties are not required to identify the expected subject matter of any of the witness' anticipated trial testimony.

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.

11 Evidence – trial

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.

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.

12 Interim remedies

What interim remedies are available?

There are several pre-judgment 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 pre-judgment 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 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, pre-judgment or interim remedies issued by US courts are not enforced by their foreign counterparts with respect to property located in other jurisdictions.

13 Remedies

What substantive remedies are available?

The typical remedies available in civil proceedings are money damages, injunctive relief and declaratory relief.

As to monetary damages, the court's award of such damages may also include recovery of costs (which are normally recoverable as a matter of right by statute), pre-judgment 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 generally 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.

14 Enforcement

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 party do, or refrain 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.

The disobedience of a court order requiring that a party do, or refrain 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.

15 Public access

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 court filings that are filed by parties

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.

16 Costs

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 electronically stored information (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, under 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.

17 Funding arrangements

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. Such 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 prohibitions 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 communications between a claimant and a litigation funding firm is subject to protection from discovery by reason of the work product doctrine.

18 Insurance

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, as well as 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 obligated 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 obligated 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).

19 Class action

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); and
- typicality – the claims or defences must be typical of the plaintiffs or defendants. See *Vasquez v Superior Court* (4 Cal 3d 800 (1971)).

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 property subject to removal to federal court (*Corber v Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir 2014)).

As perhaps a harbinger of things to come, a proposed bill was recently introduced into the US Congress whose purpose is to reform class action litigation. The author of the bill, Rep. Rob Goodlatte (R. Va.), was also one of the authors of the Class Action Fairness Act, which was enacted in 2005. The pending bill introduced by Rep. Goodlatte goes much further in making the prosecution of class action litigation more difficult.

There is now a widespread perception among businesses of all sizes that class action practice, especially in California, has become abusive. Among other things, it is widely perceived that many of these suits are contrived by plaintiffs' counsel in order to generate fees and do not confer any meaningful benefits on the class members.

The key highlights of the proposed bill include the following:

- restrictions on fee awards to class counsel, so that the amount of such fee awards will in no event exceed the total amount of money directly distributed to and received by all class members;
- requiring the existence of third-party litigation funding – that is, disclosure of the identity of any person or entity (other than a class member or class counsel) who has a contingent right to receive compensation from any settlement or judgment in the action;
- requiring that an order certifying a class not be issued unless the party seeking to maintain such class action affirmatively demonstrates that each proposed class member suffered 'the same type and scope of injury as the name class representative'; and
- requiring disclosure and prohibition of conflicts, especially where any proposed class representative or named plaintiff is a relative of, a present or former employee of, or a present or former client of class counsel.

Although the proposed bill was only recently introduced, and has not certainly not been passed by Congress or become law, its introduction reflects a swing of public sentiment in reaction to perceived class action abuses.

20 Appeal

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.

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.

21 Foreign judgments

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 US. 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.

22 Foreign proceedings

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 US.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

No. As more fully discussed below, a distinction needs to be made in the procedural law applicable to arbitration and the substantive law governing a claim that is in arbitration.

At the threshold, the applicable procedural law governs 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. In this regard, there are three primary sources for this procedural law in connection with arbitration proceedings taking place in California or governed by its law. First, there is a federal statute, 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 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.

As distinct from these procedural rules, 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.

24 Arbitration agreements

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 a particular types of claims. Recent California appellate decisions have applied the Court's ruling in *Conception* to enforce agreements to arbitrate. See, for example, *McGill v Citibank, NA*, 232 Ca App 4th 753 (2014), review granted, 185 Cal Rptr 430 (2015); *Iskanian v CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348 (2014) (FAA pre-empts prohibition of class action waivers in employment cases).

The appellate courts in California are also coming to grips with the enforceability of browserwrap agreements. These agreements are typically found on websites in the form of 'terms and conditions' for website use. In one recent case, the Court declined to compel a claimant to pursue his claim via arbitration where the arbitration provision was contained in such a browserwrap agreement. The Court held that the website at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract. For this reason, the Court declined to compel arbitration of the claim. *Long v Provide Commerce*, 245 Cal App 4th 855 (2016).

Finally, the California Legislature passed a law prohibiting mandatory pre-dispute arbitration provisions in contracts for goods or services in certain specified instances. Under the new law, which amends Civil Code sections 51.7, 52 and 52.1, any waiver of the right to seek judicial redress must be knowing, voluntary and expressly not made as a condition of entering into a contract or as a condition of providing

or receiving goods or services. This new law applies to all agreements entered into, modified, renewed or extended on or after 1 January 2015. As the US Supreme Court has made it clear that courts applying the FAA will invalidate state laws and single out arbitration agreements for special scrutiny, it is uncertain whether this law will survive subsequent US Supreme Court challenge.

25 Choice of 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 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 section 1281.91 sets forth the grounds for the disqualification of an arbitrator.

26 Arbitrator options

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. In addition, the rules of the particular arbitral organisation (eg, JAMS, International Chamber of Commerce (ICC), etc) that the parties have selected 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 American Arbitration Association (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 his or her area of practice. 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.

27 Arbitral procedure

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

As noted above, both the Federal Arbitration Act 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.

28 Court intervention

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.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Depending on the rules of the arbitral organisation, interim relief can be granted in arbitration. Such 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).)

30 Award

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.

31 Appeal

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.

As to whether an order granting or denying a petition to compel arbitration is appealable, the general rule in both state and federal court 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 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.

32 Enforcement

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. As noted above, 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. 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 US has not affected the enforcement procedures for foreign or domestic awards. Inasmuch as there is a separation of powers as between the executive and judicial branches of government, the enforcement of foreign and domestic awards is governed by the pertinent statutes and the judicial interpretations of those statutes.

33 Costs

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.

Noted in response to question 16 are some recent statutory enactments that allow for the costs incident to the production or management of ESI.

There are no California statutes or judicial decisions that allow for the recovery of the costs incident to third-party litigation funding.

Alternative dispute resolution

34 Types of ADR

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

The main types of ADR besides arbitration are detailed below.

Mandatory pre-arbitration or pre-litigation mediation

The parties can provide 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 ICC, 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

This process is often referred to as 'rent a judge'. In brief, the parties may designate a specific decision maker (such as a retired judge) who is given authority to decide any future disputes in accordance with the applicable rules and procedures that are also agreed to by the parties. In effect, the parties stipulate, with the court's approval, to a grant of judicial authority to the appointed decision maker. Any judgment resulting from this process will be enforced in the same manner as any other judgment issued by the local court.

Mini-trial

This process can either be 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.

35 Requirements for ADR

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**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 ADR, and especially arbitration. This move has been given particular impetus over the past few years, as the state has experienced a series of budget crises that have resulted in significant underfunding of the state court system. Put simply, the state court system does not have the financial or human resources to adequately resolve civil disputes.

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. 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.

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 AAA 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). 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).



Peter S Selvin

pselvin@troygould.com

1801 Century Park East, Suite 1600
Los Angeles
CA 90067
United States

Tel: +1 310 789 1230
Fax: +1 310 789 1430
www.troygould.com

United States – Federal Law

Robert M Abrahams, Robert J Ward and Caitlyn Slovacek

Schulte Roth & Zabel LLP

Litigation

1 Court system

What is the structure of the civil court system?

The United States Supreme Court is the highest federal court and is provided for in article III of the United States Constitution. The Supreme Court consists of the Chief Justice of the United States and eight associate justices. With discretion and within certain guidelines, the Supreme Court reviews a limited number of the cases it is asked to decide. Those cases may begin in state or federal courts, and they usually involve important constitutional or federal law questions.

The Constitution also grants Congress the authority to establish additional federal courts. To date, Congress has established trial and appellate courts below the Supreme Court.

The district courts are the general trial courts of the federal system. Within the limits set by the Constitution and Congress, district courts have jurisdiction over civil and criminal matters arising under federal law. There are 94 district courts throughout the United States with about 3,200 judges. There is at least one district court in each state, the District of Columbia and Puerto Rico. Each district also includes a bankruptcy court.

There are also two special trial courts in the federal system: the Court of International Trade and the Court of Federal Claims. The Court of International Trade has nationwide jurisdiction over cases involving international trade and customs issues. The Court of Federal Claims has nationwide jurisdiction over most claims for monetary damages against the United States, disputes over federal contracts claims, including unlawful ‘taking’ of private property by the federal government, and a variety of claims against the United States.

Above the trial courts are 12 regional circuits, which each have an appellate court, a United States Court of Appeals. Each such circuit court hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. The Federal Circuit Court of Appeals has specialised jurisdiction to hear appeals from the Court of International Trade, the Court of Federal Claims and other specific types of cases, such as those involving patent laws.

Federal court jurisdiction

The jurisdiction of United States federal courts, unlike the jurisdiction of the state courts, is limited. The two most common types of civil cases arise under either federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction includes claims involving disputes over federal constitutional issues or federal statutes. Diversity jurisdiction, rather than being based on the subject matter of the claim, depends on the citizenship of the parties. When citizens of different states (United States or foreign) are on opposite sides of the dispute, parties may seek to commence the case in federal court or to remove a case commenced in state court to federal court. To commence or remove a claim based on diversity, there must be complete diversity among the parties. Complete diversity only occurs if no plaintiff and no defendant is a citizen of the same state; this includes the citizenship of corporations that are parties to an action. The citizenship of a corporation for diversity purposes is both its state of incorporation and its principal place of business. For example, if the action includes one plaintiff from the state of Delaware and a corporation that is considered a citizen of Delaware

is a defendant, complete diversity does not exist. On the other hand, if plaintiffs are residents of the United States and none of the defendants are citizens of the United States, such as foreign corporate entities, complete diversity will be satisfied. Diversity jurisdiction also requires that the matter in controversy exceed the sum or value of US\$75,000.

2 Judges and juries

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

In a civil action, the Seventh Amendment to the Constitution preserves the right to a jury trial for federal actions. In the absence of an express statutory provision, if the action can be fairly characterised as a legal claim that would have been triable by a jury at common law in England in the late 18th century, then such claim can be brought before a jury. A party seeking to invoke its right to jury trial must make a demand that is served on the other parties in the action within 14 days after service of the last pleading directed to the issue to be tried (Federal Rules of Civil Procedure (FRCP) rules 5(d) and 38(b)).

In a jury trial, the jury is responsible for deciding issues of fact. The judge decides issues of law.

Under Article III of the United States Constitution all federal judges are nominated by the President of the United States and confirmed by the United States Senate. Nominees are typically recommended by the members of the United States Senate or House of Representatives, who are of the President’s political party.

As a result of concerted efforts in the nomination and confirmation processes, the federal bench has become increasingly more diverse in recent years.

3 Limitation issues

What are the time limits for bringing civil claims?

The time limits for bringing civil claims are referred to as statutes of limitation. The statutes of limitation depend on the type of claim. A federal court adjudicating state claims will apply the relevant statute of limitations prescribed by the state legislature or state common law. For federal claims, the court will apply the statute of limitations as prescribed by federal statute or federal law. Some common federal statutes of limitation are:

- one year for private actions based on violations of the federal securities laws involving misrepresentations in public statements (eg, Securities Act of 1933 sections 11 and 12);
- two years or five years for private actions based on violations of federal securities laws involving fraud or deceit (eg, Securities Exchange Act of 1934 section 10(b)) (the earlier of two years after the discovery or five years after the violation occurred); and
- four years for private actions based on violations of federal anti-trust laws.

Parties may also enter into tolling agreements to stay the running of the limitations period. This is often done while parties are discussing settlement.

4 Pre-action behaviour

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

There is only one pre-action consideration regarding discovery that parties should take into account. Parties may petition the court before an action is filed to ask the court for an order authorising the petitioner to depose certain persons in order to perpetuate testimony (FRCP rule 27). However, the petitioner bears the burden of demonstrating the following:

- that the action is cognisable in federal court but the petitioner cannot presently bring it or cause it to be brought;
- the subject matter of the expected action and the petitioner's interest;
- the facts the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;
- the names or descriptions of persons whom the petitioner expects to be adverse parties; and
- the names and expected substance of each deponent's testimony.

5 Starting proceedings

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 a complaint with the court. On or after filing the complaint, the plaintiff may present a summons to the clerk to obtain a signature or seal. Next, the summons and a copy of the complaint must be served on the defendants within 90 days after the complaint was filed. The method of service varies depending on the type and availability of the defendant. Unless service is waived, proof of service must be filed with the court. The court, upon motion or its own notice, will dismiss the action if service is not completed within 90 days after filing (FRCP rules 3 and 4).

After an action has commenced, the federal court system generally hears and resolves matters in a timely manner. The federal courts are well equipped with over 600 trial court judges and over 150 appellate court judges. Moreover, the limited jurisdiction of the federal courts greatly reduces the number of potential filings.

6 Timetable

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

After process has been served, defendants must serve an answer or motion to dismiss the complaint (a responsive pleading) within 21 days of personal service. If personal service was waived, the defendant has 60 days after the request for waiver to serve a responsive pleading. Under the compulsory counterclaim rule, a party must assert any counterclaim that it has against the opposing party if the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Although not required, a defendant may also assert a cross-claim (a claim against another defendant) if the claim arises out of the same transaction or occurrence that is the subject matter of the original action or relates to any property that is the subject matter of the original action (FRCP rule 13). Either party may also join third parties to an action, who may be liable for a portion of the original claim or against whom a party may have additional claims related to the same transaction (FRCP rule 14).

In any action, the court may order the attorneys and unrepresented parties to appear for pretrial conferences to expedite the disposition of the action, encourage management, discourage wasteful pretrial activities and facilitate settlement. In most circumstances, parties must confer as soon as practicable – at least 21 days before a scheduling conference is to be held or a scheduling order is due. In accordance with local rules, the district judge or magistrate judge will issue a scheduling order that limits the time to join other parties, amend pleadings, complete discovery and file motions. The scheduling order will be issued within the earlier of 90 days of any defendant being served with a complaint or 60 days after any defendant has appeared in the action. The court may hold a final pretrial conference to formulate a trial plan (FRCP rule 16).

7 Case management

Can the parties control the procedure and the timetable?

Parties must submit discovery plans detailing the timing, form of disclosure and the subject matters to be discovered. The discovery plan should also address whether the parties require an expedited schedule. The court may or may not accept the parties' discovery plan, and some federal courts require extraordinarily short deadlines for pretrial activity. In all cases, the court will issue a scheduling order addressing such matters. The court, upon request of the parties, may modify the schedule for good cause shown (FRCP rules 16 and 26(f)).

8 Evidence – documents

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 an affirmative duty to preserve documents and other evidence even before a trial has commenced. Once a party reasonably anticipates litigation, the party must suspend any routine document destruction or retention policies and put in place a process to ensure the preservation of relevant documents. During the course of discovery, parties will make requests detailing the types of documents to be produced by the other side. Before a discovery request is received, all parties must disclose certain information about the location and availability of potentially discoverable information (FRCP rule 26(a)(1)(A)). The scope of discovery is generally very broad, and includes relevant documents that would be unhelpful to a party's case.

9 Evidence – privilege

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

The admission of evidence in federal courts is governed by the Federal Rules of Evidence (FRE). FRE 501 provides that for federal claims, federal common law governs an assertion of privilege unless the Constitution, federal statute or rules prescribed by the Supreme Court state otherwise. Federal common law recognises, *inter alia*, the attorney-client privilege and the spousal privilege.

The attorney-client privilege protects confidential communications between an attorney and his or her clients made for the purpose of rendering legal advice. This includes communications with in-house counsel, as long as counsel is acting in its capacity as an attorney. The federal common law also recognises the extensions of the attorney-client privilege, known as the joint defence and common defence privileges. These privileges protect attorney-client privileged information shared between parties and their attorneys with a common interest in an actual or potential litigation against a common adversary.

The federal rules also specifically recognise an attorney-work product protection. The FRCP restrict the discovery of documents prepared in anticipation of litigation. The work product protection, however, may be overcome if the party shows substantial need and cannot without undue hardship obtain the substantial equivalent by other means (FRCP rule 26(b)(3)).

For claims based on state law, state statutory or common law governs the application of privilege (FRE 501).

10 Evidence – pretrial

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

Typically, evidence is exchanged before trial in the form of deposition testimony. However, a party may, by written questions, depose any person, including a party (FRCP rule 31). In addition, unless otherwise stipulated by the parties or ordered by the court, any expert witness a party intends to call at trial must provide a written report containing:

- a statement of all opinions and the basis and reasons for them;
- the facts or data relied on to form such opinions;
- any exhibits that will be used to summarise or support such opinions;
- the witness's qualifications, including any publications authored in the previous 10 years;

- a list of cases in which the witness has testified as an expert during the previous four years; and
- a statement of compensation for the study and testimony in the case (FRCP rule 26(a)(2)).

11 Evidence – trial

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

At trial, evidence is typically presented through oral testimony. Both lay and expert witnesses testify. Both plaintiffs and defendants are allowed to ask any witness questions. The party calling a witness will conduct a direct examination of the witness. The opposing party may then conduct a cross-examination of the witness. If a witness is unavailable for trial, deposition testimony may be admitted in certain circumstances. Objects and written evidence may also be presented at trial.

12 Interim remedies

What interim remedies are available?

Except to the extent that federal rules apply, federal district courts can utilise provisional remedies available in the state in which the district court is located (FRCP rule 64). Additionally, district courts under the federal rules may order preliminary injunctions. A party seeking a preliminary injunction must demonstrate substantial likelihood of success on the merits, a threat of irreparable harm or injury, that the balance of equities tips in its favour and that the grant of an injunction would serve the public interest. If a party fears that immediate and irreparable injury will occur before a hearing on a preliminary injunction will occur, the party can seek a temporary restraining order either on notice or ex parte (without written notice to the adverse party or its attorney). A temporary restraining order is an extraordinary remedy and is usually only granted in an emergency. For both a preliminary injunction and a temporary restraining order, a moving party must provide the court with security in the amount the court determines is proper to cover the cost and damages sustained by any party if found to have been wrongfully enjoined or restrained (FRCP rule 65).

13 Remedies

What substantive remedies are available?

The federal courts have the power to grant the same legal and equitable remedies as the state courts, such as money damages, injunctions and specific performance. A federal court reviewing state claims under diversity jurisdiction can award the same remedies available for such claims under state law. Federal claims are usually based upon federal statutes and regulations, which in many cases provide the specific remedies available for such claims. Most statutes provide for legal and equitable remedies similar to those available under state law.

Interest is typically payable on money judgments. The interest rate is not fixed. Instead, the rate allowed on most judgments for civil actions in a federal court can be calculated based on government securities rates as published by the board governors of the Federal Reserve System, for the calendar week preceding the date of the judgment (28 USC section 1961).

14 Enforcement

What means of enforcement are available?

Once a judgment is entered, enforcement is sought through supplementary proceedings. Unless specific federal statutes apply, federal courts will apply the procedure of the state where the court is located for supplementary proceedings. For example, federal courts will follow the local state court rules providing for discovery about a judgment creditor's assets. A money judgment will be enforced through a writ of execution: a court order directing an officer of the court to seize the property of judgment debtor and transfer proceeds to a judgment creditor (FRCP rule 69). The federal courts may also order the performance of specific acts, and if a party fails to comply within the established time the court may, *inter alia*, order that the act be done by some other person, issue a judgment divesting a party of title in real or personal property, issue a writ of attachment or sequestration, or hold the disobedient party in contempt (FRCP rule 70).

15 Public access

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

Except occasionally, all steps of the federal judicial process are open to the public. The public can usually observe the court sessions, review court calendars, watch a proceeding, and access dockets and case files and records. At certain times, access to court records and proceedings may be limited; for example, in a high-profile trial for which courtroom space is not sufficient to accommodate everyone, the court may restrict access. In addition, the court may restrict access for privacy or security reasons, including actions involving juveniles or confidential informants. Finally, the court may seal certain documents that contain confidential business records (including trade secrets), certain law enforcement reports and juvenile records.

16 Costs

Does the court have power to order costs?

Unless otherwise provided by federal statute, the court may, with discretion, order costs – other than attorneys' fees – to the prevailing party (FRCP rule 54(d)). The court may also award reasonable attorneys' fees and other non-taxable costs in a certified class action (FRCP 23(h)). Costs are not synonymous with expenses. Costs are typically limited to court fees and witness fees. However, the court may review requests for unusual costs. In addition, under FRCP rule 11, the court may sanction an attorney, and require a monetary payment to help defray the opposing party's legal expenses if the court finds that rule 11 was violated. Under rule 11, attorneys must certify that the claims were brought in good faith, and the court may sanction an attorney for failure to do so.

A claimant may be required to provide security for defendant's costs when plaintiffs are residents of a foreign country or if provided by federal statute.

17 Funding arrangements

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 most districts, attorney conduct including fee arrangements will be governed consistently with local state rules, but some district courts and courts of appeal have not adopted any rules governing attorney conduct and others may apply federal common law rules. However, under the prevailing state ethics rules that govern attorneys in most districts, attorneys may contract for contingency fee arrangements and recover a percentage of the final award, except in criminal and domestic relations matters. Attorneys may not share fees received with any third parties.

There is no prohibition against legal financing. Investors may provide funding to litigants in return for a percentage of the final award. A party to a litigation may also share its risk through an insurance or indemnification agreement.

18 Insurance

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

Individuals or corporations may obtain insurance to cover both liability and legal costs. However, as a matter of public policy, intentional and criminal acts may not be covered by insurance.

19 Class action

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

Litigants with similar claims may pursue a class action in federal courts. Litigants may only sue or be sued as representative parties on behalf of all members if:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;

- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class (FRCP rule 23).

Similarly, a shareholder of a corporation or a member of an unincorporated association may also bring a collective action (commonly known as a derivative action) on behalf of the corporation or association to enforce a right that the corporation or association may properly assert but has failed to enforce. The plaintiff must fairly and adequately represent the interest of shareholders or members who are similarly situated in enforcing the right of the corporation or association (FRCP rule 23.1).

Currently pending before the United States Senate is comprehensive class action reform legislation. If enacted, the new legislation would alter almost all aspects of class action litigation. For example, it would impose a stricter typicality requirement, the disclosure of class counsel's conflicts of interest, a demonstration of a reliable and administratively feasible way to identify the class members, a limitation on class counsel's recovery of attorneys' fees, as well as other various procedural changes, including timing of discovery and appeals.

20 Appeal

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

Appeals in the federal system are limited, because the circuit courts generally may only review final judgments of the district courts and a few specific interlocutory orders. A district court decision is appealable if it is considered final (28 USC section 1291). There are no statutory definitions of 'final'. The Supreme Court has stated that a final judgment is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' (*Catlin v United States*, 324 US 229 (1945)). Ultimately, whether a judgment is final will largely depend on the case.

The circuit courts may review certain interlocutory orders. Such appealable orders include orders granting, modifying, or refusing injunctions; orders appointing receivers or refusing to wind up receiverships; and decrees determining the rights and liabilities of the parties to admiralty cases (28 USC section 1292(a)). The district court may also certify for immediate appeal certain orders that involve a controlling question of law as to which there is substantial ground for difference of opinion. In order to appeal, after certification by the district court, a party must seek permission from the circuit court to bring such appeal (28 USC section 1292(b)).

Cases from the circuit courts may be reviewed by the Supreme Court pursuant to a writ of certiorari, granted based upon the petition of any party to a civil case or by certification from the Court of Appeals on any question of law (28 USC section 1254). A writ of certiorari is essentially an application to the Supreme Court requesting that the Court review the matter. The Supreme Court does not accept all applications; it typically chooses to hear a small number of cases involving important questions about the Constitution or federal law.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

There is no general federal statute or treaty on foreign judgments. Under federal common law, foreign judgments may be recognised as long as the judgment appears to have been rendered by a 'competent court, having jurisdiction of the cause and parties, and upon due allegations of proof, and an opportunity to defend against them, and its proceedings are according to a course of civilised jurisprudence, and are stated in a clear and formal record' (*Hilton v Guyot*, 159 US 113, 205-06 (1895)). The requirement of a reciprocal agreement is not straightforward. Federal courts with diversity jurisdiction will typically apply the state law regarding recognition of foreign judgments, and some states have rejected the reciprocity requirement. Meanwhile, federal courts with federal question jurisdiction will apply the federal common law, which does require reciprocity. Until the Supreme Court or Congress provides further guidance, the requirements for the enforcement of foreign judgments will continue to vary across jurisdictions and types of matters.

22 Foreign proceedings

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

The district courts may, with discretion, issue an order pursuant to a letter rogatory or request made by a foreign or international tribunal, and direct a resident of the district to give testimony, make a statement or produce a document or thing (28 USC section 1782).

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Congress enacted the Federal Arbitration Act (FAA) in 1925 to validate agreements to arbitrate and to provide mechanisms for their enforcement. The Supreme Court has held that the FAA applies in both federal question and diversity jurisdiction matters, and in some cases preempts state statutes precluding arbitration. The FAA is not based on the UNCITRAL Model Law, and differs from it in several ways, including the basis for setting aside an award, the power to modify or correct an award, the procedure for the appointment of arbitrators and the arbitral tribunal's power to rule on its own jurisdiction.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

According to FAA section 2, an agreement will be valid, irrevocable and enforceable, except upon such grounds as exist at law or equity for the revocation of any contract, if there is a written provision or contract evidencing a transaction involving commerce to settle by arbitration a controversy arising thereafter, or a transaction or refusal to perform the whole or part thereof of such contract, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal. Generally, courts will apply the ordinary state-law principles that govern the formation of contracts to determine the validity of an agreement. An agreement to arbitrate is considered a separate contractual undertaking; the validity of an arbitration clause does not depend on the validity of the underlying contract.

25 Choice of 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?

Typically, parties will specify the procedure for the appointment of arbitrators, or adopt procedural rules of an administering arbitral institution such as the American Arbitration Association (AAA), JAMS or the International Chamber of Commerce International Court of Arbitration, which provide default rules for the appointment of arbitrators. In the absence of a contractual provision regarding the procedure for the appointment of arbitrators or the adoption of the procedure of an administering arbitral association, the appointment of arbitrators shall be made upon application to the court. The court may designate and appoint any arbitrator or arbitrators as the case may require. If the contract is silent about the number of arbitrators, the court shall appoint a single arbitrator for the action (FAA section 5).

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The available arbitrator options will depend on the chosen arbitral association or court. Generally each arbitral association or court maintains a roster of available mediators and arbitrators. Eligibility for such rosters is based on the each association or court's own criteria and evaluation. For example, the JAMS roster is mainly composed of retired judges and other professional neutrals. The AAA roster tends to include arbitrators with more varied industry experience. Usually the arbitral association or court can provide arbitrators with sufficient knowledge or experience to address the complexity of the issues presented.

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

The domestic statutory law provides almost no requirements regarding the procedure to be followed. The arbitrators once appointed typically control the procedure, conducting the hearings, administering oaths and making awards. The FAA grants an arbitrator or arbitrators the power to summon the attendance of witnesses. The courts defer to the arbitrator on procedural matters.

If the parties have contractually adopted an administering arbitral association's rules, those rules will bind the arbitrator or panel's actions. The AAA provides different rules of procedure depending on the type of case (commercial, construction, labour, international, etc). Any procedural rules in the arbitration agreement will overrule the institutional rules.

28 Court intervention**On what grounds can the court intervene during an arbitration?**

Federal courts have jurisdiction to hear arbitration-related issues for matters with federal question jurisdiction or diversity jurisdiction. Judicial intervention is commonly sought when the arbitration demand is made (to compel or stay a proceeding) or after the award (to enforce, modify or vacate). However, during an arbitration, parties may turn to the courts to enforce a subpoena issued by the arbitrator. If a person summoned to testify refuses or fails to appear, the parties may petition the district court in which the arbitrator (or a majority of the arbitrators) sits to compel attendance or punish said persons for contempt (9 USC section 7).

29 Interim relief**Do arbitrators have powers to grant interim relief?**

The FAA does not provide for provisional remedies, but the majority view is that arbitrators can and should grant preliminary injunctive relief to preserve the status quo pending arbitration. Likewise, administering arbitral associations often give arbitrators the power to grant interim relief.

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

Under the FAA, there are no formal requirements regarding the delivery and form of the award. The rules of the administering arbitral association may require, or the parties may stipulate, that the award be in writing and signed by the majority of arbitrators. The timing of the award may also be governed by the administering arbitral association or the arbitration agreement.

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

An award can be appealed to the courts on limited grounds. The FAA lists the following grounds for vacating an award:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality or corruption in the arbitrators, or any one of them;
- where 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
- where 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.

Once an action on the award is brought to the courts, the normal rules governing the appeal of a court decision or an order will attach.

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

Foreign and domestic awards are enforced through the courts. Domestic awards may be enforced under FAA section 9. The party seeking enforcement need not commence a civil action, but rather can make an application to the appropriate federal district for an order confirming the award within one year after the award is issued. The party seeking confirmation must also serve the adverse party with notice of the application.

There are two methods under which foreign commercial arbitral awards may be recognised and enforced. First, as part of the FAA, the United States has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 USC section 201). A party seeking to enforce an award must establish a prima facie case for enforcement under the New York Convention, and provide an original or certified copy of both the award and arbitral agreement to the appropriate judicial forum. Enforcement may be challenged on five grounds:

- absence of a valid arbitration agreement;
- lack of fair opportunity to be heard;
- the award exceeds the scope of the submission to arbitration;
- improper composition of the arbitral tribunal or improper arbitral procedure; and
- the award has not yet become binding or stayed.

The party opposing enforcement has the burden to prove the invalidity of the award.

Alternatively, the United States has also adopted the Inter-American Convention on International Commercial Arbitration. Foreign commercial arbitral awards will be recognised and enforced on the basis of reciprocity; if the foreign state has ratified or acceded to the Inter-American Convention, such award will be recognised and enforced (9 USC section 304). If both the requirements for the application of the New York Convention and the Inter-American Convention are met, unless expressly agreed otherwise, the Inter-American convention will apply if the majority of parties to the arbitration are citizens of a state or states that have ratified or acceded to the Inter-American Convention or are a member state of the Organization of Americans. In all other cases, the New York Convention will apply (9 USC section 305).

33 Costs**Can a successful party recover its costs?**

In general, parties normally bear their own costs, unless otherwise agreed in the arbitration clause. The arbitrator may award administrative costs if the parties have contracted for such or the rules of the administering arbitral association so provide. Typically, costs do not include attorneys' fees, but an arbitrator may award attorneys' fees when allowed by the governing law, such as when authorised by a specific statute, when the applicable arbitration rules so provide or as a matter of contract as provided for by the parties.

Alternative dispute resolution**34 Types of ADR****What types of ADR process are commonly used? Is a particular ADR process popular?**

According to a recent study, all of the federal courts authorise some form of ADR. The types of ADR procedures used in federal courts include mediation, arbitration, early neutral evaluation, summary jury trial and settlement week. The most commonly authorised form of ADR across the district courts is mediation. The next most common forms are arbitration and early neutral evaluation.

35 Requirements for ADR

**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 requirement to consider ADR varies from court to court. Some district courts require litigants to consider the use of an alternative dispute resolution process. In addition, some district courts mandate that parties in certain cases utilise mediation, early neutral evaluation and, if the parties consent, arbitration. Judges in some districts are authorised to refer cases without party consent to mediation or early neutral evaluation.

Miscellaneous

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

No.

Schulte Roth & Zabel

**Robert M Abrahams
Robert J Ward
Caitlyn Slovacek**

**robert.abrahams@srz.com
robert.ward@srz.com
caitlyn.slovacek@srz.com**

919 Third Avenue
New York
NY 10022
United States

Tel: +1 212 756 2000
Fax: +1 212 593 5955
www.srz.com

United States – New York

Robert M Abrahams, Robert J Ward and Caitlyn Slovacek

Schulte Roth & Zabel LLP

Litigation

1 Court system

What is the structure of the civil court system?

New York has both state and federal courts. New York state courts have general jurisdiction over most matters occurring within the state or involving citizens of New York, while the federal courts have more limited jurisdiction. See the ‘United States – Federal Law’ chapter for more about the federal court system.

The New York civil state court system is complex and consists of a tiered court structure. The trial court of general jurisdiction is the Supreme Court, but there are also a number of trial courts whose jurisdiction is limited to hearing cases of smaller amounts. The next tier consists of intermediate appellate courts, making up the appellate divisions. The final tier is the highest court, the Court of Appeals.

In general, cases in New York will start in one of the trial courts. As mentioned above, the general civil trial court in New York is the New York Supreme Court, which can hear almost every type of civil and criminal case. Supreme Court jurisdiction includes cases above certain monetary amounts (typically US\$25,000) or requests for equitable relief, such as an injunction. The Supreme Court in many counties also has a specialised commercial division that handles complicated commercial cases. For smaller cases in New York City, the Civil Court decides lawsuits involving claims for damages up to US\$25,000 and includes a small claims part for cases involving amounts up to US\$5,000 and another part for housing-related matters concerning landlords and tenants. Outside New York City there are district courts, city courts and town and village courts that hear smaller claims.

In addition, there are several speciality trial courts in New York, including the Court of Claims, which has exclusive authority over claims seeking money damages against the state of New York and jurisdiction over claims against certain state-related entities; the Surrogates Court, which hears matters related to validity of wills and the administration of estates; and the Family Court, which hears divorce cases, matters related to children and other family matters.

Above the trial courts, the intermediate appellate courts review appeals originating from the trial courts. The Appellate Term reviews cases originating from certain lower courts such as the New York City Civil Court, the district, city or town and village courts. The principal appellate court is the Appellate Division, which consists of four departments that geographically divide the state. The Appellate Division hears civil and criminal appeals from the Supreme Court trial courts, as well as civil appeals from the appellate terms and certain county courts.

New York’s highest court is the Court of Appeals. The Court of Appeals is a court of very limited jurisdiction. It hears civil and criminal appeals from the state’s intermediate appellate courts, and in certain instances appeals from the trial courts.

New York also has four federal district courts that geographically divide the state (Northern, Eastern, Southern and Western). The Southern and Eastern Districts cover the greater New York City area. Appeals from any of the districts are heard by the United States Court of Appeals for the Second Circuit, which sits in New York City. The Second Circuit also hears appeals from the Connecticut and Vermont federal district courts. The United States Supreme Court, the highest federal court, may review by petition decisions rendered by the Second Circuit.

For more information about the federal court structure, see the ‘United States – Federal Law’ chapter.

2 Judges and juries

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

The role of judge and jury varies depending on the nature of the matter before the court. In New York, any party may demand a trial by a jury of six persons for any claims that are legal in nature, as opposed to claims in equity. Claims that are legal and triable by a jury generally include those seeking money damages. Even if the parties have a right to a jury, they may waive that right and proceed without a jury. In a jury case, the jury decides questions of fact and the judge decides questions of law, including the admission of evidence and procedural issues.

On the other hand, if the nature of the claim sounds in equity or requests equitable relief, such as an injunction or a declaratory judgment, or if the parties waive the right to a jury trial, the case will be heard as a bench trial – a judge without a jury. During a bench trial, a judge will decide both questions of fact and law.

The role of the judge will also vary depending on the personality and style of the judge. Some judges will use every opportunity to intervene in a matter, while others will more passively let a case unfold.

The selection of justices for New York trial courts, the Supreme and county courts, occurs primarily through partisan elections. The appellate courts and limited jurisdiction courts use an assisted appointment method. For example, Appellate Division justices are first nominated by a commission composed of a selection of current Supreme Court justices. Then the Governor appoints a justice from among the nominee candidates. Court of Appeals judges are selected through the same process as the Appellate Division, except for the additional requirement that the Senate consents to the gubernatorial appointment.

Due to concerted efforts in the nomination and appointment processes, the composition of the bench has become increasingly diverse in recent years.

3 Limitation issues

What are the time limits for bringing civil claims?

New York has a complex statutory scheme that sets forth different limitations periods, referred to as statutes of limitations. The applicable statute of limitations varies depending on the nature of the claim. The limitations period generally begins to run from the time the action accrues. Some common New York statutes of limitations are:

- three years for actions based on tort claims such as personal injury or injury to property (except for some intentional torts such as defamation, for which a one-year limitations period applies);
- six years for actions based on contractual obligations, or actions based on a bond or note; and
- six years or two years for actions alleging fraud (the time within which the action must be commenced is the longer of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it).

Parties may also enter into tolling agreements to stay the running of the limitations period. This is often done while parties are discussing settlement.

4 Pre-action behaviour

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

There are no pre-action considerations, with one limited exception. Under New York Civil Practice Laws and Rules (NY CPLR) section 3102(c), before an action is commenced a party may request a court order to seek disclosure to aid in the bringing of an action to preserve information or to aid in an arbitration. These pre-action requests are very rarely granted.

5 Starting proceedings

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 party may commence a civil action by purchasing an index number, and then filing either a summons and complaint or a summons with notice (a summons without a complaint) with the county clerk. The party must then serve the summons and complaint or summons with notice upon all defendants within 120 days. Service may be accomplished in various ways, depending on the type and location of the defendant.

The summons identifies the name of the case, the name of the court, the index number, the date filed, the name of the plaintiff and plaintiff's lawyer, and the name of the defendant or defendants. Where, as is usual, a complaint is also served, the complaint sets out the plaintiff's claims against the defendant and the relief sought by the plaintiff. A summons with notice, which is rarely used, includes a summons, and instead of a complaint attaches a brief description of the case and relief the plaintiff is seeking.

After the completion of service, an affidavit attesting to proper service should be filed with the court. If service is not made within 120 days the court, upon motion, may dismiss the action. The court may also, upon a showing of good cause, approve an extension for the time to complete service of up to 60 additional days.

For proceedings seeking a judgment for the payment of a note, the plaintiff may commence an expedited proceeding by serving a summons and notice of motion for summary judgment along with the supporting papers in lieu of a complaint (see NY CPLR section 3213).

In general, the courts are able to efficiently and effectively address their caseloads. An action may be commenced in various different courts depending on the disputed issue. By categorising cases and providing specialised courts, the New York Court system is able to more easily address the increasing caseloads. For example, in the counties that hear the highest number of commercial disputes there are commercial division courts that deal only with such matters. Moreover, the courts will also suggest cases to be referred to alternative dispute resolution or designate certain issues to be decided by administrative judges to ease docket congestion.

6 Timetable

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

In general, after receiving service of process, a defendant has between 20 and 40 days (depending on the method of service and type of proceeding) to respond by filing an answer or a motion to dismiss the complaint with the court. Any allegations in the complaint not denied in the answer are deemed admitted. Unlike in federal court, in New York state courts, related counterclaims by the defendant do not have to be filed at this time, but if a defendant chooses to file counterclaims they would generally be filed along with the answer. Either party may also join third parties to an action, who may be liable for a portion of the original claim or against whom a party may have additional claims related to the same transaction.

Under the New York Uniform Court Rules (NYCRR), parties can request a preliminary conference with the court any time after the completion of service (22 NYCRR section 202.12). Soon after such request is filed, the court will notify all parties of a scheduled conference date. At the conference, counsel should be prepared to discuss matters, including the simplification and limitation of legal issues, establishing

a timetable for the completion of all disclosure proceedings, and the establishment of the method and scope of any electronic discovery. At the conclusion of the conference, the court will issue a preliminary conference order, which is a written order including stipulations of counsel that sets forth a timetable for all forms of discovery, the timing for summary judgment motions and the time for the filing of a note of issue, which is the document that informs the court that the parties have completed discovery and are ready for trial.

7 Case management

Can the parties control the procedure and the timetable?

Subject to approval by the court, parties can agree to amend the preliminary conference order. Parties may also make a motion to the court to request extensions of the scheduling deadlines.

8 Evidence – documents

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 an affirmative duty to preserve documents. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy to put in place a 'litigation hold' to ensure the preservation of relevant documents. The scope of discovery is very broad, and includes documents that may not be helpful to a party's case. Generally, parties serve upon each other written requests for documents related to the claims or defences. Parties are required to produce all documents responsive to such requests that are within their possession, custody or control, and not privileged or otherwise immune from disclosure. Parties may object to the scope and nature of the requests. The court, upon motion, will resolve any disputes regarding the document requests.

9 Evidence – privilege

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

New York provides protection from disclosure for several categories of privileged documents. The most commonly invoked privileges are the attorney-client privilege and the attorney work-product doctrine. The attorney-client privilege protects confidential communications between an attorney and his or her client made for the purpose of facilitating or rendering legal advice. The attorney-client privilege can be applied to in-house counsel communications so long as the in-house lawyer is working in his or her capacity as a legal adviser, not a business adviser. The attorney work-product doctrine protects documents or communications created by counsel in anticipation of litigation. Unlike the attorney-client privilege, the work-product doctrine only affords a qualified protection; a court can order disclosure of work product if the requesting party can demonstrate substantial need or undue hardship.

New York also recognises the common interest and joint defence privileges as an extension of the attorney-client privilege. The common interest and joint defence privileges protect attorney-client privileged information shared between parties and their attorneys with a common interest in an actual or potential litigation against a common adversary. A few other non-attorney related privileges are recognised in New York. The spousal privilege protects communications between spouses. The physician-patient privilege protects communications between medical providers and patients. The clergy-penitent privilege protects communications between clergy members and penitents.

10 Evidence – pretrial

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

New York does not require written statements from lay witnesses before trial. Instead, parties are generally entitled to take oral depositions of lay witnesses before trial. Although not required, written witness statements may be submitted in the form of affidavits or declarations in support of pretrial motions.

On the other hand, expert witnesses are required to file written reports or disclosures setting forth the basis for their opinions before

trial and may also be required to attend depositions. Expert witnesses will also provide oral testimony at trial.

11 Evidence – trial

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

Trials are conducted through the presentation of live oral testimony from both lay and expert witnesses. Both sides are allowed to ask questions of the witnesses. The party who calls a witness will typically start with a direct examination of the witness followed by a cross examination by the opposing party, and then re-redirect and possibly recross. If a witness is unavailable for trial, deposition testimony may be admitted in certain circumstances. Documents and objects may also be presented at trial as evidence.

12 Interim remedies

What interim remedies are available?

There are four types of interim remedies available in the New York state courts. First, when a party is seeking a money judgment, the courts may issue an order of attachment against property, including, in particular, bank accounts, for the purpose of securing a final judgment (similar to a *Mareva* injunction). The party seeking the attachment must demonstrate that there is a risk that the judgment will not be satisfied; for example, such risk may occur when the defendant is a foreign corporation not qualified to do business in the state, or the defendant is about to remove assets from the state with the intent to defraud creditors.

Second, a party may obtain emergency relief through the issuance of a preliminary injunction, upon showing that a party threatens or is about to do an action that, if committed or continued during the pendency of the case, would cause injury or suffering tending to render a final judgment ineffectual. A temporary restraining order may also be granted pending a hearing for the preliminary injunction if it appears that immediate and irreparable injury, loss or damage will result before the hearing on the injunction can occur.

Third, the courts may order a temporary receivership. If a party can demonstrate a danger that property will be removed from the state, or lost, or materially injured or destroyed, the court may appoint a person (the receiver) to take control of designated property and see to its care during the course of a litigation or appeal.

Fourth, a party may file a notice of pendency for actions involving real property in which the title, possession or use and enjoyment of real property may be affected. The notice is filed with the county clerk and puts the world on notice that there is dispute over the potential rights regarding a specific piece of a real property.

Some provisional remedies may also be available in support of foreign proceedings. For example, an order of attachment may be issued pending an arbitration in a foreign country or to enforce a foreign money judgment under NY CPLR section 6201.

13 Remedies

What substantive remedies are available?

In civil actions in New York, the courts may order both legal and equitable remedies.

Legal remedies include money damages, including:

- compensatory damages;
- consequential damages;
- punitive damages (not available on contract claims);
- penalties;
- interest; and
- liquidated damages.

Equitable remedies include:

- temporary, preliminary and permanent injunctions;
- accounting, rescission, reformation of contracts and imposition of constructive trusts; and
- declaratory judgments and orders of specific performance.

New York statutorily provides for the payment of interest on litigated obligations. The timeline for accrual (whether post-judgment or pre-judgment) depends on the type of action. The rate of interest is fixed at 9 per cent per year unless otherwise provided by statute.

14 Enforcement

What means of enforcement are available?

Enforcement is usually achieved through supplementary proceedings in which the judgment creditor uses a series of devices to collect payment of the judgment. The first such device is a restraining notice, which is issued by the judgment creditor's attorney and served upon the judgment debtor or a garnishee (a person holding property belonging to the debtor). The notice enjoins the person served from transferring the debtor's property except to the sheriff or pursuant to a court order. The creditor can compel disclosure of the location of the debtor's assets without leave of the court for all matters relevant to the satisfaction of a judgment. The creditor can serve subpoenas on the judgment debtor or the debtor's friends, relatives or garnishees who may have information on the debtor's assets, including the debtor's bank, accountant, broker and employer. The subpoena can request attendance for the taking of a deposition, production of books and papers or responses to written questions. Once the assets are found, the creditor can request a turnover order instructing the debtor or garnishee to deliver assets or make payment to the creditor. A party who refuses to obey a turnover order may be found in contempt and fined or imprisoned until it obeys.

15 Public access

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

Court hearings in New York are, except in rare instances, open to the public, as are the documents filed with the court. Under certain rare circumstances, the court at its discretion may order some records and hearings to be sealed. Particularly, courts will seal matters regarding confidential or sensitive business information, such as those involving trade secrets, or information necessary to safeguard national security.

16 Costs

Does the court have power to order costs?

As is typical throughout the United States, New York courts generally do not have the power to award attorneys' fees and costs to the prevailing party. If however, the parties have provided in a contract for fee shifting, that arrangement can be enforced by the courts. The courts may also award a limited amount of costs and fees related to the proceeding to the prevailing party. Article 82 of the NY CPLR limits the costs awarded to US\$200 if the case terminates before the note of issue is filed, an additional US\$200 if the case terminates after the note of issue is filed but before trial, and an additional US\$300 if the case has gone to trial.

17 Funding arrangements

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?

Lawyers are allowed to establish contingency fee arrangements for most civil matters, except for cases involving a fee prohibited by law or a rule of court, a fee based on fraudulent billing, or in certain domestic relation matters. A contingency fee arrangement must be in writing. Lawyers are prohibited from sharing fees with non-lawyers.

There is no per se prohibition against parties using third-party funding. New York, however, does enforce a narrow construction of champerty and maintenance rules. New York Judiciary Law section 489 prohibits a 'third person' from buying or taking an assignment of a bond, promissory note, bill of exchange, book debt or thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. Alternatively, a party may share the risk with a third party through an insurance policy or indemnification agreement.

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

Insurance is available and commonly used to cover both the costs of defence (the legal costs) and payment of a judgment or settlement amount.

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

Class actions are a fairly common way for litigants with similar claims to seek collective redress. To sue as a class in New York, members must establish:

- numerosity – a class so numerous that joinder of all members, whether otherwise required or permitted, would be impractical;
- commonality – there are questions of law and fact common to the class that predominate over any questions affecting only individual members;
- typicality – the claims or defences of the representative parties are typical of the claims or defences of the class;
- adequacy – the representative parties will fairly and adequately protect the interest of the class; and
- superiority – the class action is superior to other available methods for fair and efficient adjudication of the controversy.

In addition to class actions, shareholders of a corporation or members of an unincorporated association may bring a collective action on behalf of the corporation or association, known as a derivative action, to enforce a right that the corporation or association may properly assert but has failed to assert.

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

New York is unique as to appealability, making a broad range of intermediate or 'interlocutory' trial court orders immediately appealable without waiting for a final judgment. Article 57 of the NY CPLR sets forth various categories of interlocutory orders that are appealable by right to the Appellate Division, including trial court orders regarding determinations on provisional remedies, substantive rights and statutory provisions. Trial court orders not appealable by right may still be appealed, if the party seeking to appeal is granted permission by the court that originally issued the order. All final orders and judgments are appealable by right to the Appellate Division.

Additionally, article 56 allows certain orders to be appealed by right to the Court of Appeals. For example, Appellate Division orders where there is dissent by at least two justices on questions of law may be appealed directly to the Court of Appeals. In addition, final trial court orders or Appellate Division orders where there have been determinations regarding the construction of the state or federal constitution can be appealed to the Court of Appeals. Otherwise, appeals may be taken to the Court of Appeals after first seeking permission from the Court of Appeals or the Appellate Division. The Court of Appeals is the court of last resort in New York; there are no additional state courts available to review appeals after the Court of Appeals.

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

Unless a treaty with a foreign country specifically requires it, New York is not compelled to recognise and enforce non-money judgments except for those that fall under the doctrine of comity. As for money judgments, New York has adopted the Uniform Foreign Country Money Judgments Act under article 53 of the NY CPLR. The Act dictates in detail the types of foreign money judgments that will be recognised. Generally, foreign judgments rendered under a system substantially similar to the American system will be recognised. However, judgments rendered under a system that does not provide for impartial tribunals or procedures compatible with the requirements of due process or by

foreign courts that did not have personal jurisdiction over the defendant will not be recognised.

If a party is seeking to obtain a money judgment in New York, it can take advantage of an expedited procedure under NY CPLR section 3213, which allows filing and service of a summons along with a motion for summary judgment in lieu of a complaint, skipping over the normal initial step of filing and serving a summons and complaint.

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

The same disclosure methods available for domestic actions may be used for proceedings pending in foreign jurisdictions. Under NY CPLR section 3102(e), a mandate, writ or commission issued by a foreign jurisdiction, requiring the testimony of a witness in the state, will be enforced to compel a witness to appear and testify in the same manner and by the same process employed for the purpose of taking testimony in domestic actions.

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

Arbitration law in New York is not based on the UNCITRAL Model Law. Rather, it is largely governed by contractual agreement and non-court affiliated arbitral associations. Court intervention is limited to determining if the dispute is arbitrable, whether the arbitration was sought in a timely manner and if the arbitrator's award should be confirmed (into a judgment), modified or vacated (see article 75 NY CPLR).

24 Arbitration agreements**What are the formal requirements for an enforceable arbitration agreement?**

An agreement to arbitrate must be in writing, but the writing does not need to be signed (NY CPLR section 7501). An agreement to arbitrate is viewed as a contractual arrangement and must satisfy all other legal requirements for any contract. New York does not require any particular form or words to make a valid arbitration agreement.

25 Choice of 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?**

Typically, parties will contractually agree to adopt the rules and procedures of one of the well-known arbitral associations such as the American Arbitration Association (AAA), JAMS or the International Chamber of Commerce's International Court of Arbitration (ICC). Arbitral associations often provide default rules and procedures for the appointment of an arbitrator. Parties may also stipulate to their own terms for choice of an arbitrator in the arbitration clause. If the arbitration agreement does not provide a method for the appointment, or if the agreed method fails, the court, upon application, may appoint an arbitrator (NY CPLR section 7504).

A party may seek judicial intervention to challenge the appointment of an arbitrator on the grounds that the arbitrator lacks impartiality or fails to meet the contractual standards. If a party seeks judicial intervention after the award, it may be burdened with the presumption that it knowingly waived the disqualifying relationship and proceeded without objection. Therefore, an early request to a court for intervention is advisable.

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

The available arbitrator options will depend on the chosen arbitral association or the court. Generally each arbitral association or court maintains a roster of available mediators and arbitrators. Eligibility for such rosters is based on each association or court's own criteria and

evaluation. For example, the Commercial Division of the New York County Supreme Court maintains a list of over 250 individuals that, among other qualifications, have received mandatory mediation training. Typically, the arbitral tribunal can provide arbitrators with sufficient knowledge or experience to address the complexity of the issues presented.

27 Arbitral procedure

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

The AAA, JAMS, ICC or other administering arbitral association typically provides procedural rules that apply to the conduct of the arbitration unless otherwise stipulated by the parties. Some arbitral associations such as the AAA provide different sets of rules depending on the type of the matter (labour, construction, commercial, international, etc). In the absence of a chosen arbitral association or procedural rules stipulated by the parties, article 75 NY CPLR provides a few basic rules. Before the hearing, the appointed arbitrator must swear an oath to decide the controversy faithfully and fairly. The arbitrator must choose a time and place for the hearing and properly notify all parties. The parties are entitled to be heard, to present evidence and to representation by an attorney. There must be a majority decision among arbitrators to determine any questions or render any awards (NY CPLR section 7506). The rest of the procedure is left up to the arbitrator or panel's discretion.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Most court intervention (which will be at the trial court level) occurs at the outset of the arbitration proceeding or after the final arbitration award. At the outset, a party may request court intervention to compel or stay arbitration proceedings. The courts may determine the arbitrability of the issue and the timeliness of the dispute. During an arbitration, the court may intervene at the request of the parties. Parties may request provisional remedies such as orders of attachment or preliminary injunctions. After the arbitration award, parties typically apply to the court to confirm, modify or vacate an award.

29 Interim relief

Do arbitrators have powers to grant interim relief?

The major arbitral associations typically grant arbitrators the authority to issue interim relief. A party may, however, prefer to seek interim relief from the courts, which typically can rule on interim relief more quickly. The courts may direct disclosure to aid in the arbitration and provide provisional remedies if necessary (NY CPLR section 3102(c) et seq, 7502).

30 Award

When and in what form must the award be delivered?

Each arbitral association has different rules regarding when and in what form an award will be delivered. Otherwise, the award must be delivered in accordance with the time fixed by the agreement, if any. Sometimes an award can be as simple as a determination of how much is owed by one party to another. When an arbitral association's rules have not been adopted, and the agreement does not state a fixed time for the award, the court may order a time for the delivery of an award. A court-ordered award shall be in writing, signed and affirmed by the arbitrator, and delivered either personally or by registered or certified mail (NY CPLR section 7507).

31 Appeal

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

A party can seek to vacate or modify an award on very limited grounds. An award will be vacated if a party can demonstrate that it was prejudiced by:

- corruption, fraud or misconduct in procuring the award;
- partiality of the arbitrator appointed as neutral; or

Update and trends

In April 2017, the Commercial Division of the New York County Supreme Court proposed an amendment to the alternative dispute rules that would require counsel for each party to certify to the court that they have discussed with their clients the availability of alternative dispute resolution options – through the Commercial Division's ADR programme or otherwise – before the date of the preliminary conference. The proposal is currently open for public comment.

Also, in May 2017, the New York County Supreme Court established a pilot programme to automatically refer certain commercial cases, not assigned to the Commercial Division justices, to mandatory mediation in the Commercial Division's ADR programme. The matters that shall be automatically referred will be cases in which the request for judicial intervention indicates the dispute is related to a contract and in which a request for a preliminary conference has been submitted. Cases may be exempt from the mandatory mediation if, upon a satisfactory showing, a party demonstrates unreasonable hardship or burden from participation in mediation.

- the arbitrator, or agency or person making the award, exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made (NY CPLR section 7511).

Additionally, a party may seek to vacate an award under the doctrine of manifest disregard of the law or evidence. This doctrine is severely limited, and applicable only in rare circumstances in which there is an egregious impropriety on the part of the arbitrators. Errors or misunderstandings of the applicable law generally do not fall under the doctrine.

Once a party has sought redress in the court system, all the normal rights of further appeal attach to any order from the lower court.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign and domestic awards are enforced through the courts. Once a domestic award is final, a party may seek confirmation of the award within one year after its delivery. Upon confirmation, the court will issue a judgment. That judgment is afforded all the same remedies and enforcement mechanisms as a judgment originally issued by the court (NY CPLR section 7514).

A foreign arbitral award will be treated much the same as a foreign judgment in New York. A non-money award may be enforced under the doctrine of comity, while article 53 of the NY CPLR permits the enforcement of a money award rendered by a substantially similar system of due process.

33 Costs

Can a successful party recover its costs?

Similar to court costs and attorneys' fees in civil litigation, a successful party is not generally entitled to the costs associated with the action. However, the arbitration clause in the agreement between the parties may provide for the allocation of costs. In the absence of a specific agreement regarding the costs, the arbitrator, as allowed by arbitration associations and the court, may, with discretion, award costs as part of the final award. Court-appointed arbitrators are not allowed to award attorneys' fees, unless provided by the arbitration clause (NY CPLR section 7513). However, some arbitral associations (for example, the AAA) allow arbitrators to award reasonable costs for legal representation of the successful party. Lastly, the court, upon application, may reduce or disallow any fee or expense it finds excessive, or allocate it as justice requires.

Alternative dispute resolution

34 Types of ADR

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

Mediation is the most common ADR process used in New York. The New York court system offers parties access to various ADR services

including civil mediation, civil neutral evaluation, summary jury trials and civil arbitration. New York has established a state ADR office within the Division of Court Operations. The state ADR coordinator works with judges, courts, administrators and members of the Bar to design dispute resolution programmes. The ADR office also oversees many community dispute resolution centres (CDRCs). The CDRCs primarily mediate cases referred by local courts and offer other dispute resolution services.

35 Requirements for ADR

**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 general, parties are not required to consider ADR before or during proceedings, with a few limited exceptions. For example, in disputes regarding attorneys' fees between US\$1,000 and US\$50,000, an attorney must notify the client about the right to use the Attorney-Client Fee Dispute Resolution Program before bringing the matter to court (22 NYCRR section 137). In addition, the New York Supreme Court Commercial Division may direct parties to a court-appointed mediator for the purpose of resolving some or all of the issues presented in the litigation (22 NYCRR section 202.70(g) Rule 3).

Miscellaneous

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

No.

Schulte Roth & Zabel

Robert M Abrahams
Robert J Ward
Caitlyn Slovacek

robert.abrahams@srz.com
robert.ward@srz.com
caitlyn.slovacek@srz.com

919 Third Avenue
New York
NY 10022
United States

Tel: +1 212 756 2000
Fax: +1 212 593 5955
www.srz.com

Venezuela

Carlos Dominguez

Hoet Peláez Castillo & Duque

Litigation

1 Court system

What is the structure of the civil court system?

The civil court system comprises the Supreme Court of Justice, superior courts, trial courts and municipal courts. Determining the court that will hear a particular case will depend on three aspects: the pecuniary value of the claim, the subject matter of the case and the territory where the court is located. Appeals are heard by the superior courts, whose decisions could be the subject of impugnation through a cassation resource, which will be decided by the Civil Chamber of the Supreme Court of Justice.

As for the number of judges sitting at each level, in the municipal courts, trial courts and superior courts, it is one judge per court. The number of courts at each level depends on the locality; for instance, in the Caracas district, there are 30 municipal courts, 12 trial courts and 10 superior courts.

2 Judges and juries

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

The judge is the director of the process and follows the procedural rules provided in the Code of Civil Procedure and Regulations. The claimant and the defendant, as the parties to the proceedings, are considered the owners of the process. The Code of Civil Procedure and Regulations determines the scope of the inquisitorial role of the judge in the process.

There are no juries in civil proceedings. Nonetheless, the parties can request the constitution of the court with associate judges. Each of the parties should present a list of three potential judges who meet the general requirements for becoming a judge. The parties then select one of the proposed judges from the opponent's list to sit as an associate judge.

3 Limitation issues

What are the time limits for bringing civil claims?

The statute of limitations for bringing civil claims is determined by the applicable laws and regulations, based on the nature of the civil claim to be filed.

The Civil Code provides a general time limitation applicable to all cases where a special provision is absent. According to the general provision, property-related actions will have a statute of limitations of 20 years, and the possibility to file personal actions will expire after 10 years.

The parties can suspend time limits once the claim has been filed and the defendant has been summoned. Another alternative to suspending the time limit is to register the claim and its admission before a Public Registry office.

Either way, the parties cannot suspend the statute of limitations prior to filing the claim.

4 Pre-action behaviour

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

Under the law, there are no prior mandatory actions that the parties must take before initiating a legal proceeding. However, in practice, the actions that the parties may take before initiating a proceeding are connected to the granting of powers of attorney in favour of legal representatives and gathering documentation to support the action.

The parties can also execute a pre-action procedure to gather evidence to be used in the action to be initiated.

5 Starting proceedings

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 Code of Civil Procedure establishes an ordinary proceeding for all claims that are not regulated by a special proceeding according to applicable law.

The ordinary proceeding commences with the presentation of a written submission of claim, which is admitted by the hearing court by means of an official writ.

Once the claim is admitted, the court issues a judicial notice to the defendant, which will contain a copy of the claim and the declaration issued by the court admitting the claim. After being served, the defendant must bring the corresponding allegations within 20 court-operating days counted from the date that the court officer records that the judicial notice has been accepted by the defendant.

In the event the defendant cannot be located, the court will issue a judicial notice to be published in the press. Afterwards, the defendant has 15 court-operating days to let the court know that he or she has been notified of the claim. If the defendant does not answer the published summons of the court, the latter will appoint a public defender that will act on behalf of the defendant. Once served, the public defender has 20 court-operating days to bring forward the corresponding defence.

The courts are currently experiencing problems in handling their caseload. This impacts their ability to decide upon and handle the cases that they are hearing. The time limits established in the Code of Civil Procedure are almost never observed. There is a projected new Code of Civil Procedure which will establish an oral procedure, which is expected to reduce the time taken by the courts to handle cases and to relieve the burden on the courts by creating new courts and separating the process into two stages.

6 Timetable

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

According to article 341 of the Code of Civil Procedure, once the claim is filed, the trial court will verify that the action is not contrary to public policy, morals and the rule of law. If it is not, then the claim is admitted.

After the defendant receives service of process, a period of 20 court-operating days will commence for the presentation of the defence. Once these 20 days have passed, both the claimant and the defendant have a common term of 15 court-operating days to gather all the evidence to support their rights.

After the term to gather the evidence has elapsed, the parties have an additional term of three court-operating days to challenge the evidence filed by the opposing party. When the period to challenge the evidence has passed, there is a term of three court-operating days for the court to decide on the admissibility of the evidence listed by the parties. Once this three-day period has passed, the parties have 30 days to produce all the evidence before court.

After the term to file the evidence has elapsed, the parties should file their closing arguments in writing on the 15th day. The parties then have eight court-operating days to file their comments on the written closing arguments of the opposing party.

After that, the court has a period of 60 calendar days to render a final decision on the merits of the claim.

These time limits can change depending on the subject matter of the claim and the law that regulates it.

It is common to find that, in practice, the time limits established in the Code of Civil Procedure are not observed. It is often the case that civil proceedings before a trial court can last from one to three years.

7 Case management

Can the parties control the procedure and the timetable?

As explained in the previous question, the director of the process is the judge and the time periods are established by law, even though the parties may agree to suspend the trial for a limited period of time in order to reach an agreement.

8 Evidence – documents

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

The Code of Civil Procedure does not establish an obligation to preserve evidence for ordinary proceedings. Note, however, that the interested party can force the other party to reveal a specific document in accordance with the provisions of article 436 of the Code of Civil Procedure.

Article 44 of the Code of Commerce establishes that the books and receipts must be kept for 10 years, counted from the date of the last entry in the book, and communications received and copies of the letters sent must be classified and kept for 10 years.

In addition, the principle of community of evidence is applicable. Such principle provides that evidence, once recorded in the file, does not belong to any of the parties but to the process, and the judge must assess all the relevant legal evidence furnished in order to solve the conflict; for instance, evidence furnished by the claimant may harm the claimant and favour the opposing party.

Article 509 of the Code of Civil Procedure contains the above principle, and its purpose is for the parties to tell the judge in their reports what evidence furnished by the opposing party favours them.

9 Evidence – privilege

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

In accordance with Venezuelan law, conversations and professional advice between attorney and client are considered confidential.

10 Evidence – pretrial

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

No. Parties must bring their witnesses and experts during the evidence production stage. The Venezuelan legal system does not stipulate any requirement regarding the exchange of evidence prior to trial.

11 Evidence – trial

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

In the ordinary process established by the Code of Civil Procedure, evidence is strictly provided in writing.

Experts must not issue their opinions orally, since article 467 of the Code of Civil Procedure stipulates that experts' reports must be

presented to the judge or the authorised commissioner in writing. Said report must contain a detailed description of the matter subject to assessment, the methods or systems used in the assessment and the conclusions reached.

However, witnesses must provide oral attestation before the judge and, once under oath, the questioning is performed orally by the party or the representative that is bringing the witness. Once the questioning has concluded, the opposing party or its representative may cross-examine the witness's answers regarding the matters addressed in the questioning, or others that may lead to the clarification, amendment or invalidation of the witness's declaration. Each question or cross-examination question shall address only one subject.

In addition, private documents issued by third parties that are not parties in the trial shall be ratified by such third parties by means of testimonial evidence.

12 Interim remedies

What interim remedies are available?

In accordance with the Code of Civil Procedure, the court can order provisional measures with the purpose of preventing an inefficient final decision. These provisional measures may be standard or special. Standard remedies include the attachment, seizure and prohibition to dispose of real estate. Special remedies include a variety of measures that can be requested from the court depending on the nature of the claim and the controversy.

13 Remedies

What substantive remedies are available?

'Moral' and material damages are provided in the Code of Civil Procedure. Punitive damages are not available in Venezuela.

The interested party can request the court to order that the compensation includes interest as well as the corresponding adjustment due to inflation or devaluation, depending on the nature of the claim.

14 Enforcement

What means of enforcement are available?

Once the decision is final and binding, the court grants the losing party 10 court days to comply with the decision. If this does not happen, an interested party can request the enforcement of the decision with the support of the law enforcement agencies in order to make the losing party comply with the provisions of the final decision.

In the case of monetary compensation, the interested party can request the attachment of assets to cover the amount to be paid in his or her favour.

If the judgment orders the surrender of a property, the court may use the law enforcement agencies to obligate the losing party.

If the judgment provides compliance with a personal obligation, the court may authorise the interested party to comply with such obligation, or to destroy it in the case of a negative personal obligation.

15 Public access

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

As a general rule, there is public access to court records, and court hearings are open to the public. Court documents such as pleadings, witness statements and orders are usually available to the public.

In special circumstances, the interested party can request the judge to have the court records kept private and the hearings held in private. The trial judge may consider this request due to the nature of the claim, or if the court records are threatened by external forces.

16 Costs

Does the court have power to order costs?

The court has the power to order costs to the losing party, and these are calculated based on the value of the claim. The maximum amount is 30 per cent of the value of the claim. Costs are ordered in the final decision, and only if the losing party has lost in every allegation and request. The favoured party has different remedies available to proceed before

court to collect such costs. There are no new rules governing how courts decide on costs.

17 Funding arrangements

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 Venezuela, fees can be received on a contingency basis, which means that the amount to be charged for professional fees will depend on the results of the legal proceedings. There is also the possibility of a ‘no win, no fee’ agreement.

However, article 1.482 of the Civil Code prohibits ‘cuota litis agreements’, where the lawyers receive a share of the proceeds of the claim. This provision prevents lawyers from executing agreements with their clients over the object of the litigation. Therefore, in Venezuela, lawyers and clients cannot reach a fee agreement involving a portion of the results of the claim.

Considering the above, although lawyers’ fees may depend on the results of the proceedings, a portion of what has been won in the legal proceedings cannot be used to pay for professional fees.

Currently, there is no legislation regulating whether parties can use third-party funding for their proceedings; as such, we can interpret that this is not prohibited. Regarding the possibility for this third party to share any proceeds of the claim, this will depend on the agreement reached.

In Venezuela, the defendant cannot share the risk with a third party unless there is a previous agreement with the third party that it will act as a guarantor.

18 Insurance

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

According to the Venezuelan Insurance Law, there are no prohibitions regarding insurance policies covering a party’s legal costs. This will depend on the type of policy taken out by the client and the insurance company. However, it is important to highlight that this kind of insurance is not common in Venezuela.

19 Class action

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

Article 26 of the Venezuelan Constitution stipulates the right to access the institutions of justice administration to enforce the rights and interests of litigants, whether ‘collective or common’.

To date there is no legislation developing this procedural legitimacy in a general matter; however, we do find some instances in isolated laws, such as the Law of Fair Prices, which stipulates (in article 3, No. 6) the protection of collective or common interests as one consumer right. There are other examples in, inter alia, Partial Regulation No. 1 of the Organic Statute of Municipal Regime on Participation of the Community, the Organic Statute for Urban Zoning and the Code of Criminal Procedure.

In a decision dated 13 December 2003, in the case of *Fernando Asenjo & others*, the Constitutional Chamber of the Supreme Court of Justice provided that, if the rights to be claimed are constitutional rights, the procedure to follow is a constitutional injunction.

An action for the protection of civic rights (either collective or common) is the most appropriate procedure if the aim is:

- to obtain compensation for damages;
- to request compliance with obligations;
- to prohibit an activity or proceedings carried out by the defendant;
- to request the destruction or limitation of harmful property; or
- to remedy a situation that has become harmful or threatening to the common quality of life.

The judgment thereof may order the defendant to perform certain obligations and to compensate the community or groups affected;

the judge will signal which social or public institutions or persons are owed compensation.

There have not been any developments in Venezuela regarding class actions since the above-mentioned judgment.

20 Appeal

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

The interested party can only file an appeal when the pecuniary value of the claim is equivalent to or higher than 500 tax units (one tax unit currently equals 177 bolivars), and the decision causes a burden to the appealing party.

There is no right of further appeal. The only remedy against a decision issued by a superior court that has already been appealed is the cassation remedy; such remedy only applies in extraordinary circumstances.

A party may also appeal interim acts or judgments that cause such a party an irreparable burden.

There are also special remedies for certain interim acts, such as against a decision where the capacity of the court is decided.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Any judgment or order given by a foreign court will be recognised and accepted by the courts of Venezuela without retrial or re-examination on the merits through the procedure of exequatur, provided that the following requirements are met:

- the judgment is not rendered on property rights over real estate within the territory of Venezuela, or the exclusive jurisdiction over the matter that could correspond to Venezuela has not been seized;
- the foreign court had jurisdiction in accordance with general principles of jurisdiction;
- the judgment is final (res judicata) in the jurisdiction where it was rendered;
- the judgment is rendered on civil or commercial matters;
- service of process has been properly effected;
- the judgment does not conflict with a judgment issued by the Venezuelan courts; and
- the judgment does not contradict Venezuelan public policy provisions.

To execute a foreign judgment in Venezuela the procedure is as follows:

- an exequatur petition must be filed together with the judgment to be enforced in Venezuela. This request must identify the parties, and all supporting documentation must be duly authenticated, notarised and translated into Spanish;
- the defendant must be served in accordance with the provisions of the Code of Civil Procedure; and
- the process will continue to follow a special procedure for the recognition and enforcement of foreign judgments.

22 Foreign proceedings

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

The procedure to obtain evidence for use in civil proceedings in other jurisdictions is the letter rogatory, which must be issued by the foreign court and addressed to the relevant Venezuelan court. Letters rogatory are requested in accordance with the procedures contained in the Code of Civil Procedure and international treaties ratified by Venezuela.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The Venezuelan Law of Commercial Arbitration (LCA), enacted on 7 April 1998, reflects the provisions of the UNCITRAL Model Law to a large extent. It is applicable to both domestic and international commercial arbitrations.

The LCA provides that all disputes that can be resolved, and that arise or have arisen between individuals or entities capable of transacting, may be submitted to arbitration – that is, the object of the dispute can be ‘disposed of’ by the parties and, by virtue of the law, the parties have legal capacity for the disposition of their assets and rights.

The only disputes that cannot be resolved through arbitration are the following:

- disputes dealing with matters contrary to rules of public policy or subject to criminal law (except for the amount of the civil liability, provided that it has not been fixed by a final judgment);
- matters concerning the powers or functions of the state, or persons or entities of public law;
- disputes regarding the status or the civil capacity of individuals;
- disputes involving the property or rights of legally disabled persons without prior judicial authorisation;
- disputes that are the object of a final judgment, except for those property consequences that may arise from their enforcement insofar as they exclusively concern the parties to the proceedings and have not been determined by a final judgment; and
- disputes concerning the contractual leasing of housing.

The LCA establishes that arbitration can be institutional or independent (ad hoc). Institutional arbitration is performed through arbitration centres referred to by the LCA or those created by other laws. Independent arbitration is regulated by the parties without the intervention of arbitration centres.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The LCA establishes that an arbitration agreement is a reciprocal statement of will whereby the parties submit to arbitration all or any of the controversies that have arisen or may arise between them with respect to a legal relationship, either contractual or non-contractual. The arbitration agreement can be contained in a clause that is part of a larger agreement or can arise out of a separate arbitration agreement.

By virtue of the arbitration, the parties oblige themselves to submit their controversies to the decision of arbitrators and waive any rights to bring claims before domestic courts. The arbitration agreement is exclusive and excludes the jurisdiction of local courts.

The arbitration agreement must be evidenced in writing by any document or set of documents that demonstrate the consent of the parties to resort to arbitration. The reference made in a contract to a document containing an arbitration clause will be considered as an arbitration agreement, provided that the contract was made in writing and the reference entails that the clause is part of the contract.

The arbitration agreement should state:

- the nature of the arbitration (either institutional or independent);
- the matter or elements of the contract submitted to arbitration;
- the language in which the arbitration is to be conducted;
- the number of arbitrators that will form the arbitral tribunal and its nature (either of law or equity);
- the applicable law;
- any information necessary to ensure that proper notices can be given to the parties; and
- any further procedural aspects that the parties agreed to in order to resolve a potential dispute between them in the most expeditious way.

When an arbitration agreement is part of a contract, it is considered as an independent agreement that is separate and different from the remaining provisions of the contract. The decision of the arbitral tribunal on the nullity of the contract does not necessarily entail the nullity of the arbitration agreement.

In ancillary contracts, the arbitration agreement must be made expressly and independently of the main contract.

25 Choice of 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 there is no agreement as to the number of arbitrators, the tribunal will consist of three arbitrators. If the parties fail to agree on the selection of the arbitrators, each party will choose one, and the two arbitrators will select a third arbitrator, who will be the chairperson of the arbitral tribunal.

If any of the parties are reluctant to appoint their arbitrator, or if the two arbitrators cannot agree on the appointment of the third, either party can request a competent first-instance judge to appoint such arbitrator (ad hoc arbitrations) or ask the general secretary of the arbitration centre to do so (institutional arbitrations).

The arbitrators can be challenged and can disqualify themselves pursuant to the grounds for challenge and self-disqualification provided in the Code of Civil Procedure.

When all or the majority of the arbitrators have disqualified themselves or have been successfully challenged, the arbitral tribunal will declare its duties at an end, and the parties will be free to resort to the courts or restart the arbitral proceedings.

In the case of challenge or self-disqualification of the arbitrators, the LCA establishes that the arbitral proceedings will be suspended from the moment the arbitrator declares his or her self-disqualification, accepts the challenge or if the proceedings for any of these actions are initiated. The suspension will remain in place until the issue is resolved, and it will not affect the validity of any acts previously performed.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Depending on the arbitration centre chosen, the list of arbitrators might change.

If it is an arbitration procedure taking place before the Arbitration Centre of the Caracas Chamber, the list is composed of more than 100 lawyers, including international arbitrators. On the other hand, if the arbitration procedure is taking place before the Conciliation and Arbitration Centre of the Venezuelan–American Chamber, the list goes up to 150 lawyers, including international arbitrators.

Both lists are sufficient to meet the needs of a complex arbitration, given that they are composed of the most outstanding and experienced lawyers in Venezuela.

27 Arbitral procedure

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

In accordance with the LCA, the parties are free to select the rules of the arbitral procedure. If no express provision is made in the arbitration agreement (that is, submission to institutional rules), the LCA’s general procedural rules will apply.

28 Court intervention

On what grounds can the court intervene during an arbitration?

There is minimal intervention by the courts in the arbitral process. However, they can provide assistance with certain procedural matters.

With the approval of the tribunal, the arbitral tribunal or any of the parties can ask the courts for assistance in the furnishing of the necessary evidence and the enforcement of precautionary measures and the arbitral award if the losing party does not voluntarily comply with it.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Yes. Except as otherwise agreed by the parties, the arbitral tribunal can order any interim or conservatory measures deemed necessary regarding the litigated matter.

The arbitral tribunal can demand sufficient guarantees from the requesting party.

30 Award

When and in what form must the award be delivered?

The LCA provides that awards must be issued in writing and signed by the arbitrator or arbitrators forming the arbitral tribunal. Awards can be issued at any time during the arbitral procedure (generally after evidence and final conclusions have been produced by the parties).

In arbitral proceedings with more than one arbitrator, the signatures of the majority of the arbitrators will suffice.

Unless the parties otherwise agree, the award must set out *ratio decidendi*, and it must also specify the date of issue and place of the arbitration. The award will be deemed to have been issued in the seat of arbitration.

31 Appeal

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

In accordance with the LCA, the only possible remedy against arbitral awards is an appeal for annulment.

The appeal for nullity must be filed in writing before a superior court in the place where the arbitral award was issued. If the award was granted overseas, the nullity of the award will be governed by the legislation of the country where the award was produced.

Pursuant to the LCA, the appeal for nullity must be filed within five working days following the notice of the award or any further activities by the arbitral tribunal to correct, clarify or supplement the award.

The filing of an appeal for nullity does not prevent or suspend enforcement proceedings of the arbitral award unless, upon request by a petitioner, the superior court grants a staying order subject to the prior posting of a bond by the petitioner to guarantee the enforcement of the award and any possible damages in the event that the petition is dismissed.

An arbitral award can be declared null and void when:

- the party against whom it is invoked proves that one of the parties was affected by an inability at the time of entering into the arbitration agreement;
- the party against whom it is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings being initiated, or was not able to assert his or her rights due to any reason;
- the constitution of the arbitral tribunal or the arbitral proceedings did not conform to the LCA;
- the arbitral award deals with a controversy not provided for in the arbitration agreement or contains decisions exceeding the agreement itself;
- the party against whom the arbitral award is invoked proves that the award is not binding on the parties or has been previously annulled or suspended according to the terms agreed on by the parties for the arbitral proceedings; or
- the court before which the nullity of the award is requested proves that, as a matter of law, the object of the dispute cannot be solved by arbitration, or that its subject matter is contrary to public policy rules.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The LCA establishes that, regardless of the country where the award has been issued, it must be recognised by the Venezuelan courts as final and binding.

It further provides that, upon the filing of a written petition before a court of first instance, the award will be enforced by the court without having to follow the *exequatur* procedure established in the Code of Civil Procedure.

The law imposes on the Venezuelan courts the obligation to recognise arbitral awards, both domestic and foreign. However, although recognition proceedings do not amount to a formal *exequatur*, judges have the obligation to examine the legality of awards and the proceedings that produced them in light of the principles of the *exequatur*.

The party that invokes an award or requests its enforcement must file, along with the petition, a copy of the award certified by the arbitral tribunal, with a translation into Spanish if necessary.

The enforcement of an award must be made in the same way as the enforcement of a court judgment.

The recognition or enforcement of arbitral awards, regardless of the country where they were issued, can be denied only when:

- the party against whom the arbitral award is invoked proves that one of the parties was affected by an inability at the time of entering into the arbitration agreement;
- the party against whom the arbitral award is invoked had not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or he or she was not able to assert his or her rights;
- the constitution of the arbitral tribunal or the arbitral proceedings did not conform to the law of the country where the arbitration was performed;
- the arbitral award deals with a controversy not provided for in the arbitration agreement or contains decisions that exceed the agreement itself;
- the party against whom the arbitral award is invoked proves that the award is not binding on the parties or has been previously annulled or suspended by an authority with jurisdiction according to the terms agreed by the parties for the arbitral proceedings;
- the court before which the recognition or enforcement of the arbitral award is requested proves that, as a matter of law, the subject matter is contrary to public policy rules, or the object of the controversy cannot be resolved through arbitration; or
- the arbitration agreement is not valid pursuant to the law to which the parties submitted it.

The enforcement procedure of foreign and domestic awards has not been affected by the political landscape. However, in the case of enforcement of awards ruled against the state, the procedure might be affected by the political landscape.

33 Costs

Can a successful party recover its costs?

Unless otherwise agreed, the arbitration costs will be fixed by the arbitral tribunal in the arbitral award. The arbitral award will state the proportion in which the costs will be covered by the parties.

Alternative dispute resolution

34 Types of ADR

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

The most common alternative means of dispute resolution in Venezuela are arbitration, conciliation, mediation and proceedings before a Justice of the Peace.

Venezuela is currently evaluating alternative means of ADR to improve access to justice and to control the administrative costs of the judicial system; such alternative means are being introduced as part of a trend towards judicial reform that has grown in Latin America in recent decades. It is important to highlight that, in Venezuela, these means are alternative and do not substitute ordinary justice.

The most important step taken has been the inclusion of ADR in the constitution; in this text, ADR methods are constitutionally acknowledged as components of the justice system, which constitutes the starting point and basis for their development and effective application in the country.

35 Requirements for ADR

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?

Article 257 of the Code of Civil Procedure establishes that, at any stage or state of the process before the rendering of judgment, the judge may lead parties to conciliation regarding the main issue or any particulars, even when procedural, by explaining the reasons.

Regarding arbitration, the Conciliation and Arbitration Regulations of the Business Centre of Conciliation and Arbitration establish that, once the period for answering the complaint has elapsed, and if the period for replying to the counterclaim has also elapsed, the executive director shall notify the parties of the date and time when a hearing will take place in order for these parties or their representatives to appoint one or several conciliators, who shall assess the matter in controversy and try to reach an agreement between the parties.

The court cannot force the parties to participate in an ADR process if they do not wish to do so.

Miscellaneous

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

If the duration of the arbitral proceedings is not stated in the arbitration agreement, this period will be six months from the constitution of the arbitral tribunal. This period can be extended by the tribunal one or more times, ex officio or upon request of one of the parties or their attorneys-in-fact with express power to do so. The days when the

proceedings are suspended or interrupted for legal reasons will be counted for the purpose of the six-month period.

The arbitral tribunal is empowered to decide on its own jurisdiction, including exceptions concerning the existence or validity of an arbitration agreement.

The arbitral tribunal will conduct any hearings it considers necessary, with or without the participation of the parties, and will decide whether to hold evidentiary hearings or hearings for oral allegations, or even whether the issue is to be decided based on the documents only or other evidence produced, or both.

The arbitral award may be clarified, corrected or supplemented by the arbitral tribunal, ex officio or upon request of one of the parties, within 15 working days following issue of the award.

The arbitral tribunal will cease its duties:

- when the fees provided for by the LCA or the applicable regulation are not paid in a timely manner;
- by the will of the parties;
- by the issuance of the award or the ruling correcting or supplementing it; or
- by the expiry of the period set for the proceedings or any extension thereof.



Carlos Dominguez

cdominguez@hpcd.com

Av. Venezuela, Edificio Atrium, Piso 3
 Urb. El Rosal
 Caracas 1060
 Venezuela

Tel: +58 212 201 8611
 Fax: +58 212 263 7744
 www.hpcd.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Dispute Resolution
ISSN 1741-0630



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law