

# DISPUTE RESOLUTION 2022

Contributing editors

**Martin Davies and Alanna Andrew**

*Latham & Watkins LLP*



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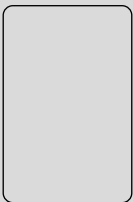
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**Contributing editors****Martin Davies and Alanna Andrew**Latham & Watkins LLP

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Lexology Getting the Deal Through is delighted to publish the twentieth edition of *Dispute Resolution*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology 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 Egypt and South Korea.

Lexology 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.lexology.com/gtdt](http://www.lexology.com/gtdt).

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.

Lexology 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 editors, Martin Davies and Alanna Andrew of Latham & Watkins LLP, for their continued assistance with this volume.

 LEXOLOGY  
**Getting the Deal Through**

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# Introduction

**Martin Davies and Alanna Andrew**

Latham & Watkins LLP

As 2022 rolls on, we see the end of the remaining provisional measures commenced in 2020 to address the pandemic and a shift back to in-person court hearings. That said, the courts and their users have benefited from some of the efficiencies brought about by embracing technology, and litigators are now well versed in electronic working and virtual hearings. Lord Reed, President of the Supreme Court, and Lord Hodge, Deputy President of the Supreme Court, described the ongoing use of technology to the House of Lords Constitution Select Committee on 6 April 2022. Lord Hodge noted with approval that electronic bundles and computer screens have replaced 'great wedges of paper', and that hybrid hearings have ensured hearings can go ahead where covid or scheduling difficulties might otherwise delay them, albeit they have caused a certain 'lack of spontaneity in debate'. We may see further electronic working reforms in line with the proposals of the Master of the Rolls, Sir Geoffrey Vos, who has recently advocated for a new online three-tier system focused on resolving disputes.

Another central theme of the House of Lords Constitution Select Committee evidence session was the role of the English courts as an international centre of legal excellence and a global champion of the rule of law. Lord Reed and Lord Hodge listed an impressive array of cases holding the government to account, dealing with disputes of real importance from around the world, and the courts' work to engage with global judicial bodies. In keeping with this image, the English courts have long been the forum of choice of Russian oligarchs for dealing with

their business and personal disputes. However, following the Russian invasion of Ukraine, government ministers have called out 'white-collar collaborators', including lawyers, for their work with wealthy Russians and threatened 'penalties'. Against this backdrop, and with the impact of sanctions, law firms in England and around the world will need to tread very carefully indeed.

The effects of Brexit continue to cause uncertainty around the recognition and enforcement of judgments across borders. On 18 November 2021, the European Parliamentary Research Service published a briefing paper regarding whether England could accede to the Lugano Convention. The paper suggested that accession was inextricably tied to close economic integration with the European Union and that the Hague Judgments Convention might be a better avenue. No doubt the position will become clearer throughout 2022.

On a brighter note, open justice and transparency continue to be hot topics, and this year brings with it a publicly accessible platform of new court and tribunal decisions from the UK Supreme Court, the Court of Appeal, the High Court and the upper tribunals. That platform is the National Archives Find Case Law website, which James Cartlidge, the Justice Minister, says will 'ensure court judgments are easily accessible to anyone who needs them'. Under the guidance of the Ministry of Justice and HM Courts & Tribunals Service and the judiciary, the platform will be expanded to include legacy judgments and decisions of lower courts and tribunals.

# Australia

Colin Loveday

Clayton Utz

## LITIGATION

### Court system

#### 1 | 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 High Court matters are appeals from the appellate divisions of the state and territory Supreme Courts and the Federal Court of Australia. Leave to appeal to the High Court of Australia is not as of right, but requires the granting of special leave to appeal. 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 all justices are able to sit. Most other matters are heard by at least two justices, although some applications for special leave are not afforded an oral hearing. Decisions of the High Court of Australia 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 appeal to the High Court of Australia). Those state and territory Supreme Courts have unlimited civil jurisdiction, but ordinarily only hear claims over a certain monetary threshold (with smaller claims being determined by lower courts). In most state and territory 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 to promote the just, quick and efficient resolution of matters.

The appellate division of state Supreme Courts is either the Court of Appeal or the Full Court of the relevant Supreme Court. Typically, three judges will hear appeals from single judges of the Supreme Court and from certain other state courts and tribunals, although a five-judge bench may be convened for certain cases. The Court of Appeal has both appellate and judicial review jurisdiction in respect of all other courts and tribunals in the state and territory system.

Most states and territories have two further levels of inferior courts. These are courts of limited jurisdiction granted by statute, which are confined to hearing matters generally below the threshold limits for the relevant Supreme Court and subject to certain subject matter limitations. The district court (in some states called the county court) is the intermediate court in this hierarchy and has jurisdiction over most civil matters within a monetary threshold. It has both trial jurisdiction and appellate jurisdiction. Some district courts have commercial lists. A local court (in some states called the magistrates court) handles smaller, summary matters.

In keeping with the hierarchy of courts established under the laws of each state, there is also a parallel hierarchy of courts that 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 Federal Court of Australia has jurisdiction

to hear disputes on issues including competition and consumer protection laws, bankruptcy, corporations, industrial relations, intellectual property, native title and taxation. Certain discrete, high-volume areas of law are managed by a discrete court established for this purpose. For example, the Family Court of Australia has jurisdiction to resolve most complex family law disputes. Less complex disputes relating to child support, administrative law, bankruptcy, industrial relations, migration and consumer laws are heard at first instance by the Federal Circuit Court of Australia (formally the Federal Magistrates Court) and are then appealable (generally as of right) to the Federal Court of Australia.

There are also various tribunals designed to hear specific categories of disputes. These tribunals are ordinarily less formal than the court system. There are often no rules of evidence, and it is expected that parties will be self-represented. The decisions of these tribunals are subject to either appeal or judicial review by the relevant state, territory or federal court.

### Judges and juries

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

The judicial system in Australia is independent of the other arms of government. This principle is enshrined in the Constitution of Australia. As such, 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 1970 (NSW) 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'. Similarly, the Federal Court of Australia Act 1976 (Cth) provides that, unless the court otherwise orders, civil trials are to be determined by a judge without a jury.

### Limitation issues

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

Limitation periods are governed by the relevant state, territory or federal legislation. Importantly, they are a matter of substantive law rather than a matter of procedural matter. Limitation periods vary in terms of length and how they are calculated depending upon the underlying 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) limitation periods. A party may also be estopped from relying on the expiry of a limitation period, if, for example, they have made previous representations that they would not rely on the limitation period.



## Pre-action behaviour

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

In both federal and state jurisdictions, legislation imposes pre-litigation requirements on parties involved in civil disputes. A failure to comply with pre-litigation requirements does not have jurisdictional consequences for an applicant, but it may be taken into consideration when awarding costs, and may have personal consequences for the relevant practitioner.

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.

## Starting proceedings

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

Proceedings are commenced by filing an originating 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 relevant court rules. In many jurisdictions, filing is through an online system, and it is possible to conduct a search of the court files to determine whether claims have been filed but not served.

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 matters the subject of litigation. Australia is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (commonly called the Hague Convention). The Hague Convention is designed to simplify the process of serving court documents internationally 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. In addition, courts will refer parties to early mediation and sometimes other alternative dispute resolution options, to minimise the litigation of disputes that could be otherwise resolved.

## Timetable

### 6 | 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 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. Courts provide guidelines as to the approximate time period for the delivery of judgment, but these are indicative only.

## Case management

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

Australian courts have broad case management powers. These powers are also the subject of comprehensive court rules and practice notes, which provide parties with guidance as to how those powers will be exercised and what is expected of them. Each court has its own allocation system to determine which judge is assigned to determine a particular case. Parties can challenge the allocation of a judge to hear a matter in very restricted circumstances. Judges have 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. Courts also issue standard directions or practice notes that set timetables and practices with which parties are expected to comply, 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 wide discretion to impose sanctions (which may include adverse costs orders) on a party that has not complied with court orders or directions.

## Evidence – documents

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

There are both common law and statutory requirements to preserve evidence pending trial. Severe sanctions apply for the intentional or reckless destruction of evidence. The compulsory disclosure process, once litigation is ongoing, is referred to as 'discovery'. Discovery is an interlocutory procedure whereby a party can obtain disclosure and the 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, discovery is not ordinarily ordered 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.

## Evidence – privilege

### 9 | 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.

Australia has a system of broadly consistent evidence acts across all jurisdictions. These 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 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.

## Evidence – pretrial

### 10 | 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, witness statements or expert reports before 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) or an individual expert's report. Unless otherwise ordered, an expert's evidence-in-chief must be given through one or more expert's reports.

## Evidence – trial

### 11 | 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 may 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 orally in court by

counsel. A witness will have access to their original written statement throughout this process.

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

## Interim remedies

### 12 | What interim remedies are available?

Courts have wide discretion to determine whether to grant interim relief to a party 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 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 the order is sought 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; and
- orders that apply to Australian assets in the context 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).

## Remedies

### 13 | What substantive remedies are available?

Should a matter in Australia run through to trial, the relevant judge will publish a judgment regarding the matter. A judgment is a formal order by a court that 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. Courts will publish written reasons for judgment in all but the most minor of interlocutory applications. Parties can also request written reasons for judgment. In some circumstances a judge will give *ex tempore* judgments (orally, at the time of the application), but will still publish written reasons at a later date.

Generally, damages are awarded 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.

## Enforcement

### 14 | 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 this 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.

## Public access

### 15 | 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, are now available to the public via online portals in some jurisdictions. 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 have been tendered into evidence or otherwise disclosed in open court.

## Costs

### 16 | 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 guide the exercise of that power.

Ordinarily, costs follow the event, which means that 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 or client costs); and
- those that arise by order of the court, which can either be on an ordinary basis (party or party costs) or an indemnity basis (solicitor or 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 that is rejected can entitle the party making the offer to obtain costs on an indemnity basis at the conclusion of trial. However, the mere making of an offer is not sufficient to entitle a party to indemnity costs. Other discretionary factors will also be considered.

## Funding arrangements

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

'No win, no fee' agreements 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 pay legal fees. 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. However, 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 a court's consideration of 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 litigious process entails. Courts have 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). The common fund order and the timing of such orders is currently subject to developing jurisprudence.

## Insurance

### 18 | 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'.

## Class action

### 19 | 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 outweigh individual issues.
- The rules expressly allow for the determination of 'subgroups' 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 arise 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 common in class actions.

## Appeal

**20** | 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.

The relevant court legislation or procedural provisions set out the relevant rules of appeal, and whether appeal is as of right or leave to appeal is required.

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.

## Foreign judgments

**21** | 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.

## Foreign proceedings

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

Australia is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention), 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 Convention

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

### UNCITRAL Model Law

**23** | 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, which are largely based on the UNCITRAL Model Law. Section 2(a) of these 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.

### Arbitration agreements

**24** | 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.

### Choice of arbitrator

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

If the parties fail to make an agreement, there will be one arbitrator (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 of which it becomes aware after the appointment was made, and must do so within 15 days. As is typical, the arbitral tribunal itself decides the challenge; however, if rejected, a party may request the court to also make a determination.

### Arbitrator options

26 | 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 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.

### Arbitral procedure

27 | 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.

### Court intervention

28 | 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.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, unless otherwise agreed between the parties. This power to grant interim measures allows the arbitral 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 an arbitral tribunal can be enforced, upon the application of a party, by the court.

### Award

30 | 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.

### Appeal

31 | 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 that 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 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.

### Enforcement

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

With regard 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 regard 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.

### Costs

33 | Can a successful party recover its costs?

The costs of an arbitration are at the discretion of the arbitral 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

### Types of ADR

34 | 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.

## Requirements for ADR

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

There 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. For example, 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

### Interesting features

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

Class actions continue to be a feature of the Australian litigation landscape, often run with the support of third-party litigation funders. A wide range of class actions continue to be filed, including a number that have been filed on behalf of consumers said to have suffered loss as a result of misconduct by financial institutions. Class actions are also becoming increasingly prevalent following regulatory actions. Multiple overlapping class actions continue to be a feature and are causing difficult case-management issues. Finally, while third-party litigation funding has been well established in Australian class actions, there is still debate concerning the adequacy of regulation of that sector.

## UPDATE AND TRENDS

### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

About 30 years ago, Australia's federal class actions regime was introduced to enhance access to justice, resolve disputes more efficiently and avoid respondents facing multiple individual proceedings with the potential for inconsistent findings. It was also intended to reduce the costs for both the parties and the courts. Most people with class action experience agree that the class action regime, while not perfect, has largely met these objectives, and it is not surprising that class action regimes now exist in Victoria, New South Wales, Queensland, Tasmania and, soon, Western Australia.

While objectives have largely been met, this has not stopped class actions from being the focus of different enquiries that have all made recommendations for legislative and procedural reform. Most recently, there has been a focus on the role that litigation funding plays in class actions in Australia. Exactly what, if any, reforms will arise in this area is currently unclear.

There are two other aspects of the class action regimes that are likely to see further development and, potentially, reform. The first

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relates to the management of multiple and competing class actions. It is a not uncommon feature in Australian class actions, but there is no prescriptive power in any class action regime that dictates what should occur when a court is faced with such a scenario. At present, the courts rely on the general power to ensure justice is done, but this has led to different approaches being taken by different courts.

Second, at present there is some divergence in approach as to the making of soft closure orders. It is likely we will see further developments in this area.



# Austria

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## LITIGATION

### Court system

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

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

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

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

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

### Judges and juries

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

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

### Limitation issues

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

Limitation periods are determined by substantive law.

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

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

### Pre-action behaviour

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

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

### Starting proceedings

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

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

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

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

### Timetable

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

The statement of claim is filed with the court and passed on to the defendant, along with an order to file a statement of defence. If the defendant replies in time (four weeks from receipt), a preparatory hearing will be held, which mainly serves the purpose of shaping the further proceedings by discussing the main legal and factual questions

at hand as well as questions of evidence (documents, witnesses and experts). In addition, settlement options may be discussed. After an exchange of briefs, the main hearings follow.

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

### Case management

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

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

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

### Evidence – documents

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

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

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

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

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

### Evidence – privilege

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

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

### Evidence – pretrial

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

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

### Evidence – trial

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

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

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

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

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

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

### Interim remedies

#### 12 | What interim remedies are available?

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

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

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

### Remedies

#### 13 | What substantive remedies are available?

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



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

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

## Enforcement

### 14 | What means of enforcement are available?

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

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

Generally, the usual methods for enforcement are:

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

Enforcement will be executed by a bailiff, who is an executive of the court and must comply with the court's orders. With respect to immovable property, three types of enforcement measures are available:

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

With respect to movable property, Austrian law distinguishes between:

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

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

## Public access

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

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

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

## Costs

### 16 | Does the court have power to order costs?

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

on costs is subject to redress, along with or without an appeal on the court's decision on the merits.

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

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

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

## Funding arrangements

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

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

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

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

## Insurance

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

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

## Class action

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

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

A joinder may be filed if the court has jurisdiction for all claims, the same type of procedure applies or the subject matter is of the same nature regarding facts and law. Another possibility is to organise mass claims and assign them to an institution that then proceeds as a single claimant.

## Appeal

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

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

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

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

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

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

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

## Foreign judgments

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

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

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

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

The basic requirements for enforceability include the following:

- the award is enforceable in the state of issuance of the judgment;
- an international treaty or domestic regulation expressly provides for reciprocity between Austria and the state of issuance in the recognition and enforcement of judgments;

- the document instituting the proceedings was properly served on the defendant;
- the judgment to be enforced is produced with a certified translation; and
- there are no grounds on which to refuse recognition of enforceability.

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

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

## Foreign proceedings

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

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

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

## ARBITRATION

### UNCITRAL Model Law

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

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

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

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

### Arbitration agreements

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

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

An arbitration agreement must:

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

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

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

### Choice of arbitrator

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

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

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

### Arbitrator options

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

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

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

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

### Arbitral procedure

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

The parties are free to agree on the rules of procedure (eg, by reference to specific arbitration rules) within the limits of the mandatory provisions of the ACCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal will, subject to the mandatory provisions of the ACCP, conduct the arbitration in such a manner as it considers appropriate.

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

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

### Court intervention

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

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

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

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

### Interim relief

- 29 | Do arbitrators have powers to grant interim relief?

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

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

### Award

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

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

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

### Appeal

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

The only available recourse to a court against an arbitral award is an application to set aside the award. This also applies to arbitral awards on jurisdiction. Courts may not review an arbitral award on its merits. The application to set aside is to be filed within three months from

the date on which the claimant has received the award. There are no appeals against an arbitral award.

An arbitral award shall be set aside if:

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

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

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

### Enforcement

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

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

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

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

### Costs

33 | Can a successful party recover its costs?

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

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

An exception to the above rule is found under section 609(2) ACCP, which empowers the arbitral tribunal to decide upon the obligation of

the claimant to reimburse the costs of the proceedings if it has found that it lacks jurisdiction on the grounds that there is no arbitration agreement.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

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

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

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

### Requirements for ADR

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

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

## MISCELLANEOUS

### Interesting features

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

Not applicable.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Since July 2021, the Austrian legislature has been working on amending various laws of civil procedure, including the Austrian Code of Civil Procedure (ACCP). The legislative process is still ongoing.

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

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

The expansion of the digital file management system is a step towards digitalisation. The main aim is to become as efficient and paperless as possible. Digital files are already in use (eg, signatures in trials) but are limited in certain regards. The revised ACCP will be a step towards tackling such problems.

Originals of documents will not always be required to be transferred to the court. Nevertheless, in some cases, the law demands the originals to be submitted. Originals should also be transferred when copies are impossible to make or not beneficial for the cause. Through this amendment, the courts will be able to order the presentation of the original if there seems to be a signature missing or when the copy is questionable in general.

Furthermore, it will be clarified that the parties may not only be ordered to produce documents or objects but also may be specifically requested to bring these documents or other objects (in the original and as a transcript, or only as a transcript) to oral proceedings. It shall then be decided by the court whether and in which way these documents or objects shall be included in the file (in the original or, after a declaration of the parties, as a copy and, subsequently, as a scan) or whether a description thereof, a statement of the opposing party thereon or a statement that the evidence is not in dispute can suffice. This should contribute to the reduction of paper documents to be kept.

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

Moreover, parties will not always be obliged to transfer certificates to the court if desired by the counterparty so that the use of paper files is reduced further. Instead, parties should transfer digital copies of the certificates to both the court and the counterparty. Nonetheless, counterparties will be able to insist on the original. Digital copies will also not be required if the copying process is not unreasonable for the other party.

The use of qualified electronic signatures will also be introduced to replace handwritten ones.

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

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

It must be emphasised again that the above-mentioned changes are merely proposals at this stage and have not yet been enacted into law.

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# Belgium

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## LITIGATION

### Court system

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

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

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

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

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

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

At the bottom of the judicial hierarchy sit the 162 justices of the peace, which jurisdictions cover the 162 judicial cantons. These are small claim courts that deal with matters in which the disputed amount does not exceed €5,000 (with the exception of a few disputes that are expressly reserved by law to other jurisdictions) and with certain disputes over which they have exclusive jurisdiction, regardless of the amount in dispute, such as rental disputes, certain family disputes and consumer credits. Judgments handed down by a justice of the peace may be appealed before the court of first instance or the business

court, depending on the subject matter of the dispute, provided that the disputed amount exceeds €2,000.

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

### Judges and juries

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

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

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

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

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

### Limitation issues

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

The most common limitation periods are:

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

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



## Pre-action behaviour

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

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

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

## Starting proceedings

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

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

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

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

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

## Timetable

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

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

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

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

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

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

## Case management

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

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

## Evidence – documents

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

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

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

## Evidence – privilege

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

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

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

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

## Evidence – pretrial

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

There is no pretrial discovery process in Belgium.

## Evidence – trial

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

In Belgium, arguments are generally developed in writing and parties rarely call on witnesses. Whenever they do so, they produce written statements (affidavits) that are filed with the court and added to the list

of exhibits. The court may also decide to hear witnesses at the request of a party or ex officio. In such case, the judge will administer the oath to the witness and take their deposition. There is no right of cross-examination under Belgian law. Questions to witnesses must first be filed with the judge, who is charged with deciding whether they are relevant. The credibility of witnesses' statements is left to the appreciation of the judge. They cannot be ignored but are generally given less credit than statements supported by written documents.

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

## Interim remedies

### 12 | What interim remedies are available?

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

Under exceptional circumstances, these measures can even be obtained ex parte (eg, because the adverse party needs to be taken by surprise). As such, attachment or garnishment measures are available as a pretrial remedy if the claimant can show that he or she has a prima facie claim against the debtor and there is a risk that the debtor may become insolvent or try to avoid payment.

## Remedies

### 13 | What substantive remedies are available?

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

## Enforcement

### 14 | What means of enforcement are available?

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

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

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

## Public access

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

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

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

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

## Costs

### 16 | Does the court have power to order costs?

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

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

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

## Funding arrangements

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

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

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

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



## Insurance

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

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

## Class action

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

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

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

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

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

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

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

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

## Appeal

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

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

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

## Foreign judgments

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

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

### Judgments issued in the European Union

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

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

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

### Judgments issued outside of the European Union

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

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

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

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

- a certified copy of the foreign judgment;

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

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

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

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

### Foreign proceedings

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

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

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

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

## ARBITRATION

### UNCITRAL Model Law

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

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

The goal of the 2013 reform was to bring the rules in line with recent changes in international practice and the 1985 UNCITRAL Model Law while increasing the attractiveness of Belgium as a place for arbitration. However, instead of simply copying the 1985 UNCITRAL Model Law, the Belgian legislator took into account specificities of Belgian

arbitration practice. As such, Belgian arbitration law is not limited to international commercial arbitration but applies instead to all types of arbitration, whether domestic or international.

### Arbitration agreements

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

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

### Choice of arbitrator

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

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

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

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

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

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

### Arbitrator options

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

Belgian law does not require any specific qualifications in order to be appointed as an arbitrator. Thus, apart from legal capacity and the general requirements of independence and impartiality, the parties have the utmost freedom. They may, for example, determine the required

qualifications in the arbitration agreement or preclude certain persons from acting as an arbitrator by reason of their nationalities. Absent any agreement, the parties have complete freedom to appoint whoever they believe is best fit for the task.

### Arbitral procedure

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

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

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

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

### Court intervention

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

Domestic courts can intervene during arbitration proceedings to:

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

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

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

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

### Award

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

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

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

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

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

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

### Appeal

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

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

#### Rectification/interpretation

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

#### Appeal

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

#### Request for setting aside

Third, in accordance with article 1717 of the Belgian Judicial Code, the parties may request the court of first instance to set aside the award (ie,

to file a claim for annulment). Under article 1717, an award may be set aside only on the following grounds:

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

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

Finally, please note that article 1718 of the Belgian Judicial Code provides that the parties may exclude any application for the setting aside of an arbitral award. However, this may be done only whenever none of the parties is a natural person of Belgian nationality or a natural person having his or her domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium.

## Enforcement

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

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

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

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

- there is no valid arbitration agreement;
- the party against whom the claim for leave to enforce is made was not given proper notice of the arbitral proceedings or was

otherwise unable to present their case, unless this irregularity had no impact on the award;

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

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

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

## Costs

### 33 | Can a successful party recover its costs?

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

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

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

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

In addition, please note that arbitration clauses in Belgium regularly provide that the parties shall recourse to conciliation or mediation

before resorting to arbitration. If such prerequisite has not been complied with and provided that the respondent invokes this irregularity in *limine litis*, the arbitral tribunal will be forced to suspend its mission.

### Requirements for ADR

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

When the parties have agreed to ADR, domestic courts will generally give effect to their agreement. In the absence of any agreement, domestic courts may suggest and encourage resorting to a certain type of ADR. In 2018, the Belgian parliament decided to reform certain provisions of the Belgian Judicial Code in order to promote alternative forms of dispute resolution. As of 12 July 2018, article 1734 now provides that the judge may order the parties to resort to mediation. As the parties may only oppose it jointly, it is sufficient for one party to be in favour of mediation to obtain a court order imposing it on the parties. In practice, however, this possibility is rarely used in commercial matters. The 2018 reform also amended article 444 of the Belgian Judicial Code, which now forces lawyers to consider ADR before going to trial.

## MISCELLANEOUS

### Interesting features

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

Not applicable.

## UPDATE AND TRENDS

### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

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

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

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# Cayman Islands

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## LITIGATION

### Court system

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

The main civil court of first instance is the Grand Court of the Cayman Islands (the Grand Court), which sits full-time with between six and eight judges, recruited from the Cayman Islands and other Commonwealth jurisdictions. The Grand Court has a specialist Financial Services Division, which deals with cases concerning mutual funds, exempt insurance companies, financial services regulatory matters, applications relating to trusts, corporate and personal insolvency, enforcement of foreign judgments and arbitral awards and applications for evidence pursuant to letters of request from other jurisdictions. Grand Court cases are almost always dealt with by a judge sitting alone. Certain small civil claims worth less than CI\$20,000 can be dealt with by a magistrate in the Summary Court.

Appeals from the Grand Court are heard in the Cayman Islands Court of Appeal (the Court of Appeal), which generally sits three or four times a year (and can, on payment of enhanced fees, be convened more often to deal with urgent matters). The Court of Appeal has a bench of approximately six justices of appeal, all of whom are recruited from outside the Islands and are usually sitting or retired Superior Court judges or justices of appeal from other Commonwealth nations. The Court of Appeal usually sits with a panel of three justices of appeal.

Appeal from the Court of Appeal is to the Judicial Committee of the Privy Council in London (the Privy Council).

### Judges and juries

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

Proceedings are usually adversarial in nature, and the judge does not normally have an inquisitorial role. The judge will listen to the evidence and legal submission of the parties, and make a reasoned decision, which is often handed down in written form.

Judges are selected in accordance with Part V of the Constitution. Judges and magistrates are appointed by the Governor, acting on the advice of the Judicial and Legal Services Commission. Positions are advertised openly, in many Caribbean and Commonwealth jurisdictions (including the United Kingdom). The selection process takes the form of a significant application form, shortlisting and interview. There are no specific diversity initiatives, but the Constitution contains a prohibition on discrimination, and the international nature of the candidates tends to favour a diverse bench in any event.

Section 21 of the Judicature Act provides that a party may apply for the case to be tried by a jury (of seven), but this course of action is exceptional. Juries are selected from registered electors and must be under the age of 70. Sections 8 to 21 of the Judicature Act set out a comprehensive process for the selection of jurors. Attorneys who are

actively engaged in litigation practice are among those persons exempt from jury service.

### Limitation issues

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

The Limitation Act provides that the time limit for bringing civil claims in tort (apart from defamation and personal injuries) and contract is six years from the date of accrual of the cause of action. Claims brought in equity (such as claims for breaches of fiduciary duty) will usually be subject to a six-year period by analogy. Claims brought in relation to documents under seal have a 12-year limitation period. The time limits may be extended in cases of fraud or deliberate concealment of the facts giving rise to a claim.

It is possible for parties to enter into 'standstill' agreements, to suspend the running of time, and a party may elect not to take advantage of a limitation defence if it wishes.

### Pre-action behaviour

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

There are no formal or mandatory pre-action steps that must be undertaken prior to the issue of proceedings. Although a party's pre-action conduct might be a factor that the court takes into account at the conclusion of the proceedings in the exercise of its discretion when making costs orders. Parties may bind themselves by contract to seek to resolve disputes by mediation or other forms of alternative dispute resolution before issuing proceedings if they choose to do so.

There is only very limited scope for compelling pre-action discovery. In rare cases, usually where a complainant knows that a wrong has been committed against him or her but is unaware of the precise identity of the wrongdoer, and a third party, through no fault of his or her own, has become embroiled in the tortious act, the court may order the third party to disclose information concerning the tort and the wrongdoer by making a *Norwich Pharmacal* order, following a line of cases first developed in England. *Anton Piller* (or search) orders are also available in appropriate cases.

### Starting proceedings

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

Most civil claims are commenced by the issue of a writ by the plaintiff, with certain actions being started by originating summons (in cases where the facts of the matter are unlikely to be in dispute, or where that procedure is required by legislation). Insolvency proceedings are begun



by petition. It is the plaintiff's (or petitioner's) responsibility to serve the other parties with the originating process once it has been issued by the court office. Originating documents are generally valid for four months from the date of issue (or six months, where the document is required to be served abroad and permission is granted by the court to do so). The originating process must generally be served personally by delivery to the hands of the individual. The originating process may be served on a Cayman Islands company by delivery to its registered office in the Cayman Islands. If a party cannot be found, the plaintiff may apply to the court for permission to serve the document by an alternative method, for example, by advertisement in a local newspaper.

The courts generally have capacity to handle their caseload, and 'acting' judges can be and often are appointed on a temporary basis by the Governor to ensure that sufficient judges are available. The most pressing issue concerning the capacity of the courts is a lack of sufficient and adequate courtrooms. It is acknowledged by the government that additional modern court facilities are required and a building has been acquired for that purpose, but it is not yet clear when those facilities will be ready and available for use.

## Timetable

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

In an action commenced by writ, the plaintiff must prepare a 'statement of claim' setting out the facts upon which his or her cause of action is based. This statement of claim may either be endorsed on the writ or presented as a separate document (known as a 'pleading'). If the statement of claim is not endorsed on the writ, the writ must contain a short statement giving sufficient information to the defendants to identify what the action is about (known as a general endorsement). Once the writ is served, the defendants have 14 days (or longer if the writ is served abroad) to file an acknowledgement of service with the court office. Once that is done, if the statement of claim was served with the writ, the defendant has 14 days (or such other period as the parties agree or the court directs) to file and serve a defence, which may also include a counterclaim. The plaintiff has a period of time (again, 14 days or such other period as the parties agree or the court directs) to file and serve a reply and defence to counterclaim if necessary. At this point, the pleadings are deemed to be closed and the plaintiff must file a summons for directions with the court within one month. The summons for directions is the parties' opportunity to formulate a timetable for the remainder of the action. They may either agree or seek directions for discovery of documents, oral discovery and interrogatories (if any), exchange of witness statements and experts' reports (if required) and a pretrial timetable for the preparation of trial documents, legal submissions and other matters. Simple cases can be completed in this way in a fairly short timescale (say, six to nine months), but complex matters, particularly if they are 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.

## Case management

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

To a large extent, they can. The parties will often agree the case management timetable without the need for a hearing on the summons for directions and can agree to vary the timetable by consent while it is running its course. In the event of non-compliance with a timetable, the parties can apply to the court for orders imposing sanctions ('unless' orders) in the event of further non-compliance.

## Evidence – documents

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

Preservation and discovery of relevant documents form an important part of the litigation process. An attorney has a personal obligation as an officer of the court to ensure that his or her client complies with his or her obligations concerning discovery, including the obligation to disclose all relevant documents as opposed to just those that help the client's case or harm their opponent.

## Evidence – privilege

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

Several categories of documents attract privilege, including legal advice privilege (legal advice that would be privileged whether or not litigation was in train), litigation privilege (which protects documents generated as a result of contemplated or pending litigation), without prejudice (which is a form of privilege preventing production of communications aimed at settling disputes) and the privilege against self-incrimination. Legal advice (as opposed to other more general advice) given by in-house counsel will be protected by legal professional privilege provided that the circulation group is sufficiently contained so that the dissemination of the advice within an organisation cannot be construed as a waiver of that privilege.

Documents that are confidential and fall within the scope of the Confidential Information (Disclosure) Act 2016 may not be disclosed without the permission of the party to whom the confidence attaches, unless the court orders otherwise.

## Evidence – pretrial

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

Generally speaking, yes. It is usual at the summons for directions stage for the parties to agree, or the court to order, that statements of witnesses of fact be mutually exchanged on a certain date after time for consideration of documents and information obtained by discovery. Thereafter, a timetable will be set for the exchange of experts' reports, which can either be simultaneous or sequential, depending on the nature of the case; for without prejudice meetings of experts to take place to attempt to narrow the issues in dispute; and for the composition of a joint statement of experts of like discipline to set out areas on which they are agreed and on which they disagree, and if they disagree, the reasons why. It is then often agreed or directed that the experts may serve supplemental experts' reports dealing with matters that have arisen during the course of their discussions.

## Evidence – trial

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

The principal method for giving evidence at trial, whether factual or expert, is orally in person. Facilities can be made available for overseas witnesses to give their evidence remotely via a video connection. Each witness will give his or her evidence-in-chief (usually by confirmation that the matters set out in his or her written, signed statement or report are true to the best of his or her information and belief, making any corrections or clarifications and usually being asked a few questions by his or her own counsel). The witness will be cross-examined by opposing counsel, before being asked questions by his or her party's

counsel in re-examination, where questions are limited to clarifying or correcting matters that have arisen in cross-examination.

## Interim remedies

### 12 | What interim remedies are available?

A broad range of interim remedies is available, including freezing injunctions, *Norwich Pharmacal* (disclosure) orders and orders for interim payments. As a result of a series of cases in 2015, the Grand Court Act and Grand Court Rules were amended to provide that the court may now grant interim relief in the absence of substantive proceedings in the Cayman Islands (free-standing relief), to make it easier for the court to grant interim relief in support of foreign proceedings.

The Grand Court Rules also permit a number of other interim remedies, such as applications for default and summary judgment, and applications to strike out proceedings or pleadings on various grounds.

In corporate insolvency proceedings, liquidators may be appointed on a provisional basis, either for the purpose of promoting a restructuring (and avoiding an official liquidation) or to protect assets or prevent mismanagement pending the hearing of the winding-up petition.

## Remedies

### 13 | What substantive remedies are available?

Apart from damages, the court has jurisdiction to grant a number of other remedies, including permanent injunctions, declarations, accounts and enquiries, and restitutionary remedies. Aggravated and exemplary damages are available but rarely awarded. Interest is payable on damages either pursuant to contractual arrangements (if any) or at a statutory rate (which is varied from time to time) pursuant to the Judicature Act.

Corporate insolvency procedures may lead to winding-up orders, or a range of alternative orders pursuant to section 95(3) of the Companies Act, if grounds for winding up are established, but the court is of the view that another remedy, such as the purchase of the petitioner's shares, is more appropriate.

## Enforcement

### 14 | What means of enforcement are available?

Enforcement of money judgments within the jurisdiction can be undertaken by way of execution against goods (a writ of *fiery facias*), garnishee proceedings (to capture sums owed by third parties to the judgment debtor), charging orders over real estate or other property, such as shares in Cayman Islands companies (which lead to orders for the sale of the property), the appointment of a receiver, sequestration or attachment of earnings. Disobedience of a court order such as an injunction can lead to committal to prison. Winding-up or bankruptcy proceedings can also be started using a judgment debt (and on other grounds).

## Public access

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

Trials of writ actions and final hearings of petitions and originating summonses (ie, most cases) are held in open court and are accessible by the public. When a trial or hearing takes place by video conference, which has become common as a result of covid-19, the hearing is played live in a courtroom. Other hearings, including most applications for directions, interim relief and case management, are held in chambers, but members of the public may apply to the court for permission to attend, or can attend by agreement of the parties.

Writs and other originating process and judgments are open to inspection by the public. Other court documents are not generally available to members of the public, but those interested can apply to the court for permission to inspect the court files. The clerk of the court may determine those applications administratively unless he or she considers that the matter should be referred to a judge. The applicant must provide a concise statement of the reason for the request to inspect. In winding-up proceedings, the court file is open to specified categories of persons (including admitted creditors and shareholders), but not to the public.

## Costs

### 16 | Does the court have power to order costs?

The court has power to order costs, and has very wide discretion in so doing, although the presumption is that the losing party will pay the successful party's costs. Unless the amount of costs is agreed between the parties, the costs are referred to the clerk of the court, or his or her nominee, for assessment by way of taxation, pursuant to Order 62 of the Grand Court Rules and the Court Costs Rules and Practice Directions.

Costs are payable either on the standard basis (the successful party bearing the burden of showing that its costs were reasonable), or on the indemnity basis if the court is satisfied that the paying party has conducted the proceedings (or that part of them to which the costs order relates) improperly, unreasonably or negligently. If indemnity costs are awarded, the burden of proof shifts to the paying party to establish that the costs were unreasonable. If standard costs are awarded, the Court Costs Rules provides upper limits for the hourly rates of attorneys based on seniority, and for certain disbursements. Rules exist to prevent the duplication of effort by attorneys if overseas attorneys (usually Queen's Counsel) are retained. Brief fees and refreshers (barrister's per diem rates) are not recoverable, and barristers' time must be accounted for in time units.

The court has power to order a claimant to provide security for costs on application by the defendant and frequently does so, although recent cases suggest that awards for security for costs should be limited to a relatively nominal sum equivalent to the cost of registering a costs order in a foreign jurisdiction for enforcement. It also has power to order a defendant to provide security for the costs of a counterclaim.

The current costs regime was introduced in 2002 and has been amended (albeit not significantly) from time to time.

## Funding arrangements

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

The rules in relation to litigation funding arrangements in the Cayman Islands have been revolutionised by the passing of the Private Funding of Legal Services Act, 2020 (the Act) and Private Funding of Legal Services Regulations (2021) (the Regulations). Part 4 of the Act repeals any offence or tort under the common law for maintenance or champerty. The Act also allows for litigation funding and conditional fee agreements to be entered into without court approval and, importantly, permits contingency fee arrangements for the first time. The previous common law rules, which we described in previous editions of this guide, no longer apply.

The Act governs contingency fee arrangements (CFAs) (the definition of which includes conditional fee agreements) and litigation funding agreements (LFAs). The Act defines the 'proceedings' to which it applies



broadly as including those before any court or comparable tribunal or functionary, and includes arbitration proceedings.

A CFA is an agreement providing for some or all of an attorney's fees to be payable at the conclusion of the case only if the relevant litigation is successful, typically providing for a 'success fee' payable to the attorney.

Part 2 of the Act confirms that an attorney may enter into a CFA with a client under which the attorney's remuneration is contingent (in whole or in part) on the successful disposition or completion of the matter. Section 4 records that restrictions are imposed by the Regulations on the percentage of any recoveries or property in which an attorney may participate (being 33 per cent of the total amount awarded or value). However, under section 4(4), an attorney and client may jointly apply for a court sanction to approve a CFA that contravenes these restrictions. The court may consider any relevant factors, but must have regard to the nature and complexity of the proceeding and the expense and risk involved in the proceeding, and in any event cannot approve a CFA under which the attorney would receive more than 40 per cent of the total award or proceeds recovered.

An LFA is defined in subsection 16(1) of the Act as an agreement under which a funder agrees to fund in whole or in part the provision of legal services to a client by an attorney under which the client agrees to pay a sum to the funder in specified circumstances.

Subsection 16(2) requires that an LFA be in writing; that it complies with any prescribed requirements in the Regulations; and that the sum to be paid by a client (upon success) shall include either any costs payable to the client in relation to the relevant proceedings, and an amount calculated by reference to the funder's anticipated expenditure, or a percentage of the recoveries or property.

These are significant and welcome changes that are likely to impact the litigation landscape in the Cayman Islands for many years to come. It remains to be seen what impact the changes will have on the legal profession and the conduct of litigation in the islands and we look forward to updating readers in future editions.

## Insurance

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

Legal expenses insurance, whether before or after the event, is permissible and is gradually becoming more and more common.

## Class action

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

The Cayman Islands 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.

## Appeal

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

Parties have an appeal from a 'final' order (eg, a judgment following a trial) as of right. Appeals from interlocutory or interim orders are possible with the permission of the court, which must initially be sought from the first instance Grand Court judge at the hearing of the application in question, or by way of summons within 14 days of the decision

appealed against. The applicant must show that there are arguable grounds for appeal, whether as a result of an error of law or fact, or mixed fact and law.

If the Grand Court judge refuses permission, a written, and then an oral, application may be made to the Court of Appeal.

The Court of Appeal Rules were significantly improved and updated in 2014, particularly with regard to the procedures for obtaining leave to appeal. Leave must be obtained to appeal from the Court of Appeal to the Privy Council, either confirming the appellant's right to appeal or granting special leave. In a number of recent cases, the Court of Appeal has denied special leave to appellants who must then apply separately to the Privy Council for special leave, which is only granted where there is an arguable point of law of general public importance.

The Privy Council has issued a series of detailed amended Practice Directions governing its procedures, and these are available on its website.

## Foreign judgments

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

Foreign judgments are currently enforced at common law by the issue of a writ based upon the unpaid foreign judgment debt. These proceedings must be initiated in the Financial Services Division.

These judgments are generally enforceable where they are rendered by a court of competent jurisdiction, final and conclusive, and of a nature that the principles of comity require the domestic court to enforce.

The Law Reform Commission has suggested various amendments to the largely redundant Foreign Judgment Reciprocal Enforcement Act (which only applies to certain courts of Australia) to place matters on a solid statutory footing and make reciprocal recognition of foreign judgments more easily available. These have not yet found favour with the legal and financial services community, and a bill put forward in 2014 to legislate for these changes has not yet been enacted.

## Foreign proceedings

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

Apart from the interim orders referred to above, and subject always to the provisions of the Confidential Information (Disclosure) Act also referred to, the Grand Court will supervise formal letters of request from foreign courts and will also conduct depositions pursuant to letters of request in some circumstances pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (SI 1978/1890), which extended to the Cayman Islands the provisions of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975.

## ARBITRATION

### UNCITRAL Model Law

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

The Arbitration Act 2012 is based on the UNCITRAL Model Law.

### Arbitration agreements

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

Generally speaking, an enforceable agreement must be in writing and signed by the parties, or contained in a series of communications that provide a record of the agreement. Arbitration agreements can also

arise if pleaded in a court document and not denied by the opposing party. Further, if parties agree orally by reference to terms that are in writing and that incorporate an arbitration clause, the arbitration clause is deemed to be an agreement in writing.

### Choice of arbitrator

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

If the contract is silent as to the appointment of an arbitrator, the parties are free to agree the identity and number of arbitrators. If they cannot do so, the Arbitration Act provides for a default position of a single arbitrator. If the parties are unable to agree on the identity of an arbitrator or arbitrators, the Arbitration Act provides for the 'appointing authority' (currently the Grand Court) to appoint the arbitrators on application and with regard to a number of factors. These include the subject matter of the dispute, the availability of the arbitrator, the identity of the parties, any suggestions made by the parties, any qualifications requested by the agreement of the parties and any other factor likely to secure the appointment of an independent and impartial arbitrator.

Sections 18 to 20 of the Arbitration Act provide a mechanism to challenge the appointment of an arbitrator on grounds of lack of impartiality, independence or agreed qualifications, ill health, failure or refusal to conduct the proceedings or delay. The application is made to the tribunal in the first instance, and then to the Grand Court, Financial Services Division. There is no appeal from an order of the Grand Court in this instance.

### Arbitrator options

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

The parties are free to choose their arbitrators, and in default, the court may do so. The parties are not limited to arbitrators who are based in the Cayman Islands, and may choose from the wide pool of arbitrators available internationally. However, there are a number of qualified and experienced arbitrators available in the Cayman Islands, most of whom are members of the Cayman Islands Association of Arbitrators and Mediators, or the Cayman Islands' chapter of the Chartered Institute of Arbitrators. The pool of arbitrators available is therefore wide and would meet the needs of complex arbitration.

Consistent with the shift towards the greater use of arbitration, the Cayman International Arbitration Centre is expected to open its doors in the near future, providing world-class specialist hearing facilities, its own arbitration rules and case administration services.

### Arbitral procedure

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

The Arbitration Act provides in general terms that the tribunal shall act fairly and impartially, allow each party a reasonable opportunity to present their case, conduct the arbitration without unnecessary delay and conduct the arbitration without incurring unnecessary expense. It also provides for majority decisions in tribunals with more than one member if the parties so agree. Other than those general guidelines, the parties are largely free to agree the procedure and rules of evidence and law to be adopted by the tribunal. If they do not agree, the Arbitration Act contains a series of default procedures and powers that the tribunal must adopt.

### Court intervention

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

Apart from the provisions concerning the appointment and removal of the tribunal, the court has a number of powers in relation to the conduct of an arbitration, including to:

- stay legal proceedings brought in contravention of an arbitration agreement;
- order that interpleader proceedings be determined in accordance with any relevant arbitration agreement;
- extend time for commencing arbitration proceedings if limits imposed by the contract would cause undue hardship;
- review a tribunal's positive finding as to its own jurisdiction;
- enforce a tribunal's orders and directions, including security for costs and interim relief;
- issue a subpoena to compel a witness to attend at arbitration and to compel that person to attend before the court for examination if he or she fails to comply or produce documents;
- order security for the amount in dispute;
- grant interim relief, including for prevention of dissipation of assets (or grant any other interim injunction or interim measure);
- enforce interim measures granted by the tribunal;
- extend the time for making an award;
- enforce consent awards;
- assess (tax) the costs of the arbitrator in certain circumstances;
- make awards of costs if arbitration proceedings are aborted and make provision for the costs of the arbitration so that an award may be released;
- order property recovered as a result of the arbitration to stand as security for legal fees;
- determine any substantial question of law in the course of the proceedings;
- enforce the award as if it were a judgment of the court; and
- set aside the award if a New York Convention ground is made out.

Many of these powers can be excluded by agreement of the parties.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless the parties agree otherwise, the tribunal has power, by section 44 of the Arbitration Act, to:

- grant interim relief to maintain or restore the original position of a party pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

### Award

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

Unless otherwise agreed by the parties, the tribunal may make more than one award at different points in time during the proceedings. If it makes multiple awards, the tribunal must specify in the award the issue, claim or part of a claim that is the subject matter of a particular award.

Awards are required to be in writing and signed – in the case of a sole arbitrator, by the arbitrator him or herself or, in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators

if the reason for any omitted signature is stated. The award must give reasons for the decision, unless the parties have agreed that reasons are not necessary or the award is an award on agreed terms. The date of the award and the seat of the arbitration must be stated in the award and the award will be deemed to have been made at the place of the arbitration.

After the award is made, a copy of the award signed by the arbitrators must be delivered to each party. At the request of any party to an arbitration agreement, the appointing authority may certify an original award registered with it, certify a copy of any relevant original arbitration agreement or arrange for the translation and sworn certification of any award or agreement not stated in the English language.

## Appeal

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

The parties may contract out of the right to appeal if they wish, but if they do not, a party may, with the permission of the Grand Court, appeal to the Grand Court on a question of law arising out of an award. The Arbitration Act sets out a number of factors to be considered by the court when granting permission to appeal, and the Grand Court may not grant permission unless it is satisfied that:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one that the arbitral tribunal was asked to determine; and
- on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong; or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt, and, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The order made on such an application is appealable only with further leave of the Grand Court or with leave of the Court of Appeal, but the Court of Appeal may only grant leave if it is satisfied that the point of law concerned is one of general importance, or that there is some other special reason that it should be considered by the Court of Appeal. Final appeal rests with the Privy Council.

## Enforcement

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

A domestic award made by an arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is given, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked jurisdiction to make the award. In relation to foreign arbitral awards, the provisions of the Foreign Arbitral Awards Enforcement Act 1997 enact the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into Cayman Islands law. An action on the award may also be commenced by writ. There have been no recent changes in enforcement procedures.

## Costs

### 33 | Can a successful party recover its costs?

Unless a contrary intention is expressed, every arbitration agreement shall be deemed to include a provision that the costs of the arbitration

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shall be at the discretion of the arbitral tribunal. The tribunal would usually follow the same principles as to the award of costs as applied by a judge.

The parties are free to agree the costs that might be recovered. In the absence of agreement, the losing party will normally be ordered to pay the successful party's legal costs and disbursements (taxed by the arbitrator if necessary) and the costs and expenses of the tribunal. There has been no decision in the Cayman Islands concerning the recovery of third-party funding costs incurred as a result of arbitration. However, it is possible that the court would follow the decision of the English Commercial Court in *Essar Oil Fields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), in which the judge held that the words 'other costs' in section 59(1)(c) of the Arbitration Act 1996 were broad enough to encompass third-party funding costs. While we would expect the court to be sympathetic to parties seeking to claim these costs, the Arbitration Act 2012 does not include a provision similar to the English provision, and accordingly, it is by no means a foregone conclusion that they could be recovered without the agreement of the parties.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

ADR is a relatively new concept in the Cayman Islands and is taking some time to reach critical mass. There is a Cayman Islands Association of Mediators and Arbitrators, which is willing to act as an appointing body, but the number of appointments to date has been quite small. A mediation scheme for family cases has been developed by the Judicial Administration. A small number of commercial mediations take place, but they are by nature confidential, and it is difficult to obtain firm information on numbers.

## Requirements for ADR

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

There is currently no mandatory requirement to attempt ADR prior to or during litigation or arbitration and no power to compel parties to attempt it. Parties may bind themselves by contract to do so if they wish. If requested by all parties, the court or tribunal may stay the proceedings for ADR to be attempted.

## MISCELLANEOUS

### Interesting features

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

The Grand Court Rules are based upon the Rules of the Supreme Court of England and Wales 1999, modified accordingly. There has been no attempt at a wholesale reform of court procedures as happened in England and Wales with the adoption of the Civil Procedure Rules.

## UPDATE AND TRENDS

### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The Legal Services Act 2020 (LSA) makes comprehensive changes to the requirements for admission to the Cayman Islands Bar, as well as to the regulation of practitioners of Cayman Islands law that do not reside in the Cayman Islands. This may impact who can act in relation to disputes in the Cayman Islands courts. The LSA has been approved by Parliament and was gazetted in early 2021, but has not come into force; there is no indication of when it will.

# China

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Buren NV

## LITIGATION

### Court system

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

In China, the people's courts are judicial organs exercising judicial power on behalf of the state. In accordance with the Organic Law of the People's Courts, the people's courts are divided into:

- the Supreme People's Court;
- local people's courts at various levels; and
- specialised people's courts.

Local people's courts at various levels are divided into high people's courts, intermediate courts and primary people's courts. Specialised courts in China currently include military courts, railway courts, maritime courts, financial courts, intellectual property courts and internet courts.

China implements a court system characterised by four levels and two instances of trials.

'Four levels' refers to the four levels of courts divided based on their descending order of power, namely:

- the Supreme People's Court, located in Beijing, the premier appellate forum and court of last resort, which mostly hears cross-provincial cases;
- high people's courts, mostly at the level of provinces, autonomous regions and special municipalities;
- intermediate courts, mostly at the level of prefectures and municipalities; and
- primary people's courts, at level of autonomous counties, towns and municipal districts.

'Two instances of trials' means that each case has, at most, two trials. Once the litigants challenge the judgment of first instance made by a local court, they can appeal the case to the next higher level court only once. Once an appeal is filed, the appeal court must hear the case. The judges shall hear and give their determination on both fact-finding and law application.

The subject matter, nature or size of the claim will decide which level of court such claim shall be brought to for the first instance trial. For example, an intermediate people's court shall have jurisdiction as a court of first instance over the following types of civil cases:

- major cases involving foreign parties;
- cases with significant impact in the areas over which the courts exercise jurisdiction; and
- cases determined by the Supreme People's Court to come under the jurisdiction of the intermediate people's courts.

A high people's court shall have jurisdiction as a court of first instance over civil cases with significant impact in the areas over which they exercise jurisdiction.

The Supreme People's Court shall have jurisdiction as the court of first instance over the following types of civil cases:

- cases with significant impact on the whole country; and
- cases that the Supreme People's Court deems it should try by itself.

### Judges and juries

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

In China, an inquisitorial system is adopted in the judicial system whereby the judges take dominant roles in trials and are actively involved in fact-finding by questioning the parties, advocates of the parties and witnesses. This is in contrast to the adversarial system adopted by most common law countries where the fact-finding process is controlled by the parties, and the judge or jury remains neutral and passive throughout the proceeding.

China's judicial system does not have a jury. The bench plays the role of both fact-finding and law application. There are two kinds of procedures at first instance trials. One is the formal procedure (officially translated as 'ordinary procedure') and the other is the summary procedure. The summary procedure is a simplified procedure that is used in the basic-level courts and their detached tribunals.

A summary procedure is usually presided over by a single judge or a panel, while a formal procedure is usually presided over by a three-judge collegial panel. Ordinary people (people's jurors) are sometimes chosen to adjudicate civil cases under the leadership of a professional judge. However, their role is different from that of a jury in the common law system. They enjoy the same rights as regular judges and hear cases on both fact-finding and application of the law.

Generally, people's jurors may be appointed to the collegial panel to participate in the trial of those cases:

- involving group interest;
- involving public interest;
- concerning the general public; and
- having other major potential social impacts.

People's jurors are selected from citizens who are not legal professionals with certain requirements for age, education and historical record of conduct. As every court has a list of eligible people's jurors, the selection process for each case is randomly carried out by a computer. In addition, for special cases for which people's jurors with specific professional knowledge are required, the people's court may randomly select the jurors from people's jurors with the required professional knowledge.

## Limitation issues

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

According to the Civil Code, effective as of 1 January 2021, the ordinary limitation period for civil claims is three years; although special rules, either shorter or longer than three years, will apply to certain types of disputes.

The limitation periods for some specific types of cases are set out by other laws as follows:

- claims for product liability: two years; and
- claims for disputes arising from an international contract for the sales of goods or a contract for the import and export of technology: four years.

The above limitation periods start from when the claimant knows or should have known the facts giving rise to his or her claim and who the accused is. In any event, if more than 20 years have passed since the date of the occurrence of facts giving rise to the claim, the court shall not offer any protection. However, there is an exception for product liability claims. The right to claim compensation for damage caused by defective products shall be void 10 years after the products are delivered to the first consumers, unless the product's expressly stated warranty is longer.

The law provides rules to suspend the limitation period if, within the last six months of the limitation period, a right holder is unable to exercise the right to claim owing to existence of any of the following obstacles:

- force majeure;
- the right holder with no or limited capacity for performing civil juristic acts has no legal representative, or his or her legal representative dies or loses the capacity to perform civil juristic acts or the right to representation;
- neither a successor nor an administrator of estate has been determined after the opening of succession;
- the right holder is controlled by the obligor or other persons; and
- other obstacles resulting in the failure of the right holder to exercise the right of claim.

The limitation period shall expire six months after the causes of such suspension are eliminated.

In addition to suspension, the limitation period can be interrupted according to law. The limitation period is interrupted if legal proceedings are initiated or if a party demands or agrees to the fulfilment of its obligations. The limitation period commences anew from the time of interruption and the limitation period can be interrupted repeatedly.

Article 197 of the Civil Code further regulates that the periods, calculation methods and reasons for suspension or interruption in respect of the limitation period shall be prescribed by law, and those agreed by and between the parties shall be null and void. A party's prior waiver of the benefit of the limitation of action shall be null and void.

Furthermore, even if the statute of limitations has expired, the plaintiff can still file a lawsuit. The people's court shall accept the filing when the lawsuit is within the scope of civil lawsuits to be accepted and cannot voluntarily dismiss the plaintiff's claim on the ground that the statute of limitations has expired.

## Pre-action behaviour

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

By law, generally, there are no mandatory pre-action requirements imposed before the civil proceeding can be issued, except for in the following cases:

- shareholder derivative lawsuits: the shareholder must first request the (board of) supervisors or the board of directors (executive director) to initiate the proceeding unless in the case of an emergency; and
- labour disputes: a labour dispute shall be first brought before the labour dispute arbitration committee for arbitration before proceeding to the court.

In practice, most civil disputes (suitable for mediation) will first be submitted to mediation. If no agreement is reached, then the whole case will go to trial and the people's court will render a judgment without delay.

There are also some pre-action measures available to the party to assist in bringing an action. For example, for the purposes of a smooth investigation during the proceeding, the enforceability of the judgment and the suspension of damage caused to the party, such party can apply to the court for preservation of evidence, preservation of property and relevant injunctions before the action is initiated, depending on the circumstances and in the event of an emergency.

## Starting proceedings

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

On 1 May 2015, the case acceptance system was reformed from a case-filing review system to a case-filing registration system. Under the case-filing registration system, the proceeding will commence when the people's court registers and files the complaint by the claimant. The court decides whether to file and register the complaint by the claimant on the spot or within seven days at the latest. If the complaint is dismissed by the court, the claimant is entitled to appeal against the court's decision to the higher court within 10 days.

When the court decides to accept a filing, it must inform the parties, orally or in the notice of case acceptance or the notice of litigation response, of their rights and obligations to the litigation. Within five days of its acceptance of a case, the court must deliver a copy of the complaint to the defendant, and the defendant must file a motion of defence within 15 days of receiving the copy of the complaint.

According to the data released by the Supreme People's Court, the number of cases accepted by courts across the country reached 33 million in 2021, an increase of 170 per cent in 10 years. The volume of cases has always been an issue for judges, especially those in big cities. Capacity issues do not prevent the courts from listing disputes in a timely manner but they exert great pressures on judges, who have to work overtime to schedule hearings and render decisions.

Relieving the pressure on judges is one of the most important topics in judicial reform. To alleviate the capacity issues, it is recommended to increase the proportion of judges, hire more supporting personnel to deal with the greater caseloads, further promote the implementation of multiparty dispute resolution mechanisms, rationally divert cases through litigation source management and strengthen the pre-litigation mediation mechanism.

## Timetable

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

A general procedure for a civil claim at first instance shall be concluded within six months of the commencement of the proceeding, which includes the following stages:

- starting proceeding: the civil proceeding starts when the complaint by the plaintiff is filed by the court;

- notice to the defendant and defence: within five days of the acceptance of the case, the defendant shall be given the notice of case acceptance and served with a copy of the complaint; the defendant must file a motion of defence within 15 days of receipt of the complaint; and the court shall deliver a copy of the motion of defence to the plaintiff within five days of the date it receives the motion of defence;
- collegial bench: the parties shall be promptly notified when the members of the collegial bench are decided;
- evidence submission: the period for evidence submission can either be decided by the parties, subject to court approval, or determined by the court (15 days minimum);
- counterclaims (if any): the defendant can file a counterclaim before the end of the period for evidence submission;
- hearing: the court shall notify the parties and other participants in the action three days prior to the hearing. During the court hearing, the procedure is generally divided into investigation of the facts, presentation of evidence and debate; and
- issuing judgment: if a judgment is pronounced in court, the written judgment shall be issued and delivered to the parties within 10 days. If a judgment is pronounced later on a fixed date, the written judgment shall be issued to the parties immediately after the pronouncement.

If there is a need for an extension under special circumstances, an extension of six months may be granted, subject to the approval of the president of the court. If there is a need for a further extension, the approval of the higher-level court is required.

When special procedure is applied, the court shall conclude the adjudication within one month of the case being accepted or within one month of the expiration of the term set forth in the public announcement.

The period for the trial of foreign-related civil cases by courts shall not be subject to the aforementioned time limits and restrictions.

If a party fails to perform an effective judgment, the other party can apply to the court for enforcement. The time limit to apply for enforcement of a judgment is two years, calculated from the last day of the period specified in the written judgment. If the judgment does not specify the period of performance, the time limit shall be calculated from the day when the judgment takes effects. The laws regarding suspension and termination of the statute of limitation shall also be applicable here.

## Case management

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

The case management structure in the Chinese court system is established from the top down. An inquisitorial procedure is adopted in the Chinese judicial system in which the parties play a relatively minor role.

## Evidence – documents

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

There is no compulsory or statutory duty for both parties to preserve evidence pending trial. Strategically, in civil litigation, one would benefit immensely from preserving evidence in a comprehensive manner.

Under the Civil Procedure Law, if evidence may be lost or it may be difficult to obtain evidence in the future, a litigant may apply to the people's court for the preservation of evidence during the proceedings. The people's court may also voluntarily adopt preservation measures. In urgent circumstances, an interested third party may also file the application. If the preservation measures might cause losses or restrictions of use and circulation to the evidence holder, the party applying for such

evidence preservation shall be required by the people's court to provide corresponding security.

In Several Provisions on Evidence for Civil Actions (effective from 1 May 2020), when a litigant submits the documentary evidence and relevant documentations to the court, it must submit copies to the opposing parties. However, the parties are only responsible for sharing documents related to their burden of proof and are not required to provide any documentations related to the facts.

Furthermore, a party may apply to the people's court to order the other party to provide documentary evidence. That application will be approved if the party controls the documentary evidence and one of the following circumstances exists:

- documentary evidence has been cited by the party controlling the documentary evidence in the litigation;
- documentary evidence has been prepared for the interests of the applicant;
- there is documentary evidence that the applicant is entitled to consult or obtain in accordance with the law;
- there are account books and original vouchers for bookkeeping; or
- other circumstances under which the people's court deems that documentary evidence shall be submitted.

## Evidence – privilege

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

'Privilege' often refers to attorney-client privilege, meaning a client's right to refuse to disclose, and to prevent anyone from disclosing, confidential communications between him or her and his or her attorney. The concept of 'privilege' does not exist in China, which means that legal advice from an attorney or an in-house lawyer is not protected or privileged.

Both the Lawyer's Law and the Civil Procedure Law stipulate that an attorney must keep public and commercial secrets and must not breach the privacy of the parties. However, article 75 of the Civil Procedure Law provides that any corporate entity or individual who has information about the case is obliged to testify in court. This means that an attorney may be forced to disclose or testify on confidential or privileged information in court.

## Evidence – pretrial

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

Upon a court's acceptance of a case, both parties may be required to produce evidence in support of their claims or defence, including written evidence from witnesses and experts. This would be achieved by serving a court notice to each party, containing a statutory period for evidence submission. However, this period could be extended by submitting an application in due course. According to article 224 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China, a people's court may prepare for the hearing of a case by organising the exchange of evidence, holding a pretrial conference, etc, upon the expiration of the period for response.

If the parties apply for the exchange of evidence, the people's court may organise the exchange. For cases with more evidence or in complex cases, the people's court will organise it.

If the people's court finds that a hearing is required, the litigants may be required to define the focus of the dispute through the exchange of evidence. The date of the exchange of evidence shall be the date on which the duration for the presentation of evidence expires. The timing of the evidence exchange may be agreed upon by the parties through negotiation, subject to the approval of the people's court,



or may be determined by the people's court. After the receipt of the evidence submitted by the other party, if there is any rebuttal evidence to be submitted, the people's court shall arrange for another exchange of evidence.

## Evidence – trial

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

Evidence should be presented at the stage of 'investigation', which is conducted by the people's court. In principle, each piece of evidence shall be presented in the original and cross-examined, unless the original cannot be provided for objective reasons, in which case a verified copy may be presented in lieu of the original. For each piece of evidence, cross-examination should be directed to and centred around three main aspects: authenticity, legitimacy and relevance.

The burden of proof lies with the party asserting the claim. Therefore, in most cases, the first obligor of evidence presentation is always the plaintiff, who must try his or her best to obtain evidence and present it in court. In some cases, the burden of proof shall be borne by the opposing party, the defendants. The most common cases of reversal of the burden of proof are as follows:

- in a dispute over a work-related injury, the employer must prove that it is not work-related, not the employee; and
- in a dispute over patent infringement of a new product, the alleged infringer must prove the difference between the product manufacturing methods.

It is compulsory for witnesses to testify and be cross-examined at trial unless witnesses are subject to exceptions. If a pretrial evidence exchange meeting is held, witnesses may also testify at the meeting. By contrast, an expert witness is only required to testify in court when the parties object or the court deems it necessary. If an expert is unable to attend the hearing for legitimate reasons, he or she must submit a written reply. The oral statement or the written reply, whether made at the hearing or in the pretrial meeting, will be deemed oral evidence.

## Interim remedies

### 12 | What interim remedies are available?

Interim remedies refer to measures available to the parties before the final resolution of their legal dispute, mainly to prevent evidence, property or actions of the parties from being damaged or dissipated. In accordance with the Civil Procedure Law, these interim remedies can be granted on an urgent basis before litigation is commenced, and the party must bring a lawsuit within 30 days of the date when a pre-action order is made.

Preservation of property, once initiated successfully, will often take the form of sealing up, detaining or freezing, thereby limiting any future transfer, removal or alteration of such assets without courts' prior approval. This preservation applies to both pre-action and post-action proceedings, which means a party may submit an application before or after a claim is formally brought to court. In this regard, preservation of property has similar characteristics and functions as freezing injunctions.

The aim of action preservation is to order one party to act or not to act in a particular way. Action preservation can be held before or after the commencement of the proceeding. However, currently, it is only possible in intellectual property disputes to reserve an act (injunction) before proceeding.

In addition, a court order may also be obtained for preserving relevant evidence if there is a high likelihood that the evidence would be destroyed or it would become difficult to locate its whereabouts.

This could be achieved by sealing, detaining, taking photographs, making sound recordings or visual recordings, making reproductions, conducting authentication, forensic inspection or drawing up written statements.

A court adopting preservation measures may order the applicant to provide security, and if the applicant does not provide security, the court will rule that the application be thrown out. Preservation security includes real estate mortgage, deposit and property preservation liability insurance.

Such remedies are also available in support of foreign proceedings. Considering that overseas creditors usually do not have real estate in China, and the payment process of overseas funds to China is complicated, overseas entities can use property preservation liability insurance as a security method, which is convenient and efficient to operate.

For claims involving overdue alimony, maintenance, child support, medical expenses or employee payments, or other urgent matters, courts may issue a preliminary enforcement order. This means that a preliminary payment would be made from one party to the other before the merit of the case is officially adjudged. Conditions should be met before an order can be granted, considering both the applicants' dependence on life or impacts on business operation and the financial capacity of the party against whom the application is made.

## Remedies

### 13 | What substantive remedies are available?

Depending on the nature of disputes, common substantive remedies include damages, declarations, permanent injunctions and specific performance.

In civil litigation, remedies are mostly compensatory, with punitive damages as an exception. However, according to the opinions of the Supreme People's Court on strengthening the punishment of intellectual property infringement, in the field of intellectual property, if the circumstances are serious, the punitive damages claimed by the right holder shall be supported according to law and have a deterrent effect, increasing the importance of punitive damages against intentional infringement.

Interest is commonly payable, particularly when the outcome of the judgment is of a monetary nature. According to the different legal bases of substantive law and procedural law, interest can be divided into general debt interest and delayed performance interest. The former refers to the interest determined in the effective judgments in accordance with the substantive law (such as the Civil Code), and the latter refers to the interest that the enforced person needs to pay due to the delay in performance in the enforcement procedure according to article 253 of the Civil Procedure Law.

## Enforcement

### 14 | What means of enforcement are available?

There are a wide variety of measures to enforce a judgment, including:

- to detain, freeze, transfer or sell judgment debtors' property;
- to withhold judgment debtors' lawful income in a proportionate manner;
- to evict judgment debtors from the house or land so occupied or used; or
- to compel performance or arrange third parties to perform at the expense of the judgment debtors, etc.

After the case enters the enforcement procedure, the court can take enforcement or restrictive measures against the person subject to the execution upon application or ex officio. For example, the court can:



- issue a property declaration order to force the person subject to enforcement to report in writing his or her savings, income, real estate, property rights and other property conditions within the time limit specified;
- summon (detain) the person subject to enforcement for questioning to find out his or her property situation and ability to perform his or her obligations;
- restrict the consumption of the person subject to enforcement when he or she fails to fulfil the payment obligation within the time limit specified;
- put the person subject to enforcement on the list of persons subject to enforcement for dishonesty;
- restrict the person subject to enforcement from leaving the country;
- fine or detain the person subject to enforcement;
- post a bounty announcement to find the enforceable property of the person subject to enforcement;
- publish in the media the information of the person subject to enforcement not fulfilling his or her obligations; and
- punish the person subject to enforcement with the crime of refusing to execute the judgment, if he or she was found to be capable of executing the judgment.

### Public access

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

Hearings in civil proceedings must be accessible to the public, except for cases involving state secrets, privacy issues or topics otherwise stipulated under the law.

For divorce cases and cases concerning trade secrets, public hearings shall not be held if a prior application is filed by a party.

Court documents such as judgments and orders are available to the public via an official website. There are also other websites and databases from which judgments and orders can be downloaded. Other court documents, such as witness statements and pleadings, are generally not available to the public. With proper authorisation, qualified Chinese lawyers may have access to these documents following relevant procedural steps. Recording or duplicating these documents is permitted.

### Costs

#### 16 | Does the court have power to order costs?

According to article 6 of the Measures for Payment of Litigation Fees, the litigation fees that the parties shall pay to the people's court include: case acceptance fees, application fees (fees paid by the parties when applying for special litigation procedures, such as enforcement of judgment or preservation measures), transportation expenses, accommodation expenses, living expenses and loss of work allowances for witnesses, appraisers, translators and adjusters appearing in court on the date designated by the people's court. These litigation costs shall be borne by the losing party, unless the winning party voluntarily bears it. The amount of fees shall be determined by the court according to the unified national standards.

The court has no power to order attorney fees except for in the following two situations: (1) when the parties have agreed in a contract that when a dispute related to the contract occurs, the attorneys' fees incurred by the winning party shall be borne by the losing party, and the court may order the losing party to bear the attorneys' fees as agreed; or (2) when the law explicitly prescribes that the losing party shall bear the attorneys' fees of the winning party (a reasonable part, but not all). According to the laws and relevant judicial interpretation, among others, the following circumstances or types of cases belong to

this situation: personal injury compensation cases, copyright infringement cases, trademark infringement cases, patent infringement cases, unfair competition cases, contract disputes in which the creditor exercises their right of revocation, and legal aid cases.

In China, the plaintiff is not required to provide security for the defendant's expenses during the litigation, but if the plaintiff applies to the court for preservation of the defendant's properties before or during the litigation, the court may order the plaintiff to provide certain security in accordance with the law.

### Funding arrangements

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

In China, there is a risk agency charging method that can be chosen by and between lawyers and clients. The risk agency charging method means: no win, no fee. The lawyer can charge a fixed amount or a certain percentage of the client's final realisation of the creditor's rights or the reduced debt. The total maximum amount of attorneys' fees charged must comply with the provisions of the Opinions on Further Regulating Lawyer's Service Fees:

- when the target amount is less than 1 million yuan, the total maximum amount of attorneys' fees charged must not exceed 18 per cent of the target amount;
- when the target amount is more than 1 million yuan but less than 5 million yuan, it must not exceed 15 per cent of the target amount;
- when the target amount is more than 5 million yuan but less than 10 million yuan, it must not exceed 12 per cent of the target amount;
- when the target amount is more than 10 million yuan but less than 50 million yuan, it must not exceed 9 per cent of the target amount;
- when the target amount is more than 50 million yuan, it must not exceed 6 per cent of the target amount.

The risk agency charging method must not be applied in the following cases:

- marriage or inheritance;
- requests for social insurance benefits or minimum living security benefits;
- requests for child supports, alimonies, pensions, relief funds or compensation for work-related injuries; or
- requests for employment remunerations, etc.

China's legal system does not have any system or rules similar to the common law principles of prohibiting maintenance and champerty. Although there is no inherent legal obstacle to the development of third-party funding, the legitimacy of third-party funding is currently not legally clarified, and no regulatory measures have been taken.

In practice, a number of institutions provide third-party litigation support services, which include formulating litigation plans through case background investigation and risk assessment, bearing various expenses of the case, obtaining corresponding benefits based on the outcome of the case and providing litigation support for lawyers. Bangying Litigation Investment, established in 2015, and the Dingsong Commercial Dispute Resolution Platform, established in 2016, are examples of such institutions.

## Insurance

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

Legal cost insurance in China is not as developed as in some Western countries, and it is rarely used in litigation.

However, the mechanism of liability insurance for property preservation in litigation has developed rapidly and is being used more and more in litigation. In liability insurance for property preservation, the applicant for property preservation purchases liability insurance products from an insurance company whose qualifications are recognised by the court, and the insurance company issues a letter of guarantee to the court to assume the property damage caused to the defendant if the preservation proves to be wrong.

## Class action

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

Under the Civil Procedure Law, there are concepts of 'joint action' and 'representative action'.

If there are two or more parties on one or both sides, the subject matter of the action is the same or of the same category and the court considers that the case can be tried as a joint action, the case shall be tried as a joint action, subject to the consent of the parties.

Representative action is a kind of joint action. In a representative action, one party consists of numerous persons and the action may be brought by a representative elected by these persons. The procedural acts of this representative shall be binding on all members of the party that he or she represents. However, before the representative changes or relinquishes the claims, or recognises the claims of the opposing party or participates in mediation, the consent of the parties he or she represents must be obtained. In China, collective actions mostly occur in labour disputes, especially in cases of equal pay for equal work.

A recent steady development of class actions has occurred in the securities industry. Article 95 of the new Securities Law, promulgated on 28 December 2019, basically follows the provisions above on joint action and representative action. When an investor files a securities civil compensation lawsuit pertaining to a false statement or other legal grounds, if the subject matter is of the same type and there are multiple persons in one party, a representative may be appointed for the lawsuit pursuant to the law. It further stipulates the mechanism of a special representative lawsuit. An investor protection institution may be appointed by more than 50 investors to participate in the action as a representative to register with the people's court for the right holders confirmed by the securities registration and clearing institution, unless the investors explicitly express their unwillingness to participate in the lawsuit. The special representative action, which is characterised by 'implied participation and express withdrawal', introduces the concept of 'withdrawal of class action' for the first time in the Chinese legal system. On 31 July 2020, the Supreme People's Court issued the Provisions on Several Issues Concerning Representative Actions Arising from Securities Disputes, which further refined this mechanism. On 12 November 2021, the first instance judgment of the *Kanymei Pharmaceutical* case was issued. This case is the first case in China's capital market to apply the special representative action procedure for securities disputes, which has opened up a feasible legal remedy channel for a large number of claimants with the same cause of action.

## Appeal

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

In general, Chinese courts follow the two instances of trial system, as prescribed by law. Normally, the first instance judgment or ruling is not final. If a party disagrees with a first instance judgment or ruling made by a local people's court, it shall have the right to appeal to the people's court at the next higher level within a certain period.

To exercise the right of appeal, the party must meet the following conditions:

- an appeal must be filed by a person who has the right to appeal;
- only the first instance judgment or ruling can be the subject of appeal; a mediation agreement cannot be the subject of an appeal;
- an appeal must be filed with the statutory time limit: 15 days for judgment, 10 days for ruling and 30 days for parties that are not present in China; and
- when a party appeals to a higher court, it must file with a petition stating the grounds for appeal.

The second instance judgment or ruling becomes legally effective immediately and shall be final. However, if the party that considers a legally effective judgment or ruling to be wrong, it may apply to the people's court at the next higher level or the original court for a retrial. Nevertheless, the application for a retrial does not mean that the enforcement of the judgment or ruling is suspended. The court shall conduct a retrial only when the application for retrial by a party falls under any of the circumstances explicitly stated in the law, for instance: there is new evidence that is sufficient to overturn the original judgment or ruling; an error was found in the application of the law in the original judgment or ruling; or the original judgment or ruling is not formed on the basis of due process.

## Foreign judgments

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

It is not easy to enforce a foreign court judgment in China. A foreign judgment holder can file a petition and demand a competent Chinese court to enforce and recognise his or her foreign judgment, but the Chinese court can only recognise and enforce the foreign judgment if a bilateral enforcement treaty or arrangement exists between China and the country or region where the judgment was made; a multilateral convention exists that was signed by China; or the country where the foreign judgment was given had enforced judgments of Chinese courts previously, which is the principle of reciprocity.

Regarding multilateral conventions, on 12 September 2017, China signed the Hague Convention on Choice of Court Agreements, which is pending approval by the National People's Congress. On 2 July 2019, Chinese delegates, together with delegates from 80 other countries, signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Regarding the principle of reciprocity, the first time this principle was relied upon by Chinese courts was in 2014. After the High Court of Singapore ruled to recognise a judgment made by the Suzhou Intermediate People's Court, Jiangsu Province, the Nanjing Intermediate People's Court, Jiangsu Province, ruled to recognise a civil judgment made by the High Court of Singapore in accordance with the principle of reciprocity. In recent years, China's judicial system has become increasingly open to promote economic development and communication. In 2015, the Supreme People's Court noted that:

*If the countries along the "Belt and Road" have not yet concluded any agreement on mutual legal assistance with China, people's courts may, in accordance with the intent of international judicial cooperation and exchange as well as the promise by the other countries to provide judicial reciprocity to China, carry out the pilot practice that the people's courts in China provide judicial assistance to the parties in other countries in advance, actively promote the formation of reciprocity relations and actively promote and gradually expand the scope of international judicial assistance.*

Regarding bilateral treaties, a considerable number of foreign cases are recognised and enforced successfully by Chinese courts by these means. Examples include the mutual legal assistance agreements between China and Poland, China and Russia, and China and the United Arab Emirates.

### Foreign proceedings

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

Obtaining evidence in China for use in foreign proceedings falls under judicial assistance as prescribed by the Civil Procedural Law. It must be conducted through following channels:

- **Bilateral treaties:** foreign parties could apply for mutual legal assistance in accordance with bilateral treaties concluded between China and foreign countries. For example, the Treaty on Criminal Judicial Assistance between Australia and China, which entered into force in 2007. This application is usually submitted to the Ministry of Justice, which would then review and determine whether the evidence obtainment would infringe the legal principles and national interests of China.
- **International convention:** according to the Hague Evidence Convention, the application for evidence collection is submitted by the application court to the central organ of its own country, which will in turn transfer the application to the Ministry of Justice. After receiving the application, the Ministry of Justice will pass it on to the Supreme People's Court for approval. If approved, it will then be transferred to a lower court for execution.
- **Diplomatic channel:** an embassy or consulate of a foreign country based in China may serve documents on a citizen of a foreign country and carry out an investigation and collection of evidence, but it must not violate Chinese laws and must not adopt mandatory measures.
- **International cooperation:** foreign countries can submit evidence applications to China through informal channels, such as the police or anti-corruption authorities. However, this assistance is based on the principle of reciprocity.
- Except for the circumstances stipulated above, no foreign agency or individual can carry out service of documents, investigation and collection of evidence in China without the consent of the relevant administrative authorities.

## ARBITRATION

### UNCITRAL Model Law

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

China's Arbitration Law is not enacted based on the UNCITRAL Model Law, but the latter does have a great influence on the enactment of the former.

The Arbitration Law deviates from the UNCITRAL Model Law in the following aspects, among others:

- Both the court and the arbitration commission are entitled to rule on the validity of an arbitration agreement, and the ruling by the court is prioritised under the Arbitration Law.
- An ad hoc arbitration is generally not permitted or recognised under the Arbitration Law. An exception to this is that, on 9 January 2017, the Supreme People's Court issued the Opinion on the Provision of Judicial Protection to the Development of the Free Trade Zone, article 9, which allows two parties registered in free trade zones to resolve their disputes through ad hoc arbitration, provided that the dispute is resolved in a specific place, under specific arbitration rules and by specific people.
- The arbitral tribunal or arbitration institution has no power to grant the interim measures, the application of which by a party must be forwarded to a competent court through the arbitration institution for determination under the Arbitration Law.
- The scope of arbitrability is narrower under the Arbitration Law. For example, the Arbitration Law excludes disputes arising from personal rights, such as marriage, adoption, guardianship, maintenance, inheritance, infringement of right of publication, revision and authorship.
- Under the Arbitration Law, both procedural irregularities and limited substantive reasons are grounds based on which a domestic arbitral award may be set aside or refused for enforcement, while only serious procedural irregularities are listed as grounds under the UNCITRAL Model Law in the same regard.

### Arbitration agreements

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

An effective arbitration agreement must be in writing (no matter if stipulated in a contract or provided in a separate agreement) and include the following elements:

- the expression of the parties' intention to submit for arbitration;
- the matters to be arbitrated; and
- the arbitration commission agreed by the parties.

In addition, an arbitration agreement shall be invalid if any of the following circumstances occur:

- the matters agreed upon for arbitration are beyond the scope of arbitration prescribed by law;
- an arbitration agreement is concluded by persons without or with limited capacity for civil acts;
- one party forces the other party to sign an arbitration agreement by means of duress;
- the parties agree that a dispute may be submitted to an arbitration agency for arbitration or filed with the people's court for commencement of legal proceedings; unless one party submits for arbitration, and the other party fails to object before the arbitration tribunal commences the first hearing;
- an arbitration agreement provides for two or more arbitration agencies, and the parties are unable to agree on the choice of an arbitration agency; or
- an arbitration agreement has not specified or has not specified clearly items for arbitration or the choice of an arbitration commission, and the parties concerned failed to conclude a supplementary agreement.

### Choice of arbitrator

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

Under the Arbitration Law, an arbitral tribunal may comprise three arbitrators or a sole arbitrator. In practice, unless otherwise stipulated by arbitration rules or agreed by the parties, three arbitrators will in general be appointed.

For the arbitral tribunal comprising three arbitrators, each party shall select or authorise the chair of the arbitration institution to appoint one arbitrator. The third arbitrator (ie, the presiding arbitrator) shall be selected jointly by the parties or be nominated by the chair of the arbitration institution in accordance with a joint mandate given by the parties.

If the parties fail to appoint an arbitrator within the time limit set under the arbitration rules, the arbitrators will be appointed by the chair of the arbitration institution.

The parties to the arbitration can apply for the withdrawal of the arbitrator after the appointment if the arbitrator is found to be improper or impartial in accordance with article 34 of the Arbitration Law. However, an application for withdrawal shall be submitted prior to the first hearing with the statement of reasons. If reasons for the withdrawal only became known after the commencement of the first hearing, an application for withdrawal may also be submitted before the conclusion of the last hearing.

### Arbitrator options

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

The pool of candidates of each arbitration institution is composed of Chinese and foreign arbitrators.

For Chinese residents who are eligible to be appointed as an arbitrator, they must be fair and honest persons who should satisfy one of the following conditions as stipulated by law:

- have passed the Chinese bar exam and obtained the legal professional qualification, and have engaged in arbitration work for eight years;
- have worked as a lawyer for eight full years;
- have worked as judges for eight years;
- are engaged in legal research or legal teaching with a senior academic title; or
- have legal knowledge and are engaged in professional work relating to economics and trade with a senior academic title or at the equivalent professional level.

For a foreign resident appointed as an arbitrator in the domestic arbitration institutions, the law does not specify the conditions and requirements; however, they must be equipped with comparable qualifications as required for Chinese arbitrators.

In addition, the arbitration institution prepares the panel lists of arbitrators according to their different specialisations, which ensures the needs of complex arbitration.

### Arbitral procedure

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

The Arbitration Law, Chapter IV, titled 'Arbitration Procedure', provides the rules on the following procedural matters:

- application and acceptance:
  - requirements for application of arbitration;

- list of documents;
- acceptance of arbitration and distribution of arbitration rules;
- dismissal or modification of the arbitration claim;
- property preservation; and
- attorney entrustment;
- composition of the arbitral tribunal:
  - number of arbitrators;
  - appointment and removal of arbitrators; and
  - withdrawal of arbitrators; and
- hearing and arbitral awards:
  - notification and service;
  - recording of hearings;
  - evidence rules;
  - expert rules;
  - evidence preservation;
  - reconciliation; and
  - time limit, content and signature of arbitral awards.

### Court intervention

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

The court may intervene during arbitration under the following circumstances and grounds:

- Ruling on the validity of the arbitration agreement: at the request of a party, the court may rule on the validity of the arbitration agreement; if both the arbitration institution and the court are requested by the parties to rule on the validity of the arbitration agreement, the court shall give the ruling (article 20 of the Arbitration Law).
- The issuance and enforcement of interim measures: when interim measures such as an interim injunction, evidence preservation and property preservation are applied during the arbitration, such application shall be forwarded to the competent courts through the arbitration institution for issuance and, later, enforcement (articles 28 and 46 of the Arbitration Law; articles 81 and 100 of the Civil Procedure Law).
- Setting aside an arbitral award: a party to the arbitration may request the competent intermediate people's court to set aside an arbitration award within six months of receipt of the award if this party can furnish evidence to prove the existence of any of the circumstances listed in article 58 of the Arbitration Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements).
- Enforcement of an arbitral award: if one party fails to execute the arbitral award, the other party may apply to a competent court for enforcement (article 62 of Arbitration Law).
- Refusing enforcement of an arbitral award: at the enforcement stage of an arbitral award, a party against whom the enforcement is sought can request the court to refuse the enforcement of an arbitral award, if this party can furnish evidence to prove the existence of any of the circumstances listed in article 237 of the Civil Procedure Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements), or in article 5 of the 1958 New York Convention (for foreign arbitral awards excluding those that are seated in Hong Kong, Macao and Taiwan, which are subject to different arrangements given or concluded).

## Interim relief

### 29 | Do arbitrators have powers to grant interim relief?

Interim measures, such as an interim injunction, evidence preservation and property preservation, are allowed before and during the arbitration proceedings. However, the arbitrators or the arbitration institution have no powers to issue or enforce evidence preservation and property preservation (articles 26, 46 and 48 of the Arbitration Law). Before commencing arbitration proceedings, the application for these interim measures must be directly requested by the parties to the court, where the respondent resides, or where the property or evidence in question is located. However, during arbitration proceedings, the application for interim measures may only be made through the arbitration institution, and parties to an arbitration may not directly request interim measures from the courts except in limited circumstances; for example, in arbitrations administered by the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission or the China Maritime Arbitration Commission, parties may apply for interim measures directly to the International Commercial Court under the Supreme People's Court during the arbitration proceedings.

For other interim measures that are not specified, the process generally follows the specific rules of the arbitration institution and can be decided by the arbitration tribunal.

## Award

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

The Arbitration Law does not set forth a time limit within which the award must be rendered. It leaves the relevant arbitration rules formulated by the arbitration institutions to deal with this matter.

Under their current arbitral rules, the China International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission and the China Maritime Arbitration Commission all set a six-month limit for international proceedings and a four-month limit for domestic proceedings.

According to article 54 of the Arbitration Law, an award must be delivered in writing with the following information set forth therein:

- the claims for arbitration;
- the facts of the disputes;
- the grounds upon which an award is given;
- the results of the judgment;
- the allocation of the arbitration fees; and
- the date of the award.

If the parties agree not to include in the award the facts of the dispute and the grounds on which the award is based, these matters may be omitted in the award. In addition, the award must be signed by the arbitrators and sealed by the arbitration institution. The arbitrator who disagrees with the award has the choice of whether or not to sign.

## Appeal

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

An award is final and binding once it is rendered and it cannot be appealed. However, a party may request the intermediate people's court where the arbitration institution is domiciled to set aside an award under the grounds set forth by law.

Depending on the nature of the award, the grounds upon which the award is set aside or refused for enforcement vary.

For a domestic arbitral award without foreign-related elements, a court may rule to set aside or refuse to enforce it if a party can furnish evidence to prove that there exists any of the following circumstances:

- there is no arbitration agreement between the parties;
- matters decided in the award exceed the scope of the arbitration agreement or are not under the jurisdiction of the arbitration institution;
- the composition of the arbitral tribunal or the arbitration procedure is contrary to the legal procedure;
- the evidence on which the award is based is falsified;
- the other party has concealed evidence that is sufficient to affect the impartiality of the award; or
- the arbitrators have demanded or accepted bribes, committed illegalities for personal gain or perverted the law in making the arbitral award.

For a domestic arbitral award with foreign-related elements, a court may set aside or refuse to enforce it if a party can furnish evidence to prove that any of the following circumstances exist:

- the parties have neither stipulated an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- the party against whom the application of setting aside or enforcement is sought was not requested to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his or her opinions for reasons for which he or she is not responsible;
- the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration;
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the jurisdiction of the arbitration institution; or
- if the people's court determines that the enforcement of the award would be against the public interest.

A court cannot set aside a foreign arbitration award but may refuse to enforce it under the grounds set out in article V of the New York Convention.

In addition, there are circumstances that result in the failure of enforcement, and the court may make a ruling rejecting the application for enforcement if:

- the subject of the rights and obligations is not clear;
- the specific amount of payment is not clear or the calculation method is not clear, resulting in the specific amount not being figured out;
- the particular thing to be delivered is not clear or cannot be determined; or
- the standard, target and scope of performance of action are not clear.

If the arbitration award determines a continuation of the performance of the contract but does not specify specific contents, such as the rights and obligations that are to be continued to be performed, the specific method of performance and the deadline, resulting in the failure of enforcement, the court may also reject the application for enforcement.

## Enforcement

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

#### Domestic awards

If an award is not complied with, the applicant may apply to the intermediate people's court where the respondent is domiciled or where

the respondent's property is located (or the basic-level people's court appointed) to enforce it.

If the respondent applies to the competent court to set aside the arbitral award at the same time that the applicant has applied for enforcement, the enforcement proceedings will be suspended. If the court rules to vacate the arbitral award, the enforcement proceedings will be terminated. If the court rejects the application to set aside the award, the enforcement will resume.

The time limit to apply for enforcement is two years from:

- the last day of the performance period specified in the arbitral award;
- the last day of each performance period if the arbitral award requests performance in instalments; or
- the effective date of the arbitral award if the award does not specify a period for performance.

In the last six months of the time period available to apply for enforcement, if an application for enforcement cannot be filed because of a force majeure event or other obstacles, the calculation of the time limit will be suspended and will resume after the suspension causes are eliminated.

If the parties reach a settlement, or one party requests the performance of the award or agrees to perform the award, the time limit for applying for enforcement will be started again.

The proposed ruling of any intermediate people's court or any specialised people's court after review not to enforce or set aside the domestic arbitral award shall be reported to the high people's court within its jurisdiction for review; the final ruling shall be made based on the opinions given by the high people's court after it has reviewed the proposed ruling.

### Foreign awards (including awards made in Hong Kong, Macao and Taiwan)

China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention).

Separate arrangements with Hong Kong and Macao (which is treated as a different jurisdiction for the purposes of arbitration) were entered into in 2000 and 2007 respectively, which both adopt the same general principles as the New York Convention (ie, the Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region and the Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region).

The Supreme Court has issued a judicial interpretation about the recognition and enforcement of arbitral awards made in Taiwan.

The non-enforcement of foreign arbitral awards and the setting aside or non-enforcement of domestic arbitral awards with foreign-related elements are both subject to a reporting mechanism established by the Supreme People's Court in 1995. According to the reporting mechanism, if there is a proposed ruling by any intermediate people's court or any specialised people's court not to recognise and enforce a foreign arbitral award or setting aside or not to enforce a domestic award with foreign-related elements, that proposed ruling shall be reported to the high people's court within its jurisdiction for review; if the high people's court intends to agree with the proposed ruling after review, it must report the ruling to the Supreme People's Court for final review. The final ruling must be made based on and following the review opinion given by the Supreme People's Court. As of December 2017, the Supreme People's Court has unified and applied the same reporting mechanism to domestic arbitral awards without foreign-related elements, which means that setting aside or non-enforcement

of a purely domestic award must be finally decided by the Supreme People's Court.

### Costs

#### 33 | Can a successful party recover its costs?

According to article 9 of the Arbitration Fee Collection Measures of Arbitration Institutions, fees paid to the arbitration institution must, in principle, be borne by the losing party. However, if a party only partially wins, the arbitration tribunal shall determine the allocation of fees based on the parties' liabilities and the percentage of the party's success.

The arbitration rules of an arbitration institution also involve the recovery of costs by a successful party. For example, article 52(2) of the 2015 Arbitration Rules of the China International Economic and Trade Arbitration Commission provides that the arbitral tribunal has the power to decide in the arbitral award that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The main ADR alternatives to civil litigation in China include negotiation, mediation and conciliation. Mediation is a signature element in China's amicable dispute resolution system, which has been a preferred dispute resolution throughout Chinese history and remains widely used today.

In China, judicial mediation is quite common and is frequently adopted by the courts in the case management system.

### Requirements for ADR

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

Parties to litigation or arbitration are not required by law to consider ADR before or during proceedings.

The court or tribunal cannot compel the parties to participate in an ADR process.

## MISCELLANEOUS

### Interesting features

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

When a claim is filed to the court, rather than bringing it to a full trial of civil proceeding, the parties concerned can ask the judges for judicial mediation, provided that it is requested under the free will of, and voluntarily by, the parties and the facts concerned are clear. Complex civil procedures are lessened if the dispute is solved through judicial mediation, which is more effective. If a mediation agreement is reached by the parties, the court shall prepare a written mediation statement confirming the mediation agreement, which has the same effect and enforceability as a judgment.



**UPDATE AND TRENDS****Recent developments**

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

**Amendment of Civil Procedure Law**

In December 2021, the amended Civil Procedure Law was officially promulgated, and came into force on 1 January 2022. Among other things, this amendment shortened the service time of the announcement to 30 days, shortened the maximum trial limit of summary procedure from six to four months and improved the system of application procedures of small claims litigation.

**Establishment of Beijing International Commercial Court**

The Beijing International Commercial Court was established to improve the ability to solve foreign-related commercial disputes and provide a better environment for Chinese and foreign parties to be equally protected by law.

**Rules for Online Mediation by People's Courts**

These Rules came into force on 1 January 2022. They clarify the scope of online mediation and set forth online mediation procedures.

**Improvements to the system of online litigation**

In June 2021, the Supreme People's Court issued the Online Litigation Rules of the People's Court. The Rules established an online litigation system covering all fields and the whole process of litigation.

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# Cyprus

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## LITIGATION

### Court system

#### 1 | 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 include the Labour Court, the Family Court, the Rent Control Court, the Military Court and the newly formed Administrative Court, which acts as the Administrative and Tax Court.

First instance civil proceedings before district courts are heard by a single judge.

The Supreme Court acts as the final appellate court, with jurisdiction to hear and decide 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 of three judges.

### Judges and juries

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

The Cypriot trial system is adversarial in nature and, consequently, judges act only as umpires between the parties. There are no jury trials in Cyprus. All civil cases before district courts are tried by a single judge sitting without a jury.

All judges except those of the Supreme Court are appointed by the Supreme Council of Judicature, a body composed of the judges of the Supreme Court. This body is responsible for the appointment, promotion, transfer, discipline and dismissal of judges. Supreme Court judges are appointed by the President of the Republic, from within the ranks of the judiciary, upon recommendation from the Supreme Court.

There are currently no formal procedures or initiatives to promote diversity on the bench in Cyprus. The current ratio of male to female judges is approximately 60:40.

### Limitation issues

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

The time limits within which claims must be brought before a court are currently prescribed by the Limitation of Causes of Action Law of 2012 (Law 66(I)/2012), which entered into force on 1 July 2012. According to article 3 of the 2012 law, the limitation period of a claim commences from the date the cause of action accrued. Article 4 provides for a general time limit of 10 years, unless otherwise provided in the Law

of 2012 or any other law. The Law of 2012 and other laws provide for specific time limits for particular causes of action.

For instance:

- torts: there is a six-year limitation period from the date when the cause of action accrued except for cases of negligence, nuisance and breach of statutory duty, where there is a three-year limitation period from the date when the injured person became aware of the cause of action;
- contract: there is a six-year limitation period from the date when the cause of action accrued;
- mortgage, pledge: there is a 12-year limitation period from the date when the cause of action accrued; and
- bills of exchange, etc: there is a six-year limitation period from the date when the cause of action accrued.

The above limitation periods may be extended by the court by two years where the court considers this to be just and reasonable in all the circumstances.

Parties cannot agree to suspend the time limits. Nevertheless, time limits may be suspended if the parties fall within one of the categories provided by article 12 of the Law of 2012 (eg, cohabiting partners, spouses during marriage, or parents and children where the children are minors).

The transitional provisions of the Law of 2012 provide that all limitation periods will start counting from 1 January 2016.

### Pre-action behaviour

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

Despite there being no general pre-action protocols or procedural formalities that must be followed prior to the initiation of proceedings in Cyprus, parties must bear in mind that in certain specialist proceedings (eg, winding-up proceedings or tenant evictions), there are specific procedures that must be followed prior to the commencement of the proceedings.

Courts in Cyprus may grant pre-action discovery orders, such as *Norwich Pharmacal* orders, to assist a party in bringing an action.

### Starting proceedings

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

### Commencement of proceedings

Civil proceedings in Cyprus are commenced by filing a writ of summons, which provides for the extent and nature of the claim and the remedy or relief sought, with the registrar of the district court that has jurisdiction

to adjudicate upon the case. The writ of summons may be either generally endorsed and include merely the relief sought, or specially endorsed and provide for the particulars of both the relief sought and the basis upon which that relief is being sought.

### Notification of commencement and service of a claim

The persons against whom proceedings are commenced are notified of the proceedings via personal service of the writ of summons on them, namely delivery of a copy of the writ to the person being served by a private bailiff.

In general, the writ of summons must be served within 12 months of its filing. The 12-month limit can, however, be extended for an additional six months if the plaintiff obtains permission from the court. The deemed date of service is the date on which the private bailiff served the writ of summons on the person being served.

If personal service is not feasible, an application can be made to the court for an order for substituted or other services (such as service through public advertisement, placing a notice on the board of the court, email or other).

In circumstances where the party to be served is located outside Cyprus, such service shall only be made after leave to do so has been obtained from the court. The court must be satisfied that there is a proper case for service outside Cyprus, that the plaintiff has a prima facie good cause of action against the defendant and that the defendant may be found in a particular country and place outside Cyprus. What is served outside the jurisdiction to a non-Cypriot defendant is not a writ of summons but a notice of a writ of summons.

### Courts' caseload

Further to a recent amendment of the Civil Procedure Rules, a 'small track' was established with a simplified procedure for claims under €3,000. The amendment, with a view to making the process more expedient, increased the case management options available to the judges in such cases, allowing them to give summary judgments.

The current delay for civil actions is between three and five years.

### Timetable

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

Civil proceedings are initiated by filing a writ of summons that must subsequently be served on the defendants. Provided the defendant is within the jurisdiction of Cyprus, he or she is required to enter his or her appearance within 10 days from the date on which the writ of summons was served on him or her.

If the writ of summons is generally endorsed, the plaintiff must file and deliver to the defendant a statement of his or her claim, containing particulars of the relief or remedy that is sought and the basis upon which that relief is being sought, within 10 days from the defendant filing his or her appearance. Subsequently, the defence or the defence and counterclaim of the defendant must be filed and delivered to the claimant within 14 days from the filing of the statement of claim.

If the plaintiff files a writ of summons specially endorsed, then the defendant must file and deliver a defence and, if desired, a counterclaim within 14 days from filing an appearance. In both instances, the claimant may file a reply to the defendant's defence within seven days of delivery of the defence (where there is no counterclaim), and shall file a defence to the defendant's counterclaim and a reply to the defendant's defence within 14 days from the delivery of the defendant's defence and counterclaim.

Once the pleadings are completed, the parties may apply to the court for directions preparatory to the trial, including for discovery and inspection of documents, filing of witness statements etc.

During the main trial of a typical proceeding, each side is allowed to present its witnesses, who may be subject to cross-examination by the other side. Once all testimony is completed, the parties will be invited to present their final submissions to the court in support of their arguments.

During the proceedings, various interlocutory applications may be filed by the parties. If such applications are opposed by the other party, a hearing will be conducted for the court to determine whether to issue the requested orders or allow the applications.

### Case management

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

The procedure and the timetable of the claim are dictated by the court. Nevertheless, the timetable of a claim can be influenced by the number of interlocutory applications or other procedural steps of either party in the proceedings.

### Evidence – documents

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

Any party may apply to the court for an order directing any other party to any cause or matter to make discovery on oath of the documents that are, or have been, in his or her possession or power relating to any matter in question therein. That application can be made at any time after the commencement of the proceedings. There are no particular classes of documents that do not require disclosure, but the discovery is subject to privilege and admissibility rules. If a party ordered to make discovery of documents fails to do so, he or she cannot later be at liberty to submit evidence in the action or allow any document that he or she failed to discover to be inspected, unless the court is satisfied that he or she had reason for not disclosing the said document.

### Evidence – privilege

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

A document may be covered by privilege, and as such, a party may refuse to produce it for inspection, on any one of the following grounds:

- litigation privilege;
- legal professional privilege;
- without prejudice communications;
- self-incrimination privilege;
- public interest immunity; and
- confidential nature.

### Evidence – pretrial

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

Parties do not normally exchange evidence from witnesses prior to trial, except for situations where it is their intention to adopt written statements in the course of the examination of the witnesses they have called upon to give oral evidence and the court has ordered that such statements are exchanged between the parties prior to the hearing.

With regard to experts, the reports of those witnesses are usually exchanged prior to trial, as their cross-examination is based on the content of their reports.

## Evidence – trial

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

The general rule is that all evidence, whether oral, documentary or real, must be brought before the court during the hearing of an action. That evidence must be the best possible evidence at hand, must be admissible and must be relevant to the facts in issue. Witnesses, whether expert or of fact, are called to the court for examination or to produce a certain piece of evidence. The witness is first examined by the party that has called him or her and may then be cross-examined by any other party in the proceedings. The witness may then be re-examined by the party at whose instance he or she was called to give evidence.

For an expert witness to give evidence before the court, it must be shown, to the satisfaction of the court, that expert evidence is necessary for the proceedings to be disposed of and that the person in question has the necessary knowledge and skills to give such evidence. The expert may bring to court an expert report, which he or she then adopts under oath.

## Interim remedies

### 12 | What interim remedies are available?

Cyprus courts have a wide discretion to issue any interim orders they deem just and reasonable in all circumstances, including the following:

- freezing injunctions (with either local or worldwide application);
- prohibitory and mandatory injunctions;
- appointment of an interim receiver or a provisional liquidator;
- search orders; and
- orders for the discovery and inspection of documents.

Interim remedies are available in support of foreign proceedings, where the courts have jurisdiction in that regard by virtue of a Cyprus law or a relevant international or bilateral treaty. In particular, interim relief can be sought in aid of foreign proceedings in the European Union, Norway and Switzerland by virtue of relevant European regulations, and in aid of international arbitration proceedings by virtue of Cyprus law.

## Remedies

### 13 | What substantive remedies are available?

The following substantive remedies are available, inter alia:

- declarations of rights or liabilities between the parties;
- general or special damages as compensation for any losses or injuries suffered by the plaintiff;
- orders for restitution of any gains or benefits acquired by the defendant;
- injunctive relief; and
- specific performance orders.

Interest is payable on money judgments.

## Enforcement

### 14 | What means of enforcement are available?

A money judgment may be enforced in one or more of the following manners:

- by a writ of movables, namely the seizure and sale of movable property;
- by registering the court's judgment on immovable property in the Land Registry;
- by a writ of sale of immovable property;

- by a writ of attachment, namely the seizure or payment of movables or debts owed to the judgment debtor by a third party;
- by a charging order over shares and an order for the sale of the shares;
- by an order for repayment of the debt in question via monthly instalments; or
- by appointing a receiver by way of equitable execution.

With regard to judgments other than money judgments, compliance with the court's orders may be achieved via contempt proceedings. The court, following a finding of contempt, may order the imprisonment of, the sequestration of the assets of, or the payment of a fine by anyone who does not act in conformity with a court order, including an interim order.

Additionally, a court may remove a person's right to be heard in the proceedings if he or she is found to be in contempt of a court order.

## Public access

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

By virtue of article 30(2) of the Constitution, court hearings are generally held in public. Nevertheless, court documents are only available to the parties to the proceedings.

## Costs

### 16 | Does the court have power to order costs?

The court has wide discretion to award costs, depending on the particular circumstances of the proceedings and the conduct of the parties; however, the general rule is that the losing party bears the costs of the proceedings.

The costs involved in civil court proceedings vary, depending on how protracted the case proves to be and the time dedicated by the lawyer handling the case.

The amount of costs awarded by the court is calculated on the basis of court fixed-fee scales, depending on the value of the claim. These describe the service provided throughout the proceedings and set out the minimum and maximum charges for each particular step.

Despite this, in practice, the costs recovered on the basis of the court's scales only cover a very small portion of the actual costs, including legal fees, paid by the client for the purposes of the proceedings. This is the case especially in commercial litigation where the value of the claim is very high.

An application for security for costs can be made by a defendant against a claimant (and by a claimant against a defendant in respect of a counterclaim that is not merely in the nature of a set-off) at any stage of the action where:

- the respondent is ordinarily resident outside of Cyprus or any other European member state;
- the respondent has no assets in Cyprus to satisfy any order as to costs that is made against him or her;
- the respondent is acting through a nominal plaintiff or defendant; and
- where the court orders security for costs to be given, it may stay the proceedings until such security is given and may dismiss the proceedings where the time period for providing such security has expired.

The current framework on costs was revised in 2017.

## Funding arrangements

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

Funding of litigation proceedings is normally arranged for by the parties. A lawyer may negotiate his or her legal fees for litigation proceedings and can reach any special arrangement or retainer freely with his or her client, failing which the matter will be governed by the rules of the court and the court's fixed-fee scales.

The Cypriot courts have not yet considered the issue of conditional or contingency fee agreements; however, it is assumed that such arrangements are not permissible, as they offend the equitable principle against champerty. Champerty is an agreement where a person who maintains an action takes, as a reward, a share in the property recovered in the action. Accordingly, lawyers involved in the conduct of litigation are precluded from taking a share in the property recovered in the action pursuant to a conditional fee agreement.

Similarly, third-party funding is not available in Cyprus because of the application of the aforementioned principle of champerty, which, coupled with the principle of 'maintenance', aims to restrict the selling and funding of litigation (the principle of 'maintenance' precludes a person from maintaining a case without just cause or excuse). On that basis, third-party funding and assignment of a cause of action are not permissible.

However, the matter is not regulated and there is no case law or other precedent on the above.

## Insurance

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

Although it is permissible to take insurance to cover legal costs, this course is not normally followed in Cyprus and may not be practically available.

## Class action

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

Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may be authorised by the court to sue or defend in such cause or matter, on behalf or for the benefit of all persons so interested, provided a power of attorney signed by the persons to be represented is filed in court.

In such proceedings, the persons represented shall be bound by the judgment of the court and the same may be enforced against them in all respects as if they were parties to the action.

## Appeal

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

An appeal of any interim decision must be brought within a strict time limit of 14 days from the date the relevant judgment or order was issued. Any other appeal of a judgment on the merits of the case must be brought within 42 days from the date the relevant judgment was issued. The court may, upon a relevant application, extend the time limit for filing an appeal.

Appeals are brought by filing a written notice to the registrar of the court appealed from. That notice shall specify the part of the judgment or order being appealed and the grounds of appeal. The notice shall then be served on any party that is directly affected by the appeal.

The appellant may appeal the whole or part of any judgment or order. An appeal may be made against the findings of specific facts if the appellant considers that there was insufficient evidence to support the decision, or it may be made against specific points of law.

Appeals are currently heard by the Supreme Court and there is currently no right to further appeal.

## Foreign judgments

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

A foreign judgment or order issued by a European court can be recognised and enforced in Cyprus pursuant to the provisions of the European Judgment Regulations and other European regulations on specialised proceedings (such as the European Regulations on Insolvency Proceedings). As the Judgment Regulations do not require any specialised procedure for the recognition of foreign judgments, normally, European court judgments can be directly enforced in accordance with the local procedures.

A non-European judgment or order may be recognised and enforced in Cyprus pursuant to bilateral or multilateral agreements that Cyprus has ratified. Alternatively, a separate action may be initiated in Cyprus regarding the same cause of action brought in the foreign jurisdiction.

## Foreign proceedings

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

Pursuant to bilateral or multilateral treaties or EU regulations, Cyprus courts may provide assistance in connection with foreign proceedings via the gathering of evidence in Cyprus, on the basis of letters rogatory or other letters of request sent by the foreign court.

## ARBITRATION

### UNCITRAL Model Law

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

The law governing domestic arbitrations, Chapter 4, was enacted when Cyprus was a British colony and is, therefore, very similar to the English Arbitration Act 1950.

In 1987, Cyprus adopted UNCITRAL's Model Law on International Commercial Arbitration, dated 21 June 1985, by enacting the International Commercial Arbitration Law No. 101/87. The legal framework governing international commercial arbitration proceedings is, therefore, almost identical to the UNCITRAL Model Law. In that regard, Law No. 101/87 adopts the Model Law's guiding footnote with respect to the meaning of the term 'commercial'.

### Arbitration agreements

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

Both Chapter 4, which applies to domestic arbitrations, and Law No. 101/87, which applies to international commercial arbitrations, provide for an arbitration agreement in 'writing'.

Law 101/87 defines an 'arbitration agreement in writing' as follows:

*An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*

Chapter 4 does not define the term ‘arbitration agreement in writing’.

### Choice of arbitrator

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

### Appointment of an arbitrator

In international commercial arbitrations, pursuant to Law No. 101/87, where the arbitration agreement does not specify the composition of the arbitral tribunal, the arbitral tribunal shall be constituted of three arbitrators.

If there is no specified procedure for the appointment of the arbitral tribunal, the default appointment procedure provided for under article 11(3) of Law No. 101/87 applies as follows:

- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court.
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the court.

Domestic arbitrations, pursuant to Chapter 4, are heard by a single arbitrator, where the arbitration agreement is silent on the matter. Article 10 of Chapter 4 provides that Cypriot courts will intervene in the appointment process if:

- the parties fail to agree on the appointment of an arbitrator where the arbitration agreement provides for the appointment of a single arbitrator;
- an arbitrator appointed by the parties refuses to act or is incapable of acting or passes away and the parties fail to appoint another in his or her place;
- the parties or two arbitrators fail to appoint an umpire or a third arbitrator; and
- the appointed umpire refuses to act or is incapable of acting or passes away and the parties or the arbitrators fail to appoint another in his or her place.

### Challenge on the appointment of an arbitrator

In international arbitrations, pursuant to Law No. 101/87, the exemption of an arbitrator may be proposed to the arbitral tribunal only where circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties. If the arbitrator in question does not resign or the other parties in the arbitration proceedings do not agree with the exemption proposal, the arbitral tribunal rules upon the exemption proposal.

In domestic arbitrations, pursuant to Chapter 4, any party may challenge the appointment of an arbitrator and request his or her dismissal if he or she fails to act with due speed in pursuing the arbitral proceedings and issuing the arbitral award. Additionally, the court may remove an arbitrator who has acted improperly or has handled the case badly.

### Arbitrator options

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

There are no provisions in domestic arbitration laws limiting the parties’ options when choosing an arbitrator. Nevertheless, the arbitration agreement may limit the options of the parties in that regard.

### Arbitral procedure

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

Law No. 101/87 incorporates all mandatory provisions of the UNCITRAL Model law in international commercial arbitrations. For example, article 18 requires that the parties are treated with equality and that each party is given an opportunity to present its case; article 24(1) provides a party with the right to request a hearing; and article 26 provides a party with a right to appoint and question an expert, etc.

Chapter 4 does not contain any mandatory provisions for the arbitral process to be followed but provides Cypriot courts with extensive supervisory jurisdiction over domestic arbitrations.

### Court intervention

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

In international commercial arbitrations, the courts may intervene in the instances prescribed by Law No. 101/87. The main purpose of such an intervention is to ensure the proper conduct of the international arbitration, for instance by assisting in the constitution of the tribunal, deciding on the jurisdiction of the tribunal, assisting in the taking of evidence and ruling upon the validity of the arbitral award.

In domestic arbitrations, under Chapter 4, Cypriot courts have extensive supervisory jurisdiction and may intervene, upon the application of one of the parties, for the purpose of issuing, *inter alia*:

- orders for the production of documents;
- orders for submitting evidence by affidavits;
- orders for the examination on oath of any witness or the examination of a witness outside the jurisdiction;
- orders for the inspection of property that is the subject matter of the arbitration; and
- discovery orders.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Pursuant to article 17 of Law No. 101/87, an arbitral tribunal in an international commercial arbitration may, upon the application of any of the parties, issue any necessary interim measures with regard to the subject matter of the dispute.

A tribunal in domestic arbitration, operating under Chapter 4, has jurisdiction to issue any interim order, including an order for the appointment of a receiver.

## Award

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

#### Timing for the award

There is no specific time limit for rendering an award under either Chapter 4 or Law No. 101/87. Nonetheless, there may be contractual limits within which such awards must be rendered.

#### Form of an award

Pursuant to article 31 of Law No. 87/101, an international commercial arbitration award must state the reasons upon which the award is based unless the parties have agreed otherwise or the award is an award on agreed terms. Furthermore, the award must be in writing, contain the date and place of the arbitration and be signed by all arbitrators.

Chapter 4 is silent on the form and content of domestic arbitration awards.

## Appeal

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

In domestic arbitrations, pursuant to Chapter 4, an award may be set aside by the court where the arbitrator has acted improperly or has handled the case badly or the arbitration proceedings were conducted irregularly or the arbitral award was issued irregularly.

In international commercial arbitrations, pursuant to Law No. 101/87, an award may be set aside on the same grounds as those provided in UNCITRAL Model Law, namely:

- incapacity of the parties;
- invalidity of the arbitration agreement;
- lack of sufficient notice of the proceedings to one of the parties or other denial of a party's right to present its case (due process);
- lack of jurisdiction of the tribunal;
- the tribunal's constitution or the procedure followed for the arbitration is contrary to the arbitration agreement or the Law No. 101/87;
- non-arbitrability of the subject matter of the dispute under the laws of Cyprus; or
- the award is contrary to the public policy of Cyprus.

## Enforcement

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

As a contracting party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations of 1958 (the New York Convention), Cyprus is bound to enforce awards issued in foreign states that are contracting parties to that convention.

The New York Convention is incorporated in articles 35 and 36 of Law No. 101/87. As per article 35, the party seeking the recognition and enforcement of a foreign award must submit a relevant application supported by an affidavit, attaching the original or a certified copy of the arbitral award and the arbitration agreement as well as the translation of the same in Greek.

In domestic arbitrations, under Chapter 4, an award may, with the leave of the Cypriot court, be enforced in the same manner as a Cyprus judgment or order to the same effect. In that case, a judgment may be entered in the same terms as the terms of the award.

## Costs

### 33 | Can a successful party recover its costs?

Overall cost allocation rests with the tribunal unless the parties agree otherwise. The general rule is that costs follow the event and are usually dealt with by the arbitration award. The costs that are generally

recoverable, subject to the arbitration agreement between the parties, are the fees and expenses of the tribunal, the fees and expenses of the arbitral institution, and the parties' legal and other costs, including costs relating to witnesses and the hearing.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The methods of 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.

### Requirements for ADR

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

Even though there is no general requirement for parties to litigation to consider alternative dispute resolution before or during the proceedings, according to article 15(1)(a) of the Law on Certain Aspects of Mediation in Civil Matters [Law No. 159(I)/2012], a court before which litigation proceedings are carried out may invite the parties to the litigation to present themselves before it and inform the court as to the possibility of resolving their dispute by means of mediation.

In practice, the courts will generally refrain from forcing any party, directly or indirectly, to participate in alternative dispute resolution processes.

## MISCELLANEOUS

### Interesting features

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

In 2015, Orders 30 and 25 of the Civil Procedure Rules were repealed with a view to expediting the case management stage of the proceedings and limiting the current delay in adjudicating civil cases. The repealed provisions of the said Orders apply with regard to all actions filed from 1 January 2016.

Further to the repealed provisions of Order 30, there is a strict time limit of 90 days from the date the pleadings are deemed 'closed' within which the claimant must issue a notice with request for procedural directions. In case of failure, within 15 days thereafter, the defendant may request the dismissal of the action. If the defendant does not proceed as such, the action will be considered abandoned and be dismissed by the court.

Upon the issuance of the notice for directions by the plaintiff and within 30 days from service of the same on the defendants, the defendants shall file a specified form with request for procedural directions.



A directions hearing must be held within 60 days from the issuance of the notice of directions by the plaintiff. During that hearing, the judge issues procedural directions on the matters requested by the parties. No party is permitted to request directions during the directions' hearing on any matter he or she did not request any directions with his or her relevant notice or form.

Thereafter, a further directions hearing shall be held for directions on the evidence to be given at trial, including directions for the filing of a list of proposed witnesses together with a summary of the evidence to be given by each.

The new provisions further provide for strict deadlines regarding the duration of examination, cross-examination and re-examination of witnesses.

The repealed Order 30 also provides for a fast-track procedure with respect to claims with value up to €3,000, which should generally be heard only on the basis of written evidence.

Further to the repealed provisions of Order 25, it is now permissible for a claimant to amend his or her writ of summons after its issuing but prior to its service without the leave of the court. Any party may also amend its pleadings once after the exchange of the pleadings and prior to the issuing of the notice for directions (pursuant to Order 30) without the leave of the court. Any party may amend its pleadings at any time thereafter upon the court's leave and merely where a bona fide error was made or where the court is satisfied that specific facts were not in existence when the document was first filed.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

A number of reforms for the modernisation of the judiciary and the civil court system are on the government's agenda.

One of the major reforms, which is currently a work in progress, is the establishment of a Commercial Court with jurisdiction to hear commercial and corporate disputes of substantial value. The Commercial Court is expected to take up the large volume of commercial cases with cross-border characteristics, within the frames of which applications for interim orders are usually pursued.

Additionally, the Cyprus government is currently working on the establishment of a Supreme Constitutional Court, separate from the current Supreme Court. The Supreme Constitutional Court will have jurisdiction to hear cases on constitutional matters and will act as an appellate court to the Supreme Court, thereby establishing a third tier to the Cyprus court system.

Further, a number of proposals for the formalisation of the process by which the judges are being appointed, promoted, disciplined and dismissed are being pursued, with a view to promoting transparency and diversity within the judiciary.

Finally, extensive reforms to the Civil Procedure Rules are under consideration. At the same time, the lockdown measures in response to the covid-19 pandemic have expedited the implementation process of reforms on remote court hearings and electronic filing of court documents. These are expected to be completed shortly, while directions and procedural hearings have been taking place remotely for some time now.

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# Denmark

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## LITIGATION

### Court system

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

The Danish courts are composed of the Supreme Court, two high courts, the Maritime and Commercial Court, the Land Registration Court, 24 district courts, the Appeals Permission Board, the Special Court of Indictment and Revision, the Danish Judicial Appointments Council and the Danish Court Administration.

The courts are governed by the Danish Administration of Justice Act. They do not have specialised subject matters. The district courts, high courts and the Supreme Court handle all types of cases, but certain cases may be handled by a department within the courts that has specific knowledge of that type of case. Furthermore, it is possible in a first instance case that the court may decide that the court, at the main hearing, must be acceded by two expert lay judges, whose expertise is deemed to be of importance to the case. Certain requirements must be fulfilled.

#### The high courts and district courts

As a main rule, cases commence in the district courts, which are each situated in their judicial district in Denmark. On very few occasions, cases may start in one of the two high courts (western or eastern), if the subject matter of the case is of general public importance and the case is considered to be of principal nature, so an appeal is made to the Supreme Court.

The general rule is that a case can be tried in two instances. When a case is appealed from a district court to a high court, it is possible for the high court to dismiss an appeal, if there is no prospect of the court reaching a different verdict than the district court and the appeal does not concern fundamental legal questions, or where no other general reasons exist in favour of hearing the case before the high court.

Appeals allowed by the Danish Appeals Permission Board cannot be dismissed by the high courts. If the case started before the district court concerns a matter of general public importance or of principal nature, it may be appealed twice. It is also possible to have the Supreme Court hear the case, as a third instance, if this is permitted by the Danish Appeals Permission Board.

The district courts will be presided over by at least one judge and the high courts by at least three judges.

The district courts have different subdivisions according to subject matter, such as the housing court, the probate and bankruptcy courts and the bailiff's court.

Small claims of a principal amount not exceeding 50,000 kroner are decided by the district court under simplified procedural rules, which aims to accelerate the process and extend the general availability of the courts to the public.

### The Supreme Court

The Supreme Court is the court of highest instance in the legal system. Through its rulings, the Supreme Court mainly determines the guidelines for processing similar cases in the district courts and the high courts.

The Supreme Court will be presided over by at least five judges.

### The Maritime and Commercial Court and others

The Maritime and Commercial Court decides on cases concerning maritime and commercial matters with an international trade aspect or international parties, or both. Furthermore, cases concerning the Danish Trade Marks Act, the Danish Design Act, the Danish Marketing Practices Act and the Danish Competition Act are heard by the Maritime and Commercial Court. In addition, the bankruptcy division of the Maritime and Commercial Court hears cases concerning bankruptcy, suspension of payments, compulsory debt settlement and debt rescheduling arising in the greater Copenhagen area. Decisions from the Maritime and Commercial Court may be appealed directly to the Supreme Court. In addition to the above-mentioned courts, there are also specialist courts, such as the Labour Court, which decides cases involving matters between employers' organisations and trade unions.

### Judges and juries

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

The system is based on the adversarial approach, where judges have a passive role and are only to judge based on the facts and evidence presented by the parties in court during the proceeding. It is not possible for the court to render a decision based on evidence that has not been presented by the parties. Besides delivering judgment, judges also head the trial and oversee the process. During witness testimony, judges can question the witnesses.

Judges are obliged to guide a party who is not legally represented when needed. This guidance covers only procedural issues and does not include legal advice regarding the merits of the case. In small claims cases under 50,000 kroner the guidance of the judge is extended to also consider the merits, to accelerate the process.

Juries are only involved in some types of criminal cases and not in civil law proceedings.

It is a possibility in some cases to use expert lay judges if the case calls for specific knowledge and if the courts find it relevant. Such a request must be made within a brief period of time after the initiation of the case, and no later than at the pretrial hearing, as a request otherwise is most likely to fail.

The selection process for the judges is handled by the Judicial Appointment Council, an independent council with the task of submitting recommendations to the Minister of Justice regarding the appointment of judicial posts. It follows from article 43 of the Administration of Justice Act that recruitment is based on an overall assessment of

the candidates' qualifications for the post in question. This will place a decisive emphasis on the applicants' legal and personal qualifications. The breadth of the applicants' legal basis of experience must also be emphasised, and it should be included in the assessment that judges should have different legal backgrounds.

### Limitation issues

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

As a main rule, there are no specific time limits for bringing civil claims under the Administration of Justice Act, and all claims can be brought before the court, if the claim itself has not ceased to exist (eg, because of the lapse of a time-limitation period or inactivity in the form of estoppel).

The limitation period for monetary claims is determined in the Danish Limitation Act (Chapters 3 to 4), and is, as a main rule, three years although it may be extended to 10 years. The limitation period begins at the earliest time when the claim could be made. The 10-year limitation period requires a judgment, written confirmation with acknowledgment of claim. A written notice or dunning letter is not sufficient to bring the three-year limitation period to stop, as this requires legal action or confirmation from the debtor.

Parties are free to agree to suspend the limitation period if the agreement is regarding an identified claim and after limitation has begun to run. A general waiver of the limitation periods is not possible under Danish law.

In some specific cases, a time limit exists if the lawsuit follows a decision by an administrative board or a special tribunal. Examples include decisions made by a municipality's rental board. Such decisions must be brought before the courts no later than four weeks after the decision was made. A similar time limit of eight weeks applies for decisions made by the Public Procurement Board before the courts. If the deadline expires, the decision of the administrative board is final. Other examples exist in Danish law.

The courts will not ex officio try the above limitations when the case is filed. A party who has a case filed against him or her beyond any time limit must raise the issue in their first written reply in the dispute. The matter may then be subject to a separate formality proceeding at the sole discretion of the courts.

### Pre-action behaviour

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

As a main rule, there are no definite pre-action considerations to be considered before commencing proceedings by filing a writ of summons with the court.

An exception to the main rule is monetary collection claims. As a pre-action consideration, the claimant must submit a demand by letter to the debtor with a deadline for payment of at least 10 days and information that further costs will be imposed if payment is not made. If the requirement is not fulfilled there will be a cost issue, as the creditor will not be able to claim full costs of the case. Furthermore, in cases for collection of rent, there is a special requirement involving the notice given to the tenant.

The parties may request the court to assist with a pretrial expert opinion before filing a claim. These opinions will be allowed to be presented to the court in a later trial regarding the merits of the dispute. The option is relevant in many situations where there is a special need to secure evidence for the claim. This could be in situations where the object of the expert opinion (eg, perishable goods) may not exist when the actual trial takes place.

### Starting proceedings

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

Proceedings are commenced by handing in a writ of summons stating the claim, the factual aspects of the dispute, the legal arguments, evidence and suggestions from the claimant as to the form of the proceedings in court (the number of judges, expert lay judges, etc). Also included are the exhibits on which the case is to be based. The writ of summons must be handed in via an online platform provided by the Danish Courts Administration.

The plaintiff must at the same time transfer a court fee, the size of which is based on the claim. When the case is scheduled to be heard at the final hearing, a second court fee of the same amount is to be paid.

The writ of summons is then served on the defendant digitally; however, this requires the defendant to sign off digitally. If the defendant does not sign off digitally, the writ is served by a judicial officer. This must be done in person to the defendant or to a member of his or her household. If the defendant is not a person, it must be served on the head of the legal entity or on an authorised staff member. It is possible for the court to make use of different serving mechanisms, hereunder letters, telephone notices, digital communications and personal notifications.

The process is handled by the court. After the writ of summons has been served, the defendant is granted at least two weeks to submit the defence. The court informs the parties via the digital platform, which therefore is simultaneously.

For small claims of a principal amount not exceeding 50,000 kroner the process is significantly simplified. For all claims under 50,000 kroner utilising the small claims process, the fee is a one-time payment of 500 kroner.

The courts monitor their capacity and aim to handle all cases within the shortest period. In situations where there is a capacity problem, the courts have usually recruited more judges or referred the cases to other venues. There is currently no issue regarding the capacity of the Danish courts.

### Timetable

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

Civil claims begin with the plaintiff filing a writ of summons in the court of jurisdiction via the digital platform. The court will then serve the writ on the defendant. From the time of service of the writ of summons, the defendant normally has two weeks to file a statement of defence. Any deadlines are clearly stated when viewing the case on the digital platform.

If a petition for extension is not filed, the defendant shall state his or her defence in a reply within two weeks. Following this initial upload of documents to the digital platform, the parties may upload further written replies and rejoinders. The courts oversee this process and set appropriate deadlines for these replies, taking the specific situation into account. Typically, a party is given a deadline of three to four weeks. This may be extended at the request of the party.

The courts may also offer the parties court-based mediation. For further information see the Danish Administration of Justice Act (Chapter 27). Participation in mediation is voluntary and requires the acceptance of both parties. Should one party turn down the offer, this will not harm the party in a subsequent court case.

If deadlines are not met, the court might decide to render a default judgment or decide on issues to the detriment of the party breaching the deadline.

When the initial documents and arguments are exchanged, the court may call the parties to a pretrial hearing during which the parties are to discuss the legal and factual conditions of the case. The rest of the procedure is also to be scheduled, including the date for the hearing of the case. It is intended that specific requests for evidence, hereunder expert opinions, are to be handled at this meeting.

The parties are usually free to produce more arguments and evidence up to four weeks before the scheduled hearing.

In most cases, the court will ask for a case summary. This document specifies legal arguments and production of evidence, including a list of witnesses. Typically, the summary shall be delivered no later than two weeks before the case is heard.

Following the hearing, the court has up to four weeks in the district court, and eight weeks in the high courts, to deliver the ruling. The ruling is given in writing, and must contain a short summary of the proceedings and the arguments on which the court based its ruling. Typically, the arguments are quite short.

## Case management

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

As a main rule, the parties have the freedom to control the timetable and procedure of the dispute before the court.

The Administration of Justice Act sets out several guidelines to be followed if the parties cannot agree. These also act as default procedures if the parties do not decide on the procedure. If the parties, for example, agree to stay the proceedings because of settlement negotiations or to await a rule in another dispute, the court will accept this.

The only limitation on the parties' autonomy is the courts' obligation to handle proceedings within a reasonable time frame in accordance with the European Convention of Human Rights, article 6. In practice, the courts will thus not accept extensions, even if agreed between the parties, for unlimited periods of time. If one party has an interest in finalising the dispute, however, the court will then have to enforce one or even several strict deadlines. If the deadlines are not met, this will result in either a default judgment or decisions on factual, formal or evidential issues to the detriment of the party not meeting the deadline.

## Evidence – documents

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

There is no general obligation to preserve documents or evidence pending a trial. However, in accordance with legislation concerning bookkeeping and tax, there is an obligation to preserve financial statements and documents for at least five years.

Parties must share documents on which they base their claim or defence. This is part of the presentation of material to the court. This does not include an obligation to submit potentially damaging documents on their own initiative.

If a party believes that the other party is in possession of relevant documents for the claim or defence, the party may ask for an order of discovery of documents. The party asking for such an order must specify the need for the documents and make it plausible that the other party is in possession of the documents. If an order is given and the party fails to produce the documents, this may work to the detriment of the party.

A Danish order for the discovery of specific documents is unlike the Anglo-Saxon regime of discovery.

## Evidence – privilege

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

Certain documents are privileged. This includes documents containing:

- state information from public employees without permission from the relevant authority;
- information that has come to the attention of priests, doctors, defence attorneys, court mediators and attorneys in the exercise of their duties;
- information on persons connected to a party; and
- information on journalists regarding their sources, etc.

Regarding in-house lawyers, the issue is now settled following the *Akzo Nobel/Across* ruling (European Court of Justice C-550-07). The following information from both national and foreign in-house lawyers and advisers can be seen as privileged:

- correspondence exchanged with external legal advisers;
- internal notes reporting the content of a message from or to an independent lawyer; and
- preparatory documents, even if they have not been exchanged with an external lawyer, but only if the company can demonstrate that these documents were created with the sole purpose of seeking legal advice from a lawyer in exercise of the right of defence.

The court has the final decision regarding whether a document is privileged.

## Evidence – pretrial

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

The parties do not normally exchange written evidence prior to the trial. If a case requires an expert opinion, the opinion may be produced pretrial, and it is exchanged prior to the trial, but the obtaining of such involves the court.

## Evidence – trial

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

As a main rule, evidence at trial must be given as oral evidence. In second instance cases, the testimony given by the witnesses will be used as a starting point for additional questions for the witness. In cases before the Supreme Court, testimony is presented in a written transcript of the oral testimony. If there is a need for additional witness testimony, the Supreme Court must allow for such steps.

Hearings start with the claimant presenting the case, including a recital of the documentary evidence. Written evidence is thus read aloud wholly, or just the relevant parts, at the presentation of the dispute to the court. Afterwards, witness testimony is given with the possibility of cross-examination and questions from the judges. Witnesses are not allowed to be in the courtroom prior to giving testimony.

As a main rule, expert witnesses must also give their statement orally before the court. As part of the expert statement, however, a written statement answering specific questions is usually given by the expert. Therefore, the testimony given by an expert witness will be based on the written statement, which is then reaffirmed before the court. If the parties do not wish to ask additional questions, the expert is not called to give an oral statement, as it would be irrelevant evidence.

## Interim remedies

### 12 | What interim remedies are available?

As interim remedies, the parties can file for injunctions ordering parties to cease or commence certain actions. Further, the parties may also file for search orders, which requires fulfilment of the requirements in the Administration of Justice Act.

For all interim remedies, the party asking for the measure must prove or make it plausible that the injunction or order shall be filed so as not to further damage the party, and additionally prove or make it plausible that if the injunction or order is not made, the purpose is missed.

Following any interim remedy, a lawsuit must be filed confirming the interim injunction. The deadline for this is two weeks if it involves prohibition of certain actions, and one week with the freezing of assets.

The remedies are fully available to support foreign proceedings if they fulfil the requirements for a national remedy.

In relation to infringement of intellectual property rights, a licensee may request the bailiff's court to initiate investigations for ensuring evidence of an alleged infringement. The party requesting the bailiff's court to initiate such investigation must prove or make it plausible that an infringement has been made and the extent of the infringement (see the Administration of Justice Act, Chapter 57a). The rules according to infringement of intellectual property rights apply mainly to:

- infringement of copyright or related rights;
- violation of design, including Community design;
- infringement of trademarks, including Community trademarks, and collective marks;
- violation of corporate names;
- patent infringements; and
- infringement of utility models.

Following the investigations, a lawsuit must be filed to finally prove the infringement and thereby also the legitimacy of the preliminary securing of evidence. The deadline is four weeks after the bailiff's court announced that the investigations were completed, unless the licensee withdraws the pursuit.

## Remedies

### 13 | What substantive remedies are available?

The parties have two types of claims available as substantive remedies.

The main one is a claim for damages suffered in the form of a claim for payment, including the payment of a contract price, a reduction in price and damages.

The second remedy is a claim for a party to recognise an obligation to do or not do certain actions, or to recognise the rights of a party.

Parties cannot ask for punitive damages as they may in the Anglo-Saxon legal tradition. Damages are only awarded based on actual losses suffered and proven.

The only exception is if the parties have agreed on a certain penalty clause in a contract. Such a penalty may, however, not exceed what is fair. If it is seen to be unfair it can be declared to be void.

If a claim for interest is made by the party regarding a claim for payment, it can be awarded. On monetary claims, interest is claimed from the filing of the cases until payment is made. If the claim prior to the filing has also incurred interest, this will be calculated until the filing of the case and included in the claim.

## Enforcement

### 14 | What means of enforcement are available?

If court decisions are neglected or disobeyed regarding payment and actions, the party making the claim may have it enforced 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.

## Public access

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

Court hearings are generally open to the public and only limited by the physical limitations of the actual courtroom.

In exceptional circumstances, the court may decide that only parties to the case may attend the hearing. For example, cases involving divorce or legal separation are never held in public. Aside from this, it would be rare for court proceedings to be closed to the public.

Anyone is free to review the conclusion of a judgment if a request is made within one week of the judgment being delivered. More information is available under section 41a of the Administration of Justice Act. Typically, only the conclusion of the ruling is made available to the public. Court replies, pleadings and written evidence are not available.

## Costs

### 16 | Does the court have power to order costs?

As part of any ruling, the court will decide on the matter of costs.

The awarding of costs is based primarily on the value of the dispute. The court will consider, among other things, the amount of time spent during pretrial hearings and during the final hearing, the complexity of the case, and the extent and inclusion of experts.

The high courts have produced a memorandum containing guidelines and fee bands for civil cases, which the district courts adhere to. The memorandum can be found on the courts' webpage. Decisions on costs may be appealed separately without appealing on the merits of the case, as long as the decision regards an amount higher than 20,000 kroner. If the amount is at or below that amount, it would be necessary to apply for a permission to appeal the cost issues. Such an application would have to be made within two weeks after the decision.

Security need not be provided for the defendant's cost. If the claimant is a foreign national from outside the European Union, the court may require that the claimant post security for the potential costs of the defendant, if the defendant demands this in its defence statement. Furthermore, a narrow exception is applicable if the claimant is a company with limited liability and considered to have been potentially established to avoid paying cost if the case is lost. In that situation, the court could decide that security must be provided. The amount of a potential security for a claimant from outside the European Union is estimated and decided by the court. The court uses the memorandum containing guidelines and fee bands for civil cases. For claims above 5 million kroner, the court calculates the security with 46,340 kroner until the first million and 3 per cent of the rest. According to cases with significant economic values, the courts have earlier reduced the costs by one-third of the costs according to the memorandum containing guidelines and fee bands for civil cases. The determination of the legal costs will be based on the nature and scope of the case. In case law the courts have reduced legal costs from 28 million kroner to 10 million kroner, leaving room for an individual assessment.

In general, the amount of costs awarded in civil disputes does not cover the actual costs incurred by the parties, which is known in other legal territories. Even a successful party must thus expect to pay additional costs in larger disputes.

There are no new rules on the question of cost, but the topic is, as always, discussed by lawyers.

## Funding arrangements

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

As a rule, lawyers may not claim a fee that is larger than that which is fair in relation to the case, taking into consideration the importance of the claim to the client, the size of the claim and the nature and amount of work that has been included. This is based on the principle in article 126(2) of the Administration of Justice Act.

If the fee is seen as fair, the lawyer is allowed to make any fee agreement he or she wishes. This will include monetary success fees of all types. The only limitation is that a lawyer may not receive a fixed part or percentage of an award given. It is naturally possible to agree on 'no cure, no pay' for cases.

Agreements regarding third-party funding are possible. However, they are not used in practice.

Litigation funding is beginning to have more progress in the Danish court. In a new verdict from the High Court, a parent company funded its subsidiary's legal costs in a case against the Danish Business Authority. The subsidiary company lost the case and then the parent company was responsible for the payment of the costs to the Danish Business Authority. A third party that provides financing for litigation may therefore potentially incur liability for the payment of legal costs to the counterparty under the fulfilment of certain requirements, hereunder taking into consideration the cost in regard to the specific litigation.

In bankruptcy estates, litigation funding has been approved, as a tool, and can therefore be used.

Factoring is more commonly used, where the claim is sold to a professional party.

## Insurance

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

Insurance is available and quite common. Insurance will usually cover the legal expenses of the policyholder and the legal costs awarded to the opponent.

Most insurance is subject to maximum coverage and self-excess. Further, the costs covered are usually limited to the costs awarded by the court. If additional costs are incurred, the policyholder must bear these costs. Insurance is available to both private individuals and commercial entities.

## Class action

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

Denmark introduced the possibility of class actions in 2008. According to the Administration of Justice Act, section 254b, subsection 1, a class action may be brought when:

- several persons have uniform claims against the same individual or entity: see section 254a;
- all claims have jurisdiction in Denmark;
- the court has jurisdiction over one of the claims;
- the court has subject-matter jurisdiction regarding one of the claims;
- class action is deemed to be the best way of dealing with the claims;
- the class action members may be identified and informed about the case in a suitable manner; and

- a representative for the class action may be appointed: see section 254c.

In a new decision, the High Court deemed under which circumstances several individual persons have uniform claims in accordance with the potential responsibility for a prospectus in connection with a public offering. According to this ruling, uniformity based on responsibility for a prospectus is when:

- the person has bought the shares of his or her own account and risk at the time of the initial public offering or closely related to the initial public offering;
- the person was in possession of the shares at the date of the bankruptcy; and
- the person had jurisdiction in Denmark, when the company went bankrupt.

Class actions require that the class representative can argue that the conditions above are fulfilled and that each member of the class also fulfils the requirements.

A class action is conducted by a representative appointed by the court on behalf of the class. The system is based on the opt-in principle, contrary to the opt-out principle known in the United States. Only the parties who have signed up and actively joined the lawsuit are included.

Furthermore, parties with similar claims or multiple claims between parties (or their affiliated entities) may be handled during the same proceedings. This is a way of limiting the litigation costs. Each dispute will result in a separate ruling.

There are no developments in the procedural rules for class actions, but more class actions are being filed.

## Appeal

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

As a main rule, judgments in civil cases may be appealed once to the court of instance one above. Judgments made by the district courts may be appealed to the high courts, and judgments made by the high courts and the Maritime and Commercial Court as court of first instance may be appealed to the Supreme Court.

The high courts have access to reject appeals, regardless of the economic value, unless the parties have indicated conditions that make it likely that the case may have a different outcome than in the district court.

Parties appealing judgments involving claims of under 20,000 kroner must obtain a special permit from the Appeals Permission Board to appeal.

Appeal from the district courts to the high courts must be done within four weeks of the judgment being given or from the time where the Appeals Permission Board approved the application for an appeal. The same rules apply to appeals from the high courts to the Supreme Court.

A default judgment cannot be appealed, although the case can be reopened if a request is made within four weeks and in special circumstances up to one year after the judgment.

Permission for a second appeal may, upon application, be given by the Appeals Permission Board. The permission is only given in special circumstances and if the case deals with matters of importance and principle.

## Foreign judgments

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

A foreign ruling will be recognised and enforced in Denmark if either a convention or national Danish rules granting recognition provides for recognition. The Minister of Justice has been authorised by the Administration of Justice Act, sections 223a and 479, to implement regulations regarding granting recognition and enforceability. The authorisation has, however, never been exercised by the Minister of Justice, and the recognition of foreign civil judgments is, therefore, currently only regulated by international treaties and conventions.

A judgment from a country within the European Union (or EFTA) is, as a main rule, enforceable in Denmark. [See article 33 of the Brussels I Regulation, which lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in EU member states.] Denmark has not entered the Brussels II regulation regarding jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. This is why a judgment from a country within the European Union based on matrimonial matters, etc, is not enforceable in Denmark.

Denmark is also a signatory of the Lugano Convention, which came into effect in Denmark on 1 March 1996. The Lugano Convention extends the sphere of mutual recognition and enforcement of civil judgments beyond the borders of the EU, encompassing six of the then-seven member states of EFTA (Austria, Finland, Iceland, Norway, Sweden and Switzerland, explicitly excluding the then-seventh member, Liechtenstein). As is the case with the Brussels I Regulation, the Lugano Convention solely regulates the recognition and enforcement of civil judgments among EU member states and three of the four member states of EFTA; namely, Iceland, Norway and Switzerland.

Between the Nordic countries, recognition is regulated by the Nordic Convention on the Recognition of Civil Judgments of 1933.

If a reciprocal agreement does not exist, a judgment issued in a country outside of the EU or EFTA will, as a main rule, not be enforceable in Denmark.

There are also specific conventions relating to, inter alia, family law, succession law and bankruptcy.

## Foreign proceedings

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

Denmark is a party to the 1970 Hague Convention on the Collection of Evidence Abroad in Civil or Commercial Matters, through which courts in other ratifying states may request evidence taken in Denmark. The rules apply if a formal request is made by a foreign court.

## ARBITRATION

### UNCITRAL Model Law

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

The Arbitration Act of 2005 is primarily based on the UNCITRAL Model Law of 1985 with some differences. For example, there are no formal requirements to an arbitration agreement in section 7 of the Arbitration Act. Further, it should be mentioned that the Arbitration Act has not been updated with regard to the 2006 amendments of the UNCITRAL Model Law.

## Arbitration agreements

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

Parties may enter into an arbitration agreement both before and after a dispute has arisen. There is no in-writing requirement under the Arbitration Act; however, there might be *lex specialis* laws that require otherwise, such as the Merchant Shipping Act. Arbitration agreements are not valid in contracts with consumers.

Furthermore, under the New York Convention of 1958, there is an in-writing requirement. Arbitration agreements entered into in Denmark thus need to be in writing to be enforced under several other jurisdictions.

Arbitration agreements in the event of bankruptcy may raise the question under which circumstances the arbitration agreement is valid, when a party goes bankrupt and the bankruptcy estate does not enter into the agreement containing the arbitration clause. Arbitration agreements that regulate bankruptcy, clawback claims, retention of title and offsetting, are not considered valid against a bankruptcy estate.

In case law, the High Court decided whether an arbitration agreement was binding on a bankruptcy estate that charged outstanding invoice claims without the estate having entered into an mutual agreement with the counterparty.

The High Court found that a bankruptcy estate is not bound by the arbitration agreement entered into prior to the bankruptcy if the dispute concerns clawback claims, retention of title or offsetting. If, on the other hand, the dispute is independent of the bankruptcy because the claim is based on the rules on deficiencies, then an arbitration agreement entered into prior to the bankruptcy is binding on the bankruptcy estate regardless of whether the bankruptcy estate has not entered the agreement.

## Choice of arbitrator

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

The parties are free to determine the number of arbitrators. If no agreement has been reached, arbitration will consist of three arbitrators (see section 10, subsection 2 of the Arbitration Act). If the parties have agreed upon institutional arbitration, the number of arbitrators will be determined by the chosen institution.

If the parties have not agreed upon the appointment of arbitrators, as a main rule each party appoints one arbitrator within 30 days of having received a request from the opposing party. The two party-appointed arbitrators thereafter appoint the chair within 30 days of being appointed (see section 11, subsection 2 of the Arbitration Act). If the party-appointed arbitrators cannot agree upon the chair, each of the parties may request that the national courts appoint the remaining arbitrator or arbitrators (section 11, subsection 3).

The appointment of an arbitrator may only be challenged if circumstances exist that give probable cause to believe that the arbitrator is not impartial or independent, or if the arbitrator does not possess the qualifications to which the parties have agreed (section 12, subsection 2 of the Arbitration Act).

Furthermore, a party cannot challenge the appointment of its party-appointed arbitrator if the grounds for doing so were known at the time of appointing the arbitrator.



## Arbitrator options

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

The number of arbitrators and the qualifications depend on the arbitration institution designated in the arbitral clause. The Danish Institute of Arbitration handles cases of all subject matters and has a pool of candidates, which is deemed sufficient to meet the needs of complex arbitration. It could be considered that Denmark is a small jurisdiction, which could potentially lead to difficulties in finding qualified arbitrators. This is not the case.

## Arbitral procedure

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

Under the Arbitration Act, the only mandatory provisions in regard to the procedure are that each party shall be treated equally and that each party shall be given full opportunity to present its case (see section 18 of the Arbitration Act).

## Court intervention

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

As a general rule, the court has no competence in disputes that are to be settled by arbitration (see section 4 of the Arbitration Act). However, there are exceptions in the Act.

If requested by a party, the court may implement interim remedies or enforcement, even though according to the agreement the dispute is to be settled by arbitration (see section 9).

Furthermore, the court may intervene in matters of appointing arbitrators (see section 11, subsection 3), objections against the arbitrator (section 13, subsection 3) or the competence of the tribunal (see section 16, subsection 3), or orders as to costs (section 34, subsection 3).

Regarding the arbitration award, the court may set aside the award in accordance with the rules in section 37, subsection 2-4; for example, if the dispute, owing to its nature, cannot be settled by arbitration.

## Interim relief

### 29 | Do arbitrators have powers to grant interim relief?

Yes. At the request of a party, the arbitrators have the power to grant interim relief (section 17 of the Arbitration Act). However, the arbitrators cannot enforce it. For a party to enforce interim relief, a request must be submitted to the national courts, which thereafter will hear the dispute on that matter.

The fact that the dispute according to the parties' agreement should be settled by arbitration does not bar the national courts from hearing the dispute regarding interim relief (see section 9 of the Arbitration Act). Consequently, a party may obtain a freezing order or an injunction in accordance with the provisions of the Danish Administration of Justice Act.

Moreover, a party may also be granted an order of enforcement, providing that the conditions under the Danish Administration of Justice Act are met.

## Award

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

The award is to be made in writing and is to be signed by the arbitrator or the arbitrators (see section 31 of the Arbitration Act). Furthermore, it must state the date and the place of arbitration. Lastly, after the award

has been made, a copy is to be signed by the arbitrators and delivered to each party.

The time limit for receiving the copy is primarily relevant with regard to section 33, concerning corrections of errors in computation, typographical errors, etc, within 30 days.

Moreover, each party may, unless otherwise agreed within 30 days after receiving the award, request that the tribunal issue additional awards regarding claims presented during the proceedings (see section 33, subsection 3).

## Appeal

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

An arbitral award is final and cannot be appealed to the court. The national court enforces the award; however, pursuant to section 37 of the Arbitration Act, an award may be rendered unenforceable if certain conditions are met (eg, if the tribunal was not competent in accordance with the arbitration agreement). Section 37 of the Arbitration Act is, with few alterations, an adoption of article 34 of the UNCITRAL Model Law.

Additionally, an award may be set aside if a court finds that the subject matter of the dispute is not eligible for settlement by arbitration, or if the award is manifestly contrary to public policy in Denmark.

## Enforcement

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

Denmark is party to the New York Convention of 1958. The rules of enforcement of foreign awards have been adopted into the Arbitration Act and, pursuant to section 38, both Danish and foreign arbitration awards are enforceable in Denmark. Awards from states not party to the New York Convention of 1958 are also enforceable in Denmark (see section 38 of the Arbitration Act).

A request for enforcement shall be sent to the court governing the jurisdiction where the party in breach has his or her residence or place of business. The request shall be in writing and include a duly certified copy of the award and of the arbitration agreement, if it is in writing.

If the award is not in Danish, the court will require a duly certified Danish translation.

The bailiff's court may refuse enforcement if one of the conditions mentioned in section 39 of the Arbitration Act is met; this section is based on article 36 of the UNCITRAL Model Law.

There are no changes in the options regarding enforcement.

## Costs

### 33 | Can a successful party recover its costs?

Rules about costs are governed by the Arbitration Act, part 7. The parties are jointly and severally liable for the costs of the arbitration tribunal (see section 34, subsection 2 of the Arbitration Act). The arbitration tribunal will allocate the costs to the parties and may choose to award one of the parties some or all of the costs (see section 35).

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The commonly used types of ADR are mediation and court-based mediation. To solve a dispute by regular mediation, the parties are brought together using a non-court-based mediator. The mediator is commonly an attorney at law who is educated as a mediator, and the mediator



helps the parties to negotiate and find a solution to the conflict. If the parties can find a solution, the mediator will draft the agreement.

The court-based mediation is voluntary and an alternative to dispute resolution in court. The parties have to agree to try to resolve the conflict in court-based mediation. The process is led by a judge or an attorney at law and the 'mediator' does not decide the case, but instead helps the parties find a solution to the conflict that they can agree on.

The claimant must pay a fee based on the value of the case, but the assistance from the mediator is free.

The court must decide whether a case may be conciliated and only if the court assumes the result would be negative may it abstain from conciliation.

### Requirements for ADR

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

There are no requirements for the parties to consider ADR before or during proceedings. Neither a court nor a tribunal is able to compel the parties to participate in ADR proceedings.

If the parties want to participate in court-based mediation, it is required that: a subpoena is filed; both parties agree to resolve the dispute by court-based mediation; and the court assesses that the case is suitable for court-based mediation.

### MISCELLANEOUS

#### Interesting features

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

A new law on court fees entered into force on 1 October 2021. The new law on court fees applies to all cases brought after 1 October 2021. The purpose of the law is to simplify the rules on court fees.

Under the new law, all court fees that were previously calculated as a percentage of the value of the case have been replaced by fixed fees.

In the new court tax law, when a civil lawsuit is filed in the first instance, a court fee of 1,500 kroner must be paid. If the case has no economic value, or if the financial value does not exceed 100,000 kroner, the law only proposes a court fee of 750 kroner.

In addition, a fee must be paid when the time of the trial is set.

Economic value of the case (kroner)	Court fee (kroner)
100,001–250,000	3,000
250,001–500,000	8,000
500,001–1,000,000	14,000
1,000,001–2,000,000	35,000
2,000,001–3,000,000	60,000
3,000,001–4,000,000	85,000
4,000,001–5,000,000	110,000
5,000,001–6,000,000	135,000
Over 6,000,000	160,000



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### UPDATE AND TRENDS

#### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Not at present.

# Ecuador

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## LITIGATION

### Court system

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

In Ecuador, civil courts are primarily divided by territory and hierarchy. Both divisions overlap at the third level of hierarchy, where there is only one national court for the whole country. Regarding that hierarchy, there is a first level of civil courts that handles all the cases from a specific territory within the province. At this level, only one judge manages each case.

Additionally, there is the court of appeals or provincial court, with one of each per province, except for provinces that do not handle many claims, such as the Galapagos Islands. In the court of appeals, three judges sit and handle each case, and a ruling is issued by majority vote. Similar to the first level, the number of judges varies by the amount of claims each province handles, with a minimum of three per case.

Finally, at the third level of hierarchy, there is the National Court, which is located in Quito. Similar to the court of appeals, three judges sit to manage each case and all claims are split between judges specialising in specific matters. For the National Court, by law, there should be 21 judges in total. Not all civil claims may reach the National Court, as this level is reserved for significant breaches of the law.

In Ecuador, there is no subdivision within civil claims, whether by nature or size; however, at a higher level, claims and therefore courts are divided between the different areas of the law, one of them being civil claims. There are no specialist commercial or financial courts in Ecuador.

### Judges and juries

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

There is no jury in Ecuadorian judicial proceedings.

The role of the judge depends on the individual judge. As per article 3 of the Organic General Code of Procedure, the judge shall direct and control the process and avoid any unnecessary delays. If necessary, the judge can interrupt any party to request any clarification or to promote further debate. The role of the judge lies between an inquisitorial and a passive role, meaning that the parties are responsible for driving the process forward; however, the judge has the power to request further evidence of witnesses or parties if he or she sees fit.

### Limitation issues

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

The general time limit for filing a civil claim is 10 years; however, there are certain exceptions to this. Some examples of shorter time periods are tort claims, which have only four years to file the claim; the collection of some accounts that meet specific requirements, for example,

promissory notes, being only five years; and others that are less frequently used.

Legislation does not allow the possibility for the parties to agree the suspension of time limits; thus, the parties are bound by what is established in law.

### Pre-action behaviour

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

There are no pre-actions that parties should take into account to file a civil claim. However, since the enactment of the Organic General Code of Procedure, the claim should be filed along with all evidence and experts' reports to support the arguments. This benefits the filing party, as it has more time to prepare a claim.

### Starting proceedings

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

Civil proceedings commence with the submission of the claim to the court, which assigns the claim to a specific judge by using a draw system. The judge verifies that the claim complies with the formal requirements mentioned in the Organic General Code of Procedure. If there is nothing to complete, then the judge orders the court to serve the claim to the defendant, who has 30 days to provide a response to the claim or counterclaim. According to legislation, the summons process is the sole responsibility of the court, meaning that the parties do not interfere in this part of the process and are able only to request the court to move the summons process forward through written petitions.

Since the enactment of the Organic General Code of Procedure in 2015, which established an oral litigation system, courts have gained more effectiveness and court processes are faster. However, there is still a need for more judges to handle the caseload. There have been a couple of changes in the law with the intention to relieve the judges' caseload; however, they are still responsible for handling too many cases.

Recently, the judges of the National Court were evaluated and many were removed from their positions, increasing the caseload and making timetables longer.

### Timetable

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

There are various civil claims, all of which have different procedures and timetables, but the most common form of civil claim will follow the following procedure and timetable. As the timetable established by the

Organic General Code of Procedure is rarely met owing to the caseload, the following is in practice what applies:

- The claim is filed.
- A judge is assigned to the claim and admits the claim (30 days).
- The claim is served (between one and six months). Parties are often required to file written petitions to move the process forward. There are multiple ways to serve a defendant, the most common of which is by being posted to the defendant's residence. As for the documents for serving, a copy of the claim will be delivered to the defendant.
- The defendant has 30 days to answer the claim or file a counterclaim.
- Once the defendant files a response, the judge will set a date for the preliminary hearing (the timing depends on the availability of the judge, usually four to 12 weeks). At the preliminary hearing, the parties will make their opening statements, state their preliminary defences and announce the evidence that will be presented in the trial hearing.
- Afterwards, the judge will set a date for the trial hearing (the time between a preliminary hearing and a trial hearing varies between two weeks and four months). In the trial hearing, the parties will present all admitted evidence and closing statements.
- At the end of the trial hearing, the judge issues his or her ruling orally, and then has 10 days to notify the parties with the written ruling. On notification of the written ruling, the parties have the possibility to file an appeal within the following 10 days (only if they expressed their will to do so orally in the trial hearing). The counterparty will have another 10 days to answer the appeal.
- After the appeals have been filed, they will be remitted to the court of appeals, which will set a date for the hearing (between three and five months).
- After the hearing, the parties have the chance to file a cassation appeal before the National Court, within 30 days of the issuance of the written ruling.
- Once the appeal has reached the National Court, it will be submitted for the review of alternate judges, who will verify that the cassation appeal meets the particular requirements.
- If admitted, the National Court will set a date for a hearing and will issue the ruling at the end of that hearing (three to six months).

### Case management

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

No, parties cannot control the procedure or the timetable. The procedure is a fixed procedure established in law that cannot be changed, even with the agreement of the parties. The exception is that the parties are able to defer a hearing by mutual agreement.

### Evidence – documents

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

There is no duty to preserve documents before trial. However, it is possible that a judge will order the exhibition of evidence before (through preparatory measures) or during the trial.

### Evidence – privilege

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

Legislation does contemplate that certain documents are privileged, such as those shared by lawyers, doctors and psychologists. In this

sense, the advice of an in-house lawyer will be protected under a privileged document.

### Evidence – pretrial

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

There is no obligation to exchange written evidence from witnesses and experts prior to trial, and this is uncommon under Ecuadorian law. However, parties may disclose certain evidence when they are trying to settle prior to trial. Regarding written evidence and expert reports, these shall be submitted along with the claim or response to the claim.

### Evidence – trial

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

When filing a claim, all written evidence and experts' reports shall be submitted along with the claim or response to the claim. During the trial, written documents should be exhibited and presented during the trial hearing, reading the relevant sections that support the claim.

Witnesses and experts must provide their testimony in court for the other party to cross-examine them, as per the contradiction principle set in the Organic General Code of Procedure. However, witnesses do not present a written statement, but an oral statement only. In the claim or response to claim, the parties should include a brief description of what the testimony of such a witness will bear.

### Interim remedies

#### 12 | What interim remedies are available?

The Organic General Code of Procedure establishes the possibility of filing some injunctive relief measures with the objective of safeguarding the interests of the plaintiff. Depending on the nature of the claim to be filed, the injunctive relief measure will vary, but all have the same objective. The interim remedies available are the following:

- asset seizure;
- the freezing of accounts;
- restrain in transfer of property; and
- prohibition on leaving the country

The remedies are available in support of foreign proceedings. However, owing to the procedure of validating foreign orders taking too long, remedies often defeat their purpose. Prior remedies will only be applicable when the claim is filed in Ecuador, as they require a claim to be filed within a certain period of time.

### Remedies

#### 13 | What substantive remedies are available?

Available remedies include restitution, damages and specific performance. However, the judge is not allowed to order more than is asked for by the plaintiff in the claim, meaning that the plaintiff is the one that calculates what should be received for the damage sustained. These calculations include the interest payable in a money judgment, which shall be calculated according to the rates established by the central bank.

The concept of punitive damages does not exist under Ecuadorian legislation. In damage claims, the plaintiff is only entitled to the direct damage and loss of profit.

## Enforcement

### 14 | What means of enforcement are available?

Unfortunately, in Ecuador, if a court ruling is disobeyed, another procedure must be initiated. These procedures are usually a lot shorter than an ordinary civil procedure; however, they need to follow specific rules. The process usually takes up to a year. It is through this process that the court will order compliance with a ruling.

There are other types of orders, different from a ruling, where the court may use the police to enforce a special request. The judge may impose fines or order costs to the attorneys or parties when certain orders are disobeyed.

## Public access

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

Yes, regarding civil claims, all court hearings are public. The same is true for all documents, such as pleadings, witness statements and court orders. Anyone can access the web page of the judicial system to search for a specific case, where they can find the details of the case, such as plaintiff, defendant, matter of the case, court case number, the date on which the case was filed, and a summary of the case history. With this information, anyone can request a physical copy of the entire case file from the court.

## Costs

### 16 | Does the court have power to order costs?

The court has the power to order costs for either party whenever a party litigates in an abusive manner or in bad faith. The costs ordered by the court may not exceed 10 basic salaries (US\$425 a month in 2022) and will be ordered taking into consideration the procedure, the value of the claim and the actions taken by the parties, among other factors.

For the costs, the applicable legislation is the Constitution of Ecuador, the Organic General Code of Procedure and the cost-setting rules.

The parties are not required to provide security for the defendant's costs.

## Funding arrangements

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

The Organic General Code of Procedure does not establish any type of arrangement between lawyers and their clients; the parties are free to agree on the conditions for the representation in a claim.

Ecuadorian legislation does not prohibit a third party from investing in a claim and taking part of the proceeds of the claim. However, legislation does contemplate the possibility of purchasing litigation rights.

## Insurance

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

In Ecuador, there is no specific insurance to cover legal costs; however, legal costs may be insured when they are part of a bigger insurance contract, such as car insurance or general civil responsibility insurance.

## Class action

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

Ecuador does not have the possibility of filing class action lawsuits, except for claims filed for harming the environment. Even though this is a possibility, this is not a proper class action lawsuit; it is just that all Ecuadorian citizens have standing to file a suit on behalf of the environment for environmental damage.

## Appeal

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

Parties may appeal against the final decision on the merits of the case issued by a trial judge. There is no limitation on the grounds and circumstances for this appeal; they are allowed to challenge procedural issues, evidence or legal arguments.

Parties may also appeal other court decisions made throughout the trial period, for example, the decision to admit or reject preliminary defences, such as lack of jurisdiction, improper venue, lack or improper joinder or arbitral clauses. Also, a party may appeal the court's decision to admit or reject evidence during the hearing.

Appeal is not available against the decisions of the Tax and Administrative Tribunals.

There is a right to further appeal before the National Court (a cassation court), which will not review the facts of the case but has the power to review matters of law. Decisions of the Tax and Administrative Tribunals may only be challenged in a cassation proceeding before the National Court.

Additionally, parties may initiate a constitutional action if they believe that the final decision of any court has violated their constitutional rights, where parties are required to exhaust all previous ordinary and extraordinary remedies to access the Constitutional Court.

## Foreign judgments

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

Article 105 of the Organic General Code of Procedure establishes the procedure for recognition and enforcement of foreign judgments. This is an expedited process that requires the following steps:

- The requesting person shall file an application for recognition before the competent tribunal of the provincial court.
- The court will serve the person against whom the judgment was rendered with the process.
- The defendant will have five business days to file a response arguing any of the available defences.
- Within 30 days of the date on which the response was or should have been filed, the court must decide whether to recognise and enforce the foreign judgement.
- If a properly substantiated and accredited defence was filed and the complexity of the case warrants it, the court will set a date for a hearing. The hearing must be convened within 20 business days of the date when the response was filed.
- The court will issue its decision in the same hearing.

There is no appeal available to challenge the decision of the provincial court.

Unless there is an international convention to which Ecuador is a signatory, and which does not require reciprocity, reciprocity is essential. The Ecuadorian National Court has established that, if the decision was issued by a country that does not admit, recognise or enforce

Ecuadorian judgments, the enforcement of any decision from that country will not be admitted in Ecuador.

### Foreign proceedings

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

Ecuadorian law does not provide a procedure for obtaining oral or documentary evidence for use in proceedings in other jurisdictions.

## ARBITRATION

### UNCITRAL Model Law

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

The Ecuadorian Arbitration and Mediation Law is not based on the UNCITRAL Model Law.

### Arbitration agreements

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

The arbitration agreement must be in writing. Additionally, if the arbitration involves a public party, authorisation and approval of the arbitration clause by the Attorney General are required.

Also, if the claim is brought up due to torts, the arbitration clause should specify the facts that surround that tort (applicable to past or future)

### Choice of arbitrator

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

If the agreement and rules are silent, three arbitrators are appointed. The parties shall agree on the appointment of all three arbitrators and their alternatives. If no agreement is reached, the arbitration centre will draw from an internal list of arbitrators.

The grounds to challenge the arbitrators are the same grounds to challenge a judge; there is no restriction on the right to challenge the appointment of an arbitrator.

### Arbitrator options

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

The parties are free to choose arbitrators from internal lists in local arbitration centres or may choose other arbitrators from other countries outside the lists without any limitation. However, if the centre is in charge of appointing the arbitrators, they may only draw them from its internal list of arbitrators.

The internal lists of arbitrators of the different arbitration centres include several experienced lawyers and professors who are capable of meeting the needs of a complex arbitration.

### Arbitral procedure

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

Several procedural requirements must be followed in the arbitration procedure. The Arbitration and Mediation Law provides for the manner and time to file the claim and response. It establishes a mandatory

mediation hearing and provides rules to conduct the hearing, the production of evidence and the final hearing.

### Court intervention

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

Ecuadorian courts do not have the power to issue an injunction to stay proceedings. Courts are involved in arbitration only to help arbitrators enforce the tribunals' decisions and interim relief.

Parties may not agree to override the court's powers, but they may grant arbitrators some powers that are usually exercised by courts (eg, the power to order interim relief).

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators have the power to grant interim relief. However, if the parties have not expressly granted this power in the arbitration agreement, the tribunal will need the help of the courts to enforce this relief.

### Award

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

The tribunal has 150 business days from the date of the first hearing to issue the award. The tribunal may extend this period up to 300 business days if needed.

The award must be taken by a majority of votes, in writing and signed by all the arbitrators. Additionally, the tribunal must set a date to read out the award to the parties.

### Appeal

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

The arbitral award is not subject to appeal. However, the parties may set aside the award on limited grounds if:

- the party was not given proper service of process, or the award was rendered in default and such party was not able to present his or her case;
- the party was not given proper notice of any decision or order of the tribunal and was, as a result, unable to present his or her case;
- the evidence requested by a party was not duly produced or practised when there was a relevant fact that needed to be proved;
- the award deals with a difference not contemplated by or not falling within the terms of the claim, or it contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law.

The decision of the Provincial Court on this matter is final and is not subject to appeal.

### Enforcement

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

The procedures to enforce a foreign or a domestic award are the same, as follows:

- the requesting party shall file a request to enforce the award, together with a certified copy of the award. If the award is not rendered in Spanish, the requesting party will need to provide a proper certified translation;

- the trial judge will review the enforcement request and issue an enforcement order, ordering the requested party to comply with the award within five business days;
- the judge will serve the requested party with this order; and
- if the party fails to comply with the judge's order, the judge may seize the requested party's assets and sell them at a public auction.

The enforcement procedure was affected by the political desire of the government to attract investment; therefore, this proceeding is more favourable than the one set out in the New York Convention.

### Costs

#### 33 | Can a successful party recover its costs?

Arbitral tribunals are reluctant to award arbitration costs. In most cases, arbitration costs may be recovered, but each party must bear the legal fees. In some exceptional cases, if a party has delayed the proceedings or acted in bad faith, the tribunal may award full recovery.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The most common ADR process is mediation. Some important and complicated contracts in construction, oil, energy and mining industries include dispute boards or expert adjudication.

### Requirements for ADR

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

The parties may agree on a multistep arbitral clause that requires a conciliation or mediation process before going to arbitration. In the absence of this agreement, the Ecuadorian Arbitration and Mediation Law requires a mandatory mediation process before appointing the arbitral tribunal. The arbitration centre will set a date for this mediation hearing and if a party does not attend the hearing, this fact may be considered by the tribunal when awarding costs.

This multistep process may also be implemented before a regular court trial when agreed upon by the parties. Once the trial has begun, the preliminary hearing includes an obligatory conciliation stage for the parties. The parties can settle at any point of the trial, before the final ruling.

If the parties have agreed on a multistep clause, an arbitral tribunal may compel them to participate in the ADR process.

## MISCELLANEOUS

### Interesting features

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

Ecuador is one of few civil law countries that have implemented an oral proceeding for all civil and commercial processes. During the preliminary hearing, the parties will argue all defences and argue why the requested evidence is relevant and needs to be presented. The judge will issue his or her decision in the hearing.



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During the trial hearing, the parties will present all evidence, similar to an international arbitration. However, under Ecuadorian law, documents must also be presented and read out. The judge also issues the final decision on the merits in the same hearing. The parties must appeal orally at the end of hearing; otherwise their right to appeal is lost.

## UPDATE AND TRENDS

### Recent developments

#### 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

No updates at this time.

# Egypt

Ehab Yehia

Soliman, Hashish & Partners

## LITIGATION

### Court system

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

Civil courts in Egypt are divided into three main types of court as follows:

- partial courts, which are composed of one judge and render verdicts in civil claims of an amount no more than 100,000 Egyptian pounds, as well as other specific claims;
- preliminary courts, which are composed of at least three judges and render verdicts in civil claims that exceed the scope of the partial courts; they also render verdicts in the appeal of decisions of the partial courts; and
- courts of appeal, which are composed of at least three judges and render verdicts in the appeal of decisions of the preliminary courts.

All courts usually have subdivisions according to subject matter (lease, compensation, proof of signature, etc).

The economic courts are a special type of court, incorporated in 2008, that exclusively render verdicts in civil claims and in criminal cases concerning specific economic laws (eg, the Companies Law, the Financial Lease Law, the Central Bank Law and the Telecommunication Law).

According to the initial draft of a new labour law to be issued in 2022, a special employment court shall be created.

### Judges and juries

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

The role of the judge in partial courts, and the tribunals chief in both preliminary courts and courts of appeal, is usually to review the claim to ensure the court's competency and that the procedural conditions are met. Thereafter, the judge shall review the documents submitted by the parties and render either a final or a preliminary verdict for each claim. The final verdict is the verdict that will end the claim (eg, acceptance or refusal), while the preliminary verdict is a verdict that does not end the claim (eg, referring the matter to an expert or to investigation).

The Egyptian judicial system does not apply the jury system.

### Limitation issues

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

The general rule for the time limit to bring a civil claim is 15 years, unless otherwise determined by law.

### Pre-action behaviour

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

According to the Civil Code, the general rule is that the creditor may not claim from the court performance of the obligation nor compensation except after legally giving the debtor notice to perform his or her obligation. If this rule is not followed, the court shall not accept the claim.

However, the parties may agree in the contract that this notice shall be assumed in specific cases. In such a case, the creditor does not need to notify the debtor before raising his or her claim.

### Starting proceedings

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

The claimant must submit his or her claim to the court and notify the defendant of the claim. The claim must include the full information of the claimant, the name of the defendant, the date of submission, the competent court, and the case facts, claims and legal basis.

In practice, the courts in Egypt are overloaded. However, the Ministry of Justice and court chiefs are improving the courts' capacity to handle their caseloads by incorporating new tribunals and specialised courts (eg, economic and labour courts).

### Timetable

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

The claim starts with the notice of claim served to the defendant, and the defendant may then start submitting his or her defence and counterclaims (if applicable). Thereafter, both the claimant and the defendant submit their responses or counterclaims, or both, to the court. Once the court finds that the facts of the matter are clear, and the claimant and defendant do not request the submission of any further documents, the court will render its judgment.

If the court did not decide to mandate an expert, the timetable of a normal claim is six months. If the court decided to refer the case to an expert, the case may take over a year.

### Case management

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

According to the applicable laws, no. However, in practice, if both the claimant and the defendant agreed on a timetable (eg, to grant them time before the next hearing) or a specific procedure (eg, to delegate an expert) and they requested it jointly from the court, the court will most



likely accept it, if the requested procedure or timetable is in accordance with the law.

#### Evidence – documents

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

The claimant may not register his or her claim at court unless the original copies, or at least photocopies, of the documents supporting his or her claim are attached. If not, the court will most likely not accept the case.

The court may not oblige any of the parties to submit any document, unless requested by a party and the document is a common document. The document is deemed common if it specifies their rights in relation to each other.

#### Evidence – privilege

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

Yes, any communication between any party and his or her attorney, even if in-house, is privileged. Moreover, lawyers are prohibited from testifying in court except if asked to testify by their clients.

#### Evidence – pretrial

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

No, Egyptian law does not require such an exchange.

#### Evidence – trial

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

If the court decides to hear witnesses in a specific matter of the claim, the court will render a preliminary judgment referring the case to investigation and will stipulate a date for the parties to bring their witnesses to prove the relevant matter.

If the court decides to refer the case to an expert, the court will render a preliminary verdict specifying the expert's specialty, the matter to be examined and the time for examining this matter. Once the expert finishes his or her examination, he or she will prepare a report and submit it to the court, which the parties are entitled to review and submit objections against.

#### Interim remedies

- 12 | What interim remedies are available?

Interim freezing of the debtor's property, and any of the debtor's property that is in possession of a third party, is available.

#### Remedies

- 13 | What substantive remedies are available?

If claimed, an interest rate of 4 per cent in civil matters and 5 per cent in commercial matters might be included in the judgment. The interest rate, if pre-stated in the contract, may not exceed 7 per cent.

#### Enforcement

- 14 | What means of enforcement are available?

The claimant executes the civil judgment through the court bailiff based on the writ of execution issued by the execution judge of the competent court.

#### Public access

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

Court hearings are held in public unless otherwise decided by the court. However, out of all the court documents, only judgments are available to public.

#### Costs

- 16 | Does the court have power to order costs?

The general rule is that courts order costs against the losing party. However, if the losing party did not dispute the claimed matters, courts may decide costs against the winning party.

#### Funding arrangements

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

This is not regulated for in Egyptian law and is very rare in practice.

#### Insurance

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

This is not regulated for in Egyptian law and is very rare in practice.

#### Class action

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

The Labour Law is the only law that regulates class actions. It provides for actions by employees against their employer.

#### Appeal

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

The parties can appeal judgments rendered by a court of first instance if the value of the case exceeds the final amount.

#### Foreign judgments

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

There are multiple bilateral agreements between Egypt and other countries that entitle a claimant to direct enforcement of a foreign judgment. If no agreement is in place, a case shall be raised through the same procedures for the recognition and enforcement of foreign judgments.

## Foreign proceedings

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

This is not regulated for in Egyptian law, and it depends on the other jurisdiction.

## ARBITRATION

### UNCITRAL Model Law

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

Yes, but there are a number of differences related to the applicability of the Arbitration Law, the number of arbitrators and the basis of nullifying an arbitration award.

### Arbitration agreements

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

The following comprise the formal requirements:

- the agreement must be in the form of a written document or another written means of communication;
- the scope of matters to be subject to arbitration must be defined;
- the parties to the arbitration agreement must have legal capacity; and
- the object of the arbitration must be a matter that can be reconciled.

### Choice of arbitrator

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

The number of arbitrators shall be three.

If not agreed, each party must appoint an arbitrator, and the arbitrators of both parties must agree on and appoint the third arbitrator.

### Arbitrator options

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

Arbitrators are selected in accordance with the arbitration agreement. If not regulated, they are selected in accordance with the rules of the Arbitration Law.

### Arbitral procedure

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

Yes, the Arbitration Law contains substantive requirements for the procedure to be followed.

### Court intervention

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

The competent court is entitled to:

- issue interim actions before or during the arbitration procedure if requested by any of the parties;
- appoint the sole arbitrator if the parties could not agree on one, or appoint the third arbitrator if the two appointed arbitrators could not agree on one;

- decide on the discharge of any arbitrator if requested by one of the parties for disqualification or non-performance of his or her duties;
- decide on the extension of the duration of arbitration or the termination of the arbitration procedures if the arbitration did not end during the specified timeline; and
- decide on the annulment of the arbitration judgment.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, if accepted before the arbitration by the parties to it.

### Award

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

The award must be written, signed and issued within the arbitration duration.

### Appeal

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

An award can be appealed to the court if:

- the arbitration clause is absent, is void or voidable or exceeds the statute of limitations;
- either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control, or failure to observe due process;
- the tribunal did not apply the agreed applicable law to the dispute;
- the composition of the arbitral panel or the appointment of the arbitrators contradicts the applicable law or the parties' agreement;
- the arbitral award included matters not falling within the scope of the arbitration clause; or
- it contradicts public order provisions in Egypt.

### Enforcement

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

The claimant must submit the award with the other required documents to the competent court requesting the writ of execution.

### Costs

33 | Can a successful party recover its costs?

This is not regulated for in Egyptian law.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

Mediation is commonly used.

### Requirements for ADR

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

Mediation is an obligatory first procedure before economic court proceedings.

**MISCELLANEOUS****Interesting features**

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

No.

**UPDATE AND TRENDS****Recent developments**

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Ministerial Decree No. 8548 of 2020 (published in December 2020) regulating registration in the electronic registry for litigation before the economic courts was issued to activate the legislative amendments of the Economic Courts Law with regard to the procedures for filing and initiating lawsuits remotely before the economic courts.

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# England & Wales

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## LITIGATION

### Court system

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

The civil court system is made up of a number of courts and tribunals, which range from specialist tribunals such as the Employment Tribunal and the county courts, through to the High Court, the Court of Appeal and the Supreme Court. A claim will be issued or heard in one of these courts or tribunals depending on the nature, value and status of the claim.

There are approximately 130 county courts (including combined courts), each of which hears cases in certain geographical catchment areas. Cases in the county court will ordinarily be heard in the county court located closest to where the defendant resides. Money claims with a value up to and including £100,000 and claims for damages for personal injury with a value up to £50,000 must be started in the county court. These thresholds are subject to exceptions: for example, claims falling within a specialist court that raise questions of public importance or that are sufficiently complex to merit being heard in the High Court. Equitable claims up to a value of £350,000 must also be started in the county court. The above thresholds indicate that parties are encouraged to commence proceedings in lower courts where possible, but provide that complex, high-value litigation remains unaffected.

The Civil Procedure Rules (CPR) clarify which county court must hear specialist claims, such as probate, intellectual property and claims in certain insolvency proceedings.

The High Court has three divisions: the Queen's Bench Division, the Chancery Division and the Family Division.

As of April 2021, there were approximately 66 judges in the Queen's Bench Division and 14 judges in the Chancery Division. The Family Division consists of 19 High Court judges in addition to the president of the Family Division, who all have exclusive jurisdiction in wardship.

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 and companies work, 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, in October 2015, a specialist cross-jurisdictional Financial List was created to handle claims related specifically to the financial markets and to address the particular business needs of parties litigating on financial matters. The objective of the Financial List is to ensure that cases that would benefit from being heard by judges

with particular expertise in the financial markets or that raise issues of general importance to the financial markets are dealt with by judges with suitable expertise and experience. A test case scheme was piloted in the Financial List until September 2017. Under this scheme, parties could seek declaratory relief without the need for a cause of action. Now, a claim may be brought on the basis that it raises issues of general importance to the financial markets. Interested parties may intervene in the proceedings. There is also a general rule that parties bear their own costs. Claims in the Financial List may be started in either the Commercial Court or the Chancery Division.

As of July 2017, the Business and Property Courts were launched as an umbrella for the specialist courts, lists of the High Court and some of the work of the Chancery Division, and include the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Financial List, the Business List, the Insolvency and Companies List, the Intellectual Property List, the Revenue List, the Property Trusts and Probate List and the Competition List.

The Civil Division of the Court of Appeal hears appeals from the county courts and from the High Court.

An extensive review of the structure of the civil court system commissioned by the Lord Chief Justice was undertaken by Lord Justice Briggs and published in July 2016 (the Briggs Report). The Briggs Report sets out recommendations to modernise the current system (in particular, to encourage the development of digital systems to transmit and store information and to create easier access to justice for individuals and small businesses) and suggests urgent measures to ease the current workload of the Court of Appeal.

As a result of the Briggs Report, changes to the appeals process came into force on 3 October 2016. These 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 with the High Court instead of the Court of Appeal. More recently, Her Majesty's Courts & Tribunals Service (HMCTS) is undergoing a court reform programme, scheduled for completion in 2023, which aims to introduce new technology to make the court system more efficient and accessible to the public. As part of these reforms, it is now possible to apply via HMCTS online services for a divorce, money claim or appeal to the tax tribunal. In November 2019, the Ministry of Justice set out its proposed evaluation of the HMCTS court reform programme, which will explore the effect of the reforms on outcomes and costs for users of the courts. An interim report is expected in 2021, with a final report planned for 2024.

Another key suggested change of the Briggs Report is the creation of an online court that 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.

In November 2015, electronic working was introduced at the Royal Courts of Justice at the Rolls Building, London, as the Electronic

Working Pilot Scheme. The Scheme was amended in November 2017 and extended in April 2018 until 6 April 2023. Also under discussion is the increase of the threshold for issuing a claim in the High Court to £250,000, with a further increase to £500,000 at a later stage, as well as applying this threshold to all types of claims. However, at the time of writing, no such changes have been announced.

A number of temporary schemes were brought in to address the global covid-19 pandemic, including PD51Y (Video or Audio Hearings in Civil Proceedings during the Coronavirus Pandemic), PD51Z (Stay of Possession Proceedings, Coronavirus) and PD51ZA (Extension of Time Limits and Clarification of Practice Direction 51Y). These schemes are no longer in force.

The Supreme Court is the final court of appeal. It hears appeals from the Court of Appeal (and in some limited cases directly from the High Court) on points of law of general public importance.

The Judicial Committee of the Privy Council, which consists of the justices of the Supreme Court and some senior Commonwealth judges, is a final court of appeal for a number of Commonwealth countries, as well as the United Kingdom's overseas territories, Crown dependencies and military sovereign bases.

## Judges and juries

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

Judges are appointed by the Judicial Appointments Commission, an executive, non-departmental public body sponsored by the Ministry of Justice. The application process involves qualifying tests and independent assessment, and candidates must meet the eligibility and good character requirements.

A Judicial Diversity Committee was set up in 2013 with the aim of promoting diversity on the bench. The 2021 Judicial Diversity statistics report that 34 per cent of court judges and 50 per cent of tribunal judges are female. The proportion of women remains lower in senior court appointments (29 per cent for the High Court and above). Of those judges who declared their ethnicity, the percentage who identify as Black, Asian and minority ethnic is 5 per cent in courts. The proportion of ethnic minorities is lower for senior court appointments (4 per cent for the High Court and above) compared to others. From the eligible pool, recommendation rates for Asian, Black and other ethnic minorities candidate groups were an estimated 36 per cent, 73 per cent and 44 per cent lower respectively compared to white candidates. Seventy-two per cent of court judges and 72 per cent of tribunal judges were aged 50 and over, with 37 per cent aged 60 and over in courts and 40 per cent in tribunals.

Civil cases are generally heard at first instance by a single judge. Exceptions include claims for malicious prosecution, false imprisonment and, exceptionally, if a court so orders, defamation. In these cases, there is a right to trial by jury.

Although the introduction of the CPR in 1999 has, to some extent, altered the role of the judge in civil proceedings by encouraging the court to take a more interventionist management role, the civil justice system remains adversarial. Accordingly, the judge's role during the trial is generally passive rather than inquisitorial. Lord Denning pointed out in *Jones v National Coal Board* [1957] 2 QB 553 that 'the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large'.

Nevertheless, the case of *Kazakhstan Kagazy Plc & Ors v Zhunus* (Rev 1) [2015] EWHC 996 (Comm) emphasises the courts' increased involvement in scrutinising the conduct of parties during proceedings. In that case, Walker J gave guidance on the approach expected from parties to commercial litigation, which included advice that 'solicitors and counsel should take appropriate steps to conduct the debate,

whether in advocacy or in correspondence, in a way which will lower the temperature rather than raise it'.

Judges in England and Wales have a fundamental duty under the English common law doctrine of stare decisis to interpret the law with regard to precedent. In practice, this means that a court should follow previously decided cases that considered similar facts and legal issues to ensure (as far as possible) consistency in the administration of justice.

## Limitation issues

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

Most limitation periods are laid down by the Limitation Act 1980 (as amended). The general rule for claims in contract and in tort is that the claimant has six years from the accrual of the cause of action to commence proceedings. Exceptions include the torts of libel, slander and malicious falsehood, for which there is a one-year limitation period. The limitation period for making a personal injury claim is three years.

In contract, the cause of action accrues on the date of the breach of contract, whereas in tort it accrues when the damage occurs (unless the tort is actionable without proof of damage).

The limitation period for a claim under a deed is 12 years from the breach of an obligation contained in the deed.

Usually, if the limitation period for a claim has expired, the defendant will have a complete defence to the claim. However, where any fact relevant to the claim has been deliberately concealed by the defendant, or where an action is based on the alleged fraud of the defendant, the limitation period does not commence until the concealment or fraud is actually discovered or could have been discovered with reasonable diligence.

Under CPR 17.4 (2), if a party wishes to amend its claim to introduce a new cause of action after the limitation period has expired, the court will not allow the amendment unless the new cause of action arises out of (substantially) the same facts as are in issue at the time of the amendment. The Court of Appeal has clarified this in the case of *Libyan Investment Authority v King* [2020] EWCA Civ 1690 in which it held that parties seeking to introduce a new claim after the expiry of the relevant limitation period cannot rely on previously struck out pleadings to demonstrate that the new claim arose out of substantially the same facts.

## Pre-action behaviour

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

The parties must consider the potential impact of their behaviour at the pre-action stage of any dispute, and consider at an early stage that the rules governing pre-action conduct apply to the prospective legal claim under consideration.

They should comply with the relevant pre-action protocol or, where a pre-action protocol is silent on the relevant issue or there is no specific pre-action protocol for the type of claim being pursued, a party should follow directions in the Practice Direction on Pre-Action Conduct and Protocols (PDPACP). There are potentially serious consequences for failing to comply with the PDPACP, including significant costs penalties.

Pre-action protocols outline the steps that parties should take to seek information about a prospective legal claim and to provide such information to each other. The purpose of pre-action protocols is to encourage an early and full exchange of information about prospective claims, and to enable parties to consider using a form of alternative dispute resolution (ADR), narrowing down or settling claims prior to commencement of legal proceedings. They also support the efficient management of proceedings where litigation cannot be avoided.

There are currently 14 protocols in force specific to certain types of proceedings; for example, construction and engineering disputes, professional negligence claims and defamation actions. As a general rule, the parties should consider carefully which protocol is most applicable to their proceedings. The Pre-Action Protocols are routinely updated to reflect best practice and are supplemented, from time-to-time, by pilot schemes or other similar provisional proceedings. On 27 October 2020, the Civil Justice Council (CJC) announced a review of the pre-action protocols. An interim report was published in November 2021, outlining options for reforming the Practice Direction on Pre-Action Conduct and existing pre-action protocols (PAPs), and for introducing new PAPs for certain claims. A final report is expected during 2022, and it is possible that an updated Practice Direction on Pre-Action Conduct will be put forward.

During pre-action exchanges, parties are typically provided with information about each other, which may amount to 'personal data' for the purposes of the General Data Protection Regulation (EU) 2016/679 (GDPR), which has been retained in domestic law following the withdrawal of the United Kingdom from the European Union. The UK GDPR sits alongside an amended version of the Data Privacy Act 2018. Parties should be aware of their obligations under the UK GDPR in this regard and seek appropriate counsel where necessary. In cases not covered by any approved protocol, the PDPACP provides general guidance as to exchange of information before starting the proceedings. Although the PDPACP is not mandatory and only states what the parties should do unless circumstances make it inappropriate, the parties will be required to explain any non-compliance to the court, and the court can always take into account the parties' conduct in the pre-action period when giving case management directions and when making orders as to costs and interest on sums due. The PDPACP typically applies to all types of claim, except for a few limited exceptions. Prior to the commencement of proceedings, a prospective party may apply to the court for disclosure of documents by a person who is likely to be a party to those proceedings, but must satisfy a number of tests, which limits the applicability of this route to many cases.

An extra weapon in the claimant's armoury is the *Norwich Pharmacal* order. That order can be sought where the claimant has a cause of action but does not know the identity of the person who should be named as the defendant. In those circumstances, the court may order a third party who has been involved in the wrongdoing, even if innocently, to disclose the identity of potential defendants or to provide other information to assist the claimant in bringing the claim.

## Starting proceedings

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

Proceedings are commenced by the issue of a claim form, which is lodged with the court by the claimant and served on the other party.

There are various prescribed versions of the claim form, depending on the types of claim being issued. The claim form provides details of the amount that the claimant expects to recover, full details of the parties and full details of the claim, which may be set out either in the claim form itself or in a separate document called the particulars of claim. The claim form and particulars of claim must be verified by a statement of truth, which is a statement that the party submitting the document believes the facts stated in it to be true.

Claimants must take care that the particulars of claim comply with the CPR and with court guidelines as they may be otherwise subject to an adverse costs order, or, if they are found to be sufficiently irrelevant,

incomplete or in breach of the rules, struck out (*Ventra Investments Ltd (In Liquidation) v Bank of Scotland Plc* [2017] EWHC 199 (Comm)).

A fee is payable on submission of the claim form, which varies based on the value of the claim. For claims above

£10,000, the court fee is based on 5 per cent of the value of the claim in specified money cases (subject to a maximum of £10,000). Claims exceeding £200,000 or for an unspecified sum are subject to a fee of £10,000. In certain circumstances, court fees can be reduced for persons who fulfil the relevant financial criteria, such as those with a low income or low savings. Court fees may also be slightly reduced for the online submission of a claim form, applicable for any money claims up to a value of £100,000.

As of 25 April 2017, issuing claims and filing documents in the Chancery Division, Commercial Court, Technology and Construction Court, Circuit Commercial Court and Admiralty Court (the Rolls Building Courts) is only possible through the online filing system, CE-File. Online filing has been mandatory since 20 April 2019 for all professional users issuing claims in the Business and Property Courts regardless of location, and since 1 July 2019 for those issuing claims in the Queen's Bench Division in London. Under the courts' CE-Filing system, parties can file documents at court, including claim forms, online 24 hours a day, every day. For a claim form to be served on the defendant a claimant must take steps as required by the rules of the court to bring the documents within the relevant person's attention. Service is effected via a number of methods, depending on the location of the defendants. Defendants domiciled in England and Wales will normally be served via post (but other methods of service, such as service upon a defendant in person, are available). A recent Supreme Court case (*Barton v Wright Hassall LLP* [2018] UKSC 12) serves as a reminder to prospective claimants to follow the rules on service set out in the CPR. In that case, the Court of Appeal refused to validate service by email on the basis that the fact that the claim had been effectively brought to the notice of the defendants was not sufficient reason to validate. The Supreme Court upheld the Court of Appeal's decision. CPR 6APD.4 provides that where a document is to be served by 'fax or other electronic means', the party to be served or its solicitor must previously have indicated in writing that it is willing to accept service by such means (and any limitations, for example file size) and given the number or address to which it must be sent.

A claim form must be served within four months of filing if it is to be served within the jurisdiction and six months if it is to be served outside the jurisdiction. It is possible to apply for permission to extend the period of time for service, but usually any application should be made before the relevant period expires.

Service out of the jurisdiction is a complicated area. In many cases permission to serve out of the jurisdiction is required.

Prior to the end of the transition period, proceedings could be served on a defendant outside the jurisdiction without permission if the English court had jurisdiction under any of the instruments comprising the European regime, in particular the Recast Brussels Regulation, which broadly determines jurisdiction where the defendant is domiciled in a member state (subject to some important exceptions). From 31 December 2020, defendants domiciled in the European Union may no longer be served by way of the EU Service Regulation (1393/2007). The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 came into force on 31 December 2020, meaning that where a defendant is domiciled outside the European Union, a claimant may be required to obtain permission from the court to serve the claim outside of the jurisdiction.

From 1 January 2021, it is necessary to obtain the court's permission to serve the claim form outside the jurisdiction where there is a jurisdiction clause in favour of the English courts, except where the Hague Convention applies (CPR 6.33(2B)), or where the claim form was



issued, but not served, before the end of the transition period and CPR 6.33(2) applied. Once permission is received, a claimant must follow the rules of service laid down by applicable conflict of laws rules (eg, the Hague Convention). Certain formal requirements (such as translation of the claim documents) must be complied with when serving documents outside the jurisdiction according to the Hague Convention.

On 6 April 2021, the Civil Procedure (Amendment) Rules 2021 (SI 2021/117) came into force, amending CPR 6. This amendment introduces a new rule 6.33(2C) allowing the claim form to be served outside the jurisdiction without the court's permission where the contract contains a jurisdiction clause in favour of the English courts, where the Hague Convention does not apply.

On several occasions, it has been held that service of court documents via social media platforms, such as Twitter or Facebook, is acceptable, as long as certain requirements are fulfilled (such as the claimants showing that they have attempted service by more conventional means, or that there was good reason for them not doing so).

## Timetable

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

If the defendant wishes to dispute the claim, he or she must serve a defence. In most cases (though the timetables differ between different courts, which each publish their own specific guides), the defendant has at least 28 days from service of the particulars of claim to serve his or her defence, as long as an acknowledgement of service is filed within 14 days of service of the particulars of claim.

The timetable for service of a defence may be extended by agreement between the parties (by a limited number of days) or, where the court agrees to such extension, following application by the defendant.

The court will allocate the case to the small claims track, the fast track or the multitrack, depending on various factors, including the financial value and complexity of the issues in the case. The court may allocate the case before or at the first case management conference (CMC).

The CMC enables the court to consider the issues in dispute and how the case should proceed through the courts. At the CMC, the court makes directions as to the steps to be taken up to trial, including the exchange of evidence (documentary disclosure, witness statements and expert reports). The court will fix the trial date or the period in which the trial is to take place as soon as is practicable.

Cases can come to trial as quickly as six months from issue of the claim form. Often, however, complicated cases, such as those with an international aspect or disputes of high value will be given a trial date or window that is typically up to two years after the CMC.

Following a successful pilot scheme in the Rolls Building Courts, the Shorter Trial Scheme became permanent in the Business and Property Courts nationwide from 1 October 2018. Under this scheme, suitable cases are expected to reach trial within approximately eight months following the CMC and have judgment handed down within six weeks after conclusion of the trial. The maximum length of the trial is four days, including time set aside for the judge to read into the materials. The scheme is designed for cases that do not require extensive disclosure or witness or expert evidence. Under the Shorter Trial Scheme, the costs management provisions of the CPR do not apply and an abbreviated, issue-based approach is taken towards disclosure, with no requirement for parties to volunteer adverse documents for inspection.

The Flexible Trial Scheme has also become a permanent fixture within the Business and Property Courts, with parties being able to adapt procedures by agreement to suit their particular case and proceedings.

The aim of both schemes is to achieve shorter and earlier trials for commercial litigation within England and Wales, at a reasonable and proportionate cost.

## Case management

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

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 pretrial review or the trial itself). In certain business disputes, the parties also have the option of bringing proceedings under the Flexible Trials Scheme, which allows the parties to adapt various procedures by agreement.

The CPR impose a duty on parties to assist the court in active case management of their dispute.

### Compliance with rules and sanctions for non-compliance

Following the Jackson Reforms, it is extremely important to comply with all rules and orders that the court prescribes, as any errors and oversights will not be easily overlooked, and it may be difficult to obtain relief from sanctions imposed for non-compliance.

The Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 was the high point in the court's tough new approach to granting relief from sanctions, with parties being refused relief for minor procedural breaches.

However, the test was set out by the Court of Appeal the following year in the leading case of *Denton v TH White Ltd* [2014] EWCA Civ 906. Under this three-stage test, the court will consider the seriousness of the failure to comply and why the default occurred, and will evaluate all the circumstances of the case to enable the court to deal justly with the application for relief. The underlying rationale behind the restatement of this test was to reinforce the understanding among litigants that the courts will be less tolerant of unjustifiable delays and breaches of court orders.

Although the courts continue to take a strict approach when deciding whether to grant relief from sanctions, the parties will most likely not be allowed to take their opponents to court for minor procedural breaches. The court will not refuse relief from sanctions simply as a punitive measure (*Altomart Limited v Salford Estates (No. 2) Limited* [2014] EWCA Civ 1408).

Nevertheless, strict adherence to the timetable is required by all parties, lest the court impose costs sanctions. The High Court decision in *Kaneria v Kaneria* [2014] EWHC 1165 (Ch) (as applied in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 2886 (Ch)) has clarified that an extension will not be granted simply because it was requested. The Court of Appeal has further clarified that it will not readily interfere with a first instance order imposed in respect of non-compliance with court orders or time limits, time extensions and relief from sanctions, where the first instance judge has made that order having exercised their discretion in relation to a case management decision (*The Commissioner of the Police of the Metropolis v Abdulle and others* [2015] EWCA Civ 1260).

However, under the CPR, the parties have the flexibility to agree short time extensions in certain circumstances without needing to seek court approval, provided they do not impact on any hearing date.

Significant or tactical delays will not be tolerated. Notable examples include the High Court judgment in *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) and the Court of Appeal judgment in *Denton v White*.

The parties should also be cautious when attempting to take advantage of the other party's breach. In *Viridor Waste Management v Veolia*



*Environmental Services* [2015] EWHC 2321 (Comm), a defendant refused to consent to an extension of time for service of the particulars of claim (which had been brought to the attention of the defendant but had not been properly served) where a new claim would have been time-barred. The court penalised the defendant in indemnity costs for seeking to take advantage of the claimant's mistake.

Lastly, amendments to the CPR in force as of 6 April 2017 provide that a claim or 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 to promote effective case management at a proportionate cost. Parties to all multitrack cases valued under £10 million, for example, are required to comply with additional rules, in particular the preparation of a costs budget. However, cost management rules do not apply to proceedings under the Shorter Trials Scheme unless agreed to between the parties and subject to permission by the court. The costs budget should be in the prescribed Precedent H form annexed within the CPR.

Any party that fails to file a budget in time will be treated as having filed a budget in respect of applicable court fees only, unless the court orders otherwise, restricting the party's ability to recover costs in the event of a successful outcome. In the recent case of *BMCE Bank International plc v Phoenix Commodities PVT Ltd and another* [2018] EWHC 3380 (Comm), the court confirmed that failure to file a costs budget is a serious and significant breach for which there has to be very good reason. In this case, the claimant's solicitors filed the costs budget two weeks late and without explanation on the morning of the CMC, and when questioned by the judge it was determined that the partner with conduct of the claimant's claim had been abroad on business. The court found that this was not a good enough reason to consider granting relief. However, in *Manchester Shipping Ltd v Balfour Shipping Ltd and another* [2020] EWHC 164 (Comm), the court granted relief to defendants who filed their costs budget 13 days late on the basis that the parties had not communicated as to when costs management should be considered and as a result the defendants' default was inadvertent and not egregious.

For cases valued at £10 million or more, the court may exercise discretion as to whether a costs budget is required. The parties can also apply for an order requiring costs budgets to be served (see *Sharp v Blank* [2015] EWHC 2685 (Ch)).

From 6 April 2016, budgets for claims worth £50,000 or more should be filed no later than 21 days before the first CMC pursuant to CPR 3.131(b). Where the claim is for less than £50,000, the budgets must be filed and served with the parties' directions questionnaire (pursuant to CPR 3.131(a)). There will also be a requirement to file budget discussion reports, which indicate what is agreed and disagreed in terms of proposed budgeted figures, no later than seven days before the first CMC.

Under costs management rules, parties must exchange budgets and come to an agreement on them. However, it should be noted that budgets may nevertheless be scrutinised by the court to ensure they are proportionate and reasonable.

In *CIP Properties (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).

The relevant provisions of the CPR have recently been updated to note that, as part of the costs management process, the court may not approve costs incurred up to and including the date of the costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.

The parties should also approach the preparation of a costs budget carefully, as current case law is not consistent as to whether retrospective permission to revise the budget will be granted. Revision of a budget due to an error is extremely difficult.

### Evidence – Disclosure Pilot Scheme

From 1 January 2019, the Business and Property Courts introduced a mandatory Disclosure Pilot Scheme (DPS) (subject to limited exceptions) pursuant to Practice Direction 51U (PD 51U), which has now been extended until 31 December 2022. It is expected that the pilot scheme will be adopted into procedure following the end of the trial, although with some amendments. The pilot scheme operates in the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, London, Manchester and Newcastle and has a significant impact on the disclosure process within civil proceedings and the overall case management.

On 22 September 2020, Flaux LJ, chair of the Disclosure Working Group, published an update on the DPS, including details of proposed changes being put to the CPRC for approval. The proposed changes were approved at the October CPRC meeting, and were included in the 127th Practice Direction Update, taking effect on 6 April 2021. These updates include, inter alia, clarification that the latest time for disclosure of known adverse documents is as specified in PD 51U 9.1 to 9.3, an express provision that adverse documents need not be disclosed with initial disclosure and a provision that it will be possible to seek guidance 'on any point concerning the operation of the pilot' via disclosure guidance hearings.

A further update on the operation of the DPS was published on 29 July 2021, with the outlined changes taking effect from 1 November 2021. Among others, these include guidance for 'less complex claims' and a simplified version of the Disclosure Pilot Scheme and guidance notes, new provisions tailored to the fact that disclosure in multiparty claims will likely require a more bespoke procedure and court approach.

Under the DPS, it appears that it is still necessary for parties to comply with requirements under the Practice Direction on Pre Action Conduct and Protocols or any relevant specific pre-action protocol that may apply. However, the DPS also introduces important steps that parties must take before proceedings have commenced, and establishes certain duties owed by the parties to the court, referred to as the Disclosure Duties. The Disclosure Duties are continuing duties that last until the conclusion of the proceedings, and include ensuring that parties take all relevant steps to preserve documents within their control that may be relevant to any issue in these proceedings and undertaking to search for documents in a responsible and conscientious manner to fulfil the purpose of such a search. Disclosure Duties also apply to the parties' solicitors, whose duties include, among other things, taking reasonable steps to preserve documents within their control that may be relevant to any issue in proceedings.

Under the DPS, the parties are required to take reasonable steps to preserve documents in their control that may be relevant to any issue in proceedings as well as providing specific detail on what is required in terms of document preservation. Those requirements include an obligation to send a written notification in any form to all relevant employees and former employees that identifies documents or classes

of documents to be preserved and notifying the recipient that they should not delete or destroy documents. Following the 127th Practice Direction Update, the duty to notify employees and former employees only applies where there are reasonable grounds for believing that the employee or former employee may be in possession of disclosable documents not also in the party's possession. There is also a requirement for each party's legal representatives to notify their clients of the need to preserve documents and obtain written confirmation from their clients that they have discharged their obligations under the DPS with regard to document preservation. The 127th Practice Direction Update provides that parties' legal representatives will be able to confirm, on their behalf, that document preservation duties have been complied with.

The DPS also introduces the concept of initial disclosure, which involves each party providing to all other parties an initial disclosure list of documents. The list is to be provided simultaneously with the statement of case, and will list the key documents on which a party has relied and that are necessary to enable the other parties to understand the claim or defence that they have to meet. There are several circumstances where initial disclosure is not required, most notably when the parties request extended disclosure.

Extended disclosure may be used in situations where the court is persuaded that it is appropriate to fairly resolve one or more of the issues for disclosure as identified by the parties. Extended disclosure involves five models of disclosure. The models range from an order for no disclosure to the widest form of disclosure (requiring production of documents that may lead to a train of enquiry).

A further aspect of the DPS is the replacement of the electronic documents questionnaire in its current form by a disclosure review document (DRD). Parties should complete a joint DRD to list the main issues for the purposes of disclosure, exchange proposals for extended disclosure, and share information about where and how documents are kept. The parties are required to complete a DRD prior to the CMC, which lists all issues for disclosure to be decided in the proceedings and decides which of the five models for extended disclosure is appropriate to achieve a fair determination of those issues.

## Evidence – documents

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

The DPS is now in operation and governs the disclosure process for any proceedings commenced in the Business and Property Courts on or after 1 January 2019. For disclosure in any proceedings in any other court (or proceedings commenced prior to 1 January 2019), the existing CPR provisions remain in force.

The DPS and 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 the parties consider document retention and new document creation carefully from the outset. The process of disclosure allows the parties to formally state which specific documents or more generally which types of documents exist or have existed.

Once an obligation to disclose documents has arisen, the party has an obligation to disclose all relevant documents (both paper and electronic). This is an ongoing obligation until the proceedings are concluded; therefore, if a document that should be disclosed comes to a party's notice during the proceedings, he or she must notify the other party.

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. For cases participating in the DPS, the parties are now under an express duty to preserve documentation.

Although the CPR includes a 'menu' of disclosure options, in practice the usual order made by the court is for standard disclosure. This requires a party to carry out a reasonable search for documents and disclose all the documents on which the party relies, or which adversely affect its own case, adversely affect another party's case or support another party's case.

A party's duty of disclosure is limited to documents that are or have been in its 'control', which includes documents that a party has a right to possess or to inspect. The Court of Appeal has upheld a decision that, where personal devices belonging to the defendants' employees and ex-employees potentially contained relevant documents within the defendants' 'control' for the purposes of disclosure, the court had jurisdiction to order the defendants to request the employees and ex-employees deliver up those devices for inspection by the defendants' IT consultants (*Phones 4U Limited v EE Limited* [2021] EWCA Civ 116). For cases that are proceeding under the DPS a party's duty of disclosure is defined under the Disclosure Duties and the model for disclosure ordered pursuant to the DRD.

A party to whom a document has been disclosed has a right to inspect that document except where the document is no longer in the control of the party who disclosed it, or where that party has a right or a duty to withhold inspection of it (eg, if the document is privileged), or where it would be disproportionate to permit inspection of the particular category of documents. Inspection is a separate procedural step to disclosure and is the process by which the party who has disclosed a document allows the other parties to view the originals or provide copies of any documents disclosed.

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). For cases that are proceeding under the DPS, the disclosure report is replaced by the DRD.

There is also a requirement that the parties convene, at a meeting or by telephone, at least seven days prior to the first CMC to seek to agree a disclosure proposal. For cases that are proceeding under the DPS, the parties should attempt to reach agreement on the appropriate model of disclosure to decide each issue prior to the filing of the DRD, which should take place not less than five days before the CMC.

The CPR give the courts significant powers over the conduct of the disclosure process. For example, under CPR 31.5, the court has flexibility to reduce the scope of disclosure to ensure proportionality and generally further the overriding objective of dealing with cases justly and at a proportionate cost. Extensive disclosure is limited in both the Shorter Trial and the Flexible Trial Schemes.

The court also has the power to impose alternatives to the standard disclosure process. For example, the court may order wider-ranging disclosure of documents (likely to be rare) or dispense with disclosure altogether (only likely to be appropriate in the most straightforward cases). Ultimately, the court can make any order for disclosure it considers appropriate.

## Evidence – privilege

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

The disclosing party may withhold documents protected by legal privilege from inspection by the other party or the court.

Legal professional privilege covers two principal categories: legal advice privilege and litigation privilege.

Legal advice privilege attaches to confidential communications between a client and his or her lawyer for the purpose of giving and receiving legal advice.

This includes advice from foreign and in-house lawyers, provided that they are legally qualified (eg, not accountants providing tax law advice), and are acting as lawyers and not as employees or executives performing a business role. In *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm), the High Court held that legal advice privilege extends to communications with foreign lawyers, whether or not they are in-house, provided they are acting in the capacity or function of a lawyer. There is no additional requirement that foreign lawyers should be ‘appropriately qualified’ or recognised or regulated as ‘professional lawyers’ within their jurisdiction.

Only communications with the client are protected, and the meaning of client has been construed narrowly in an important case in which communications between a lawyer and some employees of the client company were held to fall outside legal advice privilege. This decision has been criticised by practitioners as being unduly narrow and has been rejected in the Hong Kong Court of Appeal. In England and Wales, the narrow approach remains binding and has been confirmed in *Re RBS (Rights Issue Litigation)* [2016] EWHC 3161 (Ch).

The Court of Appeal confirmed in *R (Jet2.Com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 that communications or documents must have been created or sent for the dominant purpose of seeking legal advice to fall within the definition of legal advice privilege; the same principle (the dominant purpose test) will apply in cases of litigation privilege. The privilege is not limited to advice regarding a party’s rights and obligations, but extends to advice as to what should prudently and sensibly be done in the relevant legal context.

In 2015, the High Court took a wide approach to legal advice privilege by confirming that elements of documents that do not ordinarily attract privilege will nevertheless be privileged if it can be shown that they formed part of the ‘necessary exchange of information’ between lawyer and client, the object of which was giving legal advice as and when appropriate (*Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 3187 (Ch)).

Litigation privilege attaches to communications between client and lawyer or between either of them and a third party if they came into existence for the dominant purpose of giving or receiving legal advice or collecting evidence for use in litigation. The litigation must be pending or in reasonable contemplation of the communicating parties.

In 2020, the Court of Appeal confirmed that documents attached to emails will not be covered by legal professional privilege solely on the basis that the email itself is privileged; a non-privileged attachment must be disclosed notwithstanding that it may have been attached to a privileged email (*Sports Direct International Plc v Financial Reporting Council* [2020] EWCA Civ 177).

Legal professional privilege will be negated by an abuse of the normal attorney–client relationship under the ‘iniquity principle’, that is, when communications are made for wrongful, for example, fraudulent, purposes. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm), the iniquity caused by the litigant’s concealment and deceit in relation to their assets put the advice outside the normal scope of professional engagement and justified an order for disclosure of documents that would otherwise have attracted legal professional privilege.

Legal professional privilege had been in a relative state of flux following a controversial High Court decision by Andrews J in the case of *Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd* [2017] EWHC 1017 QB (ENRC). The High Court decision in that case narrowed considerably the scope of legal professional privilege in the circumstances of internal investigations in finding that documents created during the course of an internal investigation prior to the commencement of criminal proceedings by the Serious Fraud

Office (SFO) were not privileged and should be made available for inspection. On appeal, the Court of Appeal overturned the High Court’s decision, concluding that litigation privilege did apply to the documents in question, as they had been created by ENRC for the dominant purpose of resisting or avoiding criminal proceedings. The court held that businesses need to be able to investigate possible wrongdoing without the fear of creating material that might potentially incriminate them in later proceedings (once the investigation has concluded).

Prior to the Court of Appeal decision, Andrews J’s determination on litigation privilege in the High Court was regarded as controversial and was not accepted in the subsequent case of *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland* [2017] EWHC 3535 (Ch). In his judgment, Sir Geoffrey Vos, Chancellor of the High Court, distinguished that case from ENRC on its facts. He appeared to reject the proposition that documents created to try to settle the litigation, and for the purpose of being shown to the other side, could never attract litigation privilege.

There are other grounds of privilege, including in respect of documents that:

- contain ‘without prejudice’ communications between the parties, intended to resolve the dispute;
- pass between a party to legal proceedings and a third party where both parties share a common interest in the proceedings (for instance, third-party litigation funders);
- pass between co-parties to legal proceedings;
- would tend to incriminate a party criminally; or
- would be adverse to the public interest.

## Evidence – pretrial

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

The parties must exchange written statements of evidence prior to trial. Ordinarily, at the CMC, the court gives directions regarding the exchange of written witness statements and experts’ reports, including the number of expert reports that each party is entitled to rely on as evidence, the subject matter that should properly be considered in expert evidence, and the date by which the parties should file any relevant witness and expert evidence.

If a witness statement is not served within the time specified by the court, the witness may not be called to give oral evidence at trial unless the court gives permission.

Where the parties wish to rely on expert evidence on a particular issue the courts have the power to allow separate experts for each party or to appoint a single joint expert. The single joint expert will be instructed to prepare a report for evidence on behalf of two or more of the parties instead of each party appointing their own expert witnesses.

Similarly, a party who fails to apply to the court to rely on an expert’s report will require the court’s permission to call the expert to give evidence orally or use the report at trial. This is likely to have adverse cost consequences for the party that failed to seek the permission of the court at the CMC.

The courts have express powers to identify or limit the issues for witness evidence, identify which witnesses may give evidence and limit the length of witness statements. In addition, parties seeking permission for expert evidence to be adduced will have to identify the issues the evidence will address and provide a cost estimate. The court may also cause the recovery of experts’ costs to be limited, in accordance with the emphasis on proportionate cost pursuant to the overriding objective.

On 6 April 2021, new rules on witness evidence came into force in the Business and Property Courts (through a new Practice Direction 57AC and accompanying Appendix, which contains a statement of best practice). The new rules affect the content of witness statements and the manner in which witness evidence may be taken, including:

- a trial witness statement must be in the witness's own words and, if practicable, be in the witness's own language;
- a witness statement must contain only evidence as to the matters of fact of which the witness has personal knowledge, and only insofar as those matters need to be proven at trial by witness evidence. It is not acceptable to provide lengthy commentary on disclosure documents, nor to use the statement for the purposes of comment or persuasion;
- a witness statement must contain a list of the documents that the witness has referred to or has been referred to for the purposes of providing the evidence set out in that witness statement;
- a statement should be prepared in such a way as to avoid any practice that might alter or influence the recollection of the witness, other than by refreshing the witness's memory with documents to the extent that would be permissible if the witness were giving evidence-in-chief;
- an expanded form of statement of truth has been introduced, confirming that the person making the statement understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth; and
- witness statements will need to be endorsed by a certificate of compliance with PD 57AC signed by the 'relevant legal representative' confirming that they have explained the purpose and proper content of a witness statement to the witness and believe that the witness statement complies with PD 57AC (including the Appendix) and paragraphs 18.1 and 18.2 of PD 32 (PD 57AC, paragraph 4.3).

## Evidence – trial

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

Factual and expert witnesses are generally called to give oral evidence at trial.

Their written statements will normally stand as evidence-in-chief, so the witness does not need to provide oral evidence on the matters set out in their statement. However, a witness who provides any oral evidence has the opportunity, if granted the court's permission, to amplify his or her witness statement and give evidence relating to new matters that have arisen following service of the witness statement on the other parties. The opposing party can cross-examine the witness, following which the party calling the witness has the opportunity to re-examine that witness. The witness may also be asked questions by the judge.

In certain circumstances, the court may permit witnesses to give evidence via video link from abroad (*Hilden Developments Ltd v Phillips Auctioneers Ltd and another* [2022] EWHC 541 (QB)).

At the trial, the judge may also allow both parties' experts' evidence to be heard together (ie, 'concurrent expert evidence', also known as 'hot-tubbing') by way of a judge-led process, although in practice this has not been readily embraced by the courts. Revised provisions governing the procedure for hot-tubbing came into force on 22 November 2017. Among other changes, these provisions permit the court to set an agenda for hearing expert evidence, which may be on an issue-by-issue basis.

The court may permit experts to give evidence remotely. In *Optis Cellular Technology LLC and others v Apple Retail UK Ltd and others* [2022] EWHC 561 (Pat), both parties instructed experts, of which one gave evidence in person and another remotely. Meade J mentioned (though no party raised the issue) that he did not believe that there was any unfairness caused to the expert who gave evidence remotely.

A party may rely on a witness statement of fact at trial even where a witness is not subsequently called to give oral evidence. The relevant

party must inform the opposing parties, who may apply to the court for permission to call the witness for cross-examination. Where a party fails to call a witness to give oral evidence, the court is likely to attach less weight to his or her statement and in certain circumstances may draw adverse inferences from the witness's failure to give oral evidence.

## Interim remedies

### 12 | What interim remedies are available?

The court has wide powers to grant the parties various interim remedies, including interim injunctions, freezing injunctions, search orders, specific disclosure and payments into court. Interim remedies are governed by CPR Part 25.

Interim measures are often used to prevent the dissipation of assets or evidence, and usually English courts will only make orders relating to property within the jurisdiction. However, in exceptional circumstances, the English court will make a worldwide freezing injunction if the respondent is unlikely to have sufficient assets within the jurisdiction to cover the applicant's claim. The English court may also grant interim relief (typically in the form of freezing injunctions) in aid of legal proceedings anywhere in the world.

When seeking a freezing injunction (or indeed, any interim remedy) on a without notice basis, applicants must comply with the duty of full and frank disclosure. This duty requires that all material issues must be presented to the court in a full and fair matter, including those issues that are adverse or detrimental to the applicant's position or interests. In *Fundo Soberano de Angola & ors v Jose Filomena dos Santos & ors* [2018] EWHC 2199 (Comm), the English High Court confirmed that the duty of full and frank disclosure is a serious and onerous obligation that applies to applicants and their legal advisers alike who, together, must make the fullest inquiry into the central elements of their case. The parties should consider this duty very carefully before making any interim application on a without notice basis.

The court also has the power to grant injunctions against 'persons unknown', that is, defendants who cannot be identified. The recent case of *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 provided further guidance on the necessary requirements for the grant of such an injunction, as identified in *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515. The court decided that it may prohibit otherwise lawful behaviour where necessary to secure effective protection for claimants' rights. The importance of clarity and precision in the drafting of those injunctions was also stressed by the court.

## Remedies

### 13 | What substantive remedies are available?

Common remedies awarded by the courts are damages (the object of which is to compensate the claimant, rather than to punish the defendant), declarations, rectification, rescission, subrogation, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction), and orders for the sale, mortgaging, exchange or partition of land. Punitive damages, aiming to punish the defendant, may be available in very limited circumstances, for instance in cases involving oppressive action or deliberate torts. Interest may be payable on pecuniary awards.

## Enforcement

### 14 | What means of enforcement are available?

Once a judgment has been obtained from a court in civil proceedings in England and Wales, the judgment can be enforced in a variety of ways. If the judgment is for a payment of a sum of money and the debtor has assets that can be easily obtained and sold for value, the court can issue

a writ or warrant of control to command an enforcement officer to take control of and sell the debtor's goods. These are wholly administrative processes that do not require a judicial decision.

A third-party debt order can be obtained and operates to prevent funds reaching the debtor from a third party by redirecting them to the creditor instead.

The court can enforce a charging order, which imposes a charge over the debtor's interest in any land, securities or funds. This usually acts to prevent the debtor from selling any land with a charge over it without first satisfying the creditor. This is most effective when the debtor is the sole owner of any applicable assets.

An attachment of earnings can be employed by the court, which would order that a proportion of the income of the debtor be deducted like a tax from the debtor's salary by the employer and paid to the creditor until any relevant debt is satisfied. Alternatively, a creditor can employ a variety of insolvency procedures, such as bankruptcy, appointment of a receiver or a winding-up order.

## Public access

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

The general rule is that hearings take place in public. However, the court can order that a hearing (or part of it) be held in private in some circumstances, where the court considers it necessary 'in the interests of justice' (eg, where notice to the other party would defeat the purpose of the application, such as applications for urgent freezing injunctions). The court can also order a hearing to be held in private if the hearing involves matters relating to national security. The court can also redact parts of judgments relating to confidential issues in appropriate cases.

Following the outbreak of the covid-19 pandemic and the enactment of the Coronavirus Act 2020, the Courts Act 2003 has been temporarily amended to ensure public participation in proceedings conducted by video or audio. To ensure public access to remote hearings, proceedings may be relayed to an open courtroom or a media representative could be allowed to report on the proceedings remotely. Pursuant to section 85A of the Courts Act 2003, the court has discretionary powers to allow the livestreaming of court proceedings (eg, on YouTube). In fact, the court in *Yilmaz and another v Secretary of State for the Home Department* [2022] EWCA Civ 300, remarked that remote technology has become 'ubiquitous in all jurisdictions' in court proceedings during the pandemic. During 2022, HMCTS is working with a team of researchers at the University of Oxford to produce a series of audiovisual guides and documentation to better the support available to court users attending online hearings.

Non-parties can obtain any statement of case filed after 2 October 2006 without the permission of the court or notification to the parties.

Statements of case include the claim form, the particulars of claim, the defence, the reply to the defence and any further information given in relation to any of them, but not documents aimed at confining the issues. The meaning of 'statement of case' in this context was examined in *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 397 (Ch), in which the judge distinguished between a particulars of claim (which constitutes a statement of case), and a notice to admit and the response to such notice (neither of which constitutes a statement of case). Accordingly, it was held that a third party was not entitled to copies of the notice to admit nor the response under CPR 5.4C(1).

Permission of the court may be sought to obtain copies of other documents or court records on the court file. Documents attached to a statement of case, witness statements, expert reports, skeleton arguments, notices to admit and response and correspondence between the parties and the court can be obtained by non-parties if the court grants permission. In *Cape Intermediate Holdings Ltd v Dring* [2019]

UKSC 38, the Supreme Court held that courts must engage in a fact-specific balancing exercise to determine whether allowing a non-party to obtain such documents or court records would advance the principle of open justice.

A party can also apply for an order restricting a non-party from obtaining a copy of a statement of case, but any such order is confined to statements of case. When filing electronically a party may request that a document is designated where appropriate.

Copies of judgments and orders made in public are available without permission of the court. Supreme Court hearings, and legal arguments and the delivery of the final judgment in Court of Appeal hearings, are allowed to be broadcast live. The Supreme Court has a live streaming service, and an on-demand archive of past hearings that can be viewed online.

In addition, as of 6 April 2016, skeleton arguments (anonymised in family proceedings) are provided to accredited reporters in cases being heard in the Court of Appeal.

## Costs

16 | Does the court have power to order costs?

Generally, the unsuccessful party will be required to pay the costs of the successful party. However, the court has wide discretion to order which party costs are payable by, the amount of those costs and when they are to be paid. Even where costs are reasonably or necessarily incurred, if they are deemed disproportionate then the court may nevertheless disallow them. CPR Part 44 details the general costs rules that apply in civil proceedings in England and Wales.

In determining the way in which it makes costs orders, the court will have regard to all circumstances, and specifically the conduct of the parties before and during the proceedings, as well as any efforts made before and during the proceedings to resolve the dispute.

In particular, the courts allow the parties to make certain pretrial settlement offers that are expressly taken into account in relation to costs at any subsequent trial, namely, where the settlement offers are rejected. These rules are set out in Part 36 CPR.

Where a defendant makes a 'Part 36 offer' that is rejected, if the claimant does no better at trial the claimant will generally not recover its costs after the period within which it was possible to accept the Part 36 offer (known as the 'relevant period'), and will be liable to pay the costs incurred by the defendant after the relevant period, and interest on those costs.

If a claimant makes a Part 36 offer that is rejected, and the claimant succeeds either in obtaining an amount equivalent to or better than the Part 36 offer, the claimant is entitled to an enhanced-costs award (that is, a higher rate of recovery, plus interest on both costs and damages up to 10 per cent above the base rate). In addition, the court can impose an additional penalty on the defendant, requiring an additional payment of damages up to a maximum of £75,000.

Following the recent decision of *King v City of London Corp* [2019] EWCA Civ 2266, disapproving the earlier decision in *Horne v Prescott (No. 1) Ltd* [2019] EWHC1322 (QB), an offer that excludes interest is not a Part 36 offer and, therefore, a Part 36 offer must include all interest up to the end of the period in question.

Once the court has made an order as to costs, the general rule is that the amount to be paid will be determined by an assessment process unless an amount is agreed to by the parties. The assessment process can be on either a summary or a detailed basis. Summary assessment requires the parties to focus on the cost of proceedings as they progress, with the aim of increasing settlement chances if the parties are aware of the ongoing costs of litigation. Detailed assessment usually takes place after an order for costs is made and thus involves an assessment of costs at the conclusion of proceedings. In relation to hearings



that last no more than one day (and cases allocated to the fast track) the general rule (as set out in Practice Direction 44 9.2) is that a summary assessment should occur at the conclusion of the hearing unless there is good reason not to do so.

Subject to the points above, when it comes to making a costs order the court will stipulate an assessment of the successful party's costs on either the 'standard' or 'indemnity' basis:

- on the standard basis, the court will examine whether the costs were reasonable and reasonably incurred, as well as proportionate to the matters at issue; and
- on the indemnity basis, the court resolves any doubt it has regarding disproportionate costs in favour of the successful party, which results in a higher award to the successful party.

However, the court will not allow costs that have been unreasonably incurred.

A claimant may be required to provide security for the defendants' costs for several reasons. The most common grounds for obtaining an order for security for costs are where:

- the claimant is ordinarily resident out of the jurisdiction but is not resident in a state bound by the Hague Convention; or
- the claimant is a limited company and there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so.

In each case, the court must be satisfied that it is just to make an order for security for costs. There are many factors that the court may consider, such as whether ordering security would unfairly stifle a genuine claim. When considering whether to refuse to order security on such ground, the court must also be satisfied that, in all the circumstances, it is probable that the claim would be stifled (*Pannone LLP v Aardvark Digital Ltd* [2013] EWHC 686 (Ch)).

It is important to note, generally, that a party's conduct in litigation will be considered carefully by the court when exercising its discretion to award costs in line with the Denton principles.

Additionally, from 6 April 2017, the court may record on the face of any case management order any comments it has about the incurred costs that are to be taken into account in any subsequent assessment proceedings.

However, in the Financial List test case scheme, a test case proceeds on the basis that each party bears its own costs.

## Funding arrangements

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

English law permits conditional fee agreements (CFAs) in relation to civil litigation matters, whereby a solicitor's fees (or part of them) are payable only in specified circumstances. Usually, the solicitor receives a lower payment or no payment if the case is unsuccessful, but a normal or higher than normal payment if the client is successful.

However, for CFAs to be enforceable, certain formalities must be observed. The success fee must represent a percentage uplift of fees charged (rather than a percentage of damages secured), and such uplift cannot exceed 100 per cent of the normal rate. These agreements are becoming less unusual in commercial cases.

One reason CFAs are still relatively rare in complex commercial cases is the difficulty in defining the concept of 'success' to incorporate an outcome other than simply winning the case.

The success fee element of the party's costs is not recoverable from the losing party, subject to limited exceptions (eg, in cases where the CFA was entered into before 1 April 2013, in insolvency-related proceedings where the CFA was entered into before 6 April 2016, and in publication and privacy proceedings where the CFA was entered into before 6 April 2019). As of 6 April 2016, success fees are no longer recoverable in insolvency-related cases, and as of 6 April 2019, success fees are no longer recoverable in publication and privacy proceedings.

A third party may fund litigation in return for a share of the proceeds of the claim, if successful. If the claim fails, the third party may be liable for the successful defendant's legal costs. Those agreements are upheld provided that they are not contrary to public policy. The common law principles of champerty and maintenance must also be considered when third-party litigation funding is used, for fear of 'sully the purity of justice'.

The case law in this area is developing, and there is still scope for uncertainty. *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 is a notable case in which the Court of Appeal upheld the lower court's decision ordering the third-party funders to be jointly and severally liable to pay costs on the indemnity basis.

In *ChapelGate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246, the Court of Appeal found that the 'Arkin cap', which caps a litigation funder's liability for adverse costs to the amount of funding that was provided, is not a binding rule to be applied automatically in every case involving a litigation funder. Instead, the court will consider all of the facts of the case, particularly whether the funder had funded the claim in full or in part, in determining whether to cap the litigation funder's liability for adverse costs. In the case of *Montpelier Business Reorganisation v Armitage Jones* [2017] EWHC 2273 (QB), the court ordered a third-party costs order against the 5 per cent shareholder of an insolvent claimant. As the claimant was unable to meet its costs liability, the order was granted on the basis that the shareholder had funded the litigation with a non-arms-length loan, had clearly exercised control over the litigation and stood to gain had the claimant been successful. In the case of *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch), the High Court emphasised that costs orders against non-parties are exceptional and will rarely be made against pure funders. The court's willingness to make third-party funders liable for the conduct of funded parties could have consequences for the funding market; funders are likely to be more careful as to whom they choose to fund, and the cost of such funding is likely to increase to reflect the funders' increased risk exposure but also to cover after-the-event insurance premiums.

In addition to investing in a claimant's case, third parties may also invest in litigation by way of a payment from a defendant in exchange for taking on a share of the financial risk (both in respect of the claim and legal costs). This type of arrangement, in our experience, is very rare, and developments will be monitored with interest. It is only likely to feature in high-value litigation in which a defendant prefers to make a payment to an investor to reduce its overall litigation risk. Those arrangements may offer significant investment opportunities to professional funders in an industry that continues to evolve.

Lawyers may enter arrangements involving a success fee that is directly attributable to the amount of damages recovered by the client (a contingency fee). These arrangements are known as damages-based agreements (DBAs) and are regulated.

The recovery of the contingency fee is dependent on both the success of the claim and the recovery of sums awarded from the defendant. The solicitor's legal fees are only paid in the event of 'success' (as defined in the DBA) and not during the case.

A DBA must not provide for a payment inclusive of VAT that is more than 25 per cent of the relevant sums recovered in personal injury cases, 35 per cent in employment matters and 50 per cent of the sums

ultimately covered in all other civil litigation cases. These caps are only applicable to proceedings at first instance and the figures are a percentage of the amount actually received by the successful party, not a percentage of any order or agreement to pay. The solicitor will only be able to claim a share of money that the client obtains from the litigation, and not any money or assets that the client is able to retain (*Tonstate Group Limited and others v Wojakovski and others* [2021] EWHC 1122 (Ch)). This suggests a limited application for DBAs by defendants.

Successful parties should be able to claim from the losing party some or all of their costs on the conventional basis, but must not exceed the DBA fee itself. The successful client will use the recovered costs and damages to discharge the DBA (or part thereof). It is noteworthy that DBAs have come under significant criticism from both the Bar Council and the Law Society, and very few solicitors are entering into DBAs. The Court of Appeal recently confirmed that DBAs may contain provision for payment if a DBA is terminated early by a client, which may ease the concerns of some solicitors and thereby encourage greater use of DBAs (*Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16).

In November 2014, the government announced that it did not intend to make any adjustment to the DBA regulations to expressly permit hybrid DBAs (where additional forms of litigation funding can be coupled with a DBA to fund a case), to discourage litigation behaviour based on a low-risk, high returns approach. However, the government is currently in the process of drafting a new set of DBA regulations. In October 2019, proposed redrafted regulations were published to reform the Damages-Based Agreement Regulations 2013, following an independent review of the existing regulations by Professor Rachael Mulheron and Nicolas Bacon QC. The proposals mark a significant shift in some key areas. Key changes in the current draft include the following:

- a shift away from the success fee model – the legal team will be paid the DBA percentage payment together with their recoverable costs;
- a reduction in the caps mentioned above – from 50 per cent to 40 per cent in commercial cases and from 25 per cent to 20 per cent in personal injury cases;
- hybrid DBAs to be permitted, despite the concerns raised by the Ministry of Justice;
- greater flexibility to agree terms relating to termination of the agreement within the DBAs; and
- availability of DBAs in broader range of claims, including non-monetary claims.

In June 2021, a supplementary report was submitted to the Ministry of Justice for consideration. In the meantime, the Law Society has suspended work on a model DBA and it advises that, until the DBA regulations are amended, care should be taken when entering these agreements. The Law Society has also published information that indicates that barristers are not prepared to risk entering into a DBA even if the case is deserving, leading to questions regarding access to justice in civil proceedings in England and Wales.

**Insurance**

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

Insurance is available for litigation costs. There are two types of legal expenses insurance policies:

- before the event policies – these policies are typically taken out with an annual premium and provide cover for some or all of the client’s potential costs liabilities in any future disputes. They are not usually relevant to major commercial litigation; and
- after-the-event (ATE) policies – these policies typically cover a party’s disbursements (such as counsel and expert fees) and the

risk of paying an opponent’s legal fees if the insured is unsuccessful in the litigation.

ATE policies may cover the insured’s own legal expenses, although this is less common.

If an ATE insurance policy is entered into on or after 1 April 2013, the insurance premiums will no longer be recoverable from the losing party. There are limited exceptions to this rule for claims involving insolvency (provided the policy was taken out before 6 April 2016), publication and privacy proceedings, and personal injury related to mesothelioma.

In publication and privacy proceedings the recoverability of ATE insurance was expected to be abolished, but these plans have subsequently been delayed indefinitely. In December 2018, the government announced that it was abandoning plans set out in its 2013 costs consultation and instead the recoverability of ATE insurance premiums will remain. The publication and privacy proceedings exception does not cover pure data breach or cyberattack litigation (*Warren v DSG Retail Ltd* [2021] EWHC 2168 (QB)).

In mesothelioma claims the recoverability of ATE insurance has also been delayed until a review of the likely effect of any abolition of recoverability of premiums has been carried out.

The legality of the recoverability of CFAs and ATE premiums pre-April 2013 has been tested in the Supreme Court case of *Coventry v Lawrence* [2015] UKSC 50. In that case, the Supreme Court was asked to decide whether the pre-April 2013 recoverability of ATE premiums and success fees was incompatible with human rights, specifically the right to a fair trial under article 6 of the European Convention on Human Rights. The Supreme Court decided it was not incompatible, thus preventing an estimated potential 10 million appeals out of time.

**Class action**

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

Class actions are most commonly brought in personal injury, negligence, product liability, competition and consumer disputes, but now increasingly so in commercial cases. In recent years there has been a marked increase in interest in class action litigation in England and Wales.

There are several mechanisms for pursuing collective redress:

- representative actions – where a claim is brought by or against one or more persons as representatives of any others who have the ‘same interest’ in the claim;
- group litigation orders (GLO) – the court can make a GLO under CPR 19 where a number of claims give rise to ‘common or related issues of fact or law’;
- representative damages actions for breach of competition law; and
- collective actions – claims that can ‘conveniently’ be addressed in the same proceedings by being brought jointly, being consolidated or having one or a small number of claims run as a ‘test case’, which can then be used to resolve similar claims.

These collective action mechanisms are generally conducted on an opt-in basis, which means that individual claimants must elect to take part in the litigation. Currently, there is no direct equivalent in England and Wales to the US opt-out model of class action. However, litigation funding continues to attract a high profile.

In addition, the Consumer Rights Act, the main provisions of which came into force on 1 October 2015 (and which came fully into effect in October 2016), allows for collective proceedings to be brought before the Competition Appeal Tribunal (CAT) for redress of anticompetitive behaviour, including both opt-in and opt-out. The opt-out collective action regime allows competition claims to be brought on behalf of a defined



set of claimants except those who have opted out, albeit that third-party funders are barred from bringing collective actions.

Since competition collective actions have been permitted, there has not yet been a claim certified as suitable to proceed. In *Dorothy Gibson v Pride Mobility Products* [2017] CAT 9, an application was withdrawn following an unfavourable judgment rendering any possible class too small. However, in April 2019, the Court of Appeal revived a £14 billion proposed class action lawsuit against Mastercard (heard at first instance as *Merricks v Mastercard Inc* [2017] CAT 16), which was brought following a 2007 decision by the European Commission that multilateral interchange fees charged between banks in relation to Mastercard transactions involved a breach of EU competition law. The case was then heard by the Supreme Court, which upheld the ruling of the Court of Appeal and remitted the case to the CAT for reconsideration of the certification decision in accordance with the Supreme Court's new guidance. This guidance smooths the path to certification in several areas, making it easier for a claim to achieve the necessary threshold of suitability and emphasising the policy rationale for collective actions – to facilitate the vindication of consumer rights. The CAT subsequently granted a collective proceedings order application – the very first to be granted on an opt-out basis. It is expected that this case will encourage a greater number of collective proceedings to be launched in the coming years.

One of the most significant recent cases in this area is *Richard Lloyd v Google LLC* [2021] UKSC 50. Mr Lloyd sought to bring a representative action for damages on behalf of approximately four million Apple iPhone users in respect of an alleged breach of the Data Protection Act 1998 by Google. The Supreme Court unanimously held that the claim was not suitable to proceed as a representative action as there would need to be an individualised assessment of the extent to which Google had unlawfully processed the data of each member of the class. However, the Supreme Court did not rule out the possibility of obtaining declaratory relief in cases such as this.

The issue of collective redress is continuing to attract interest and controversy. Businesses in the United Kingdom continue to be concerned about the new opt-out collective actions for alleged breaches of consumer or competition law, especially as the class action market is likely to continue to increase over the coming years.

## Appeal

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

An unsuccessful party may appeal from the county court to the High Court, from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court (as applicable). Permission to appeal generally must be obtained either from the lower court at the hearing at which the decision to be appealed was made, or from the relevant appeal court provided time limits are adhered to. In instances involving appeal to the Supreme Court, an appellant may apply directly to the Supreme Court for permission to appeal if permission is refused from the Court of Appeal.

For permission to be given, the appeal must have a real prospect of success, or there must be another compelling reason for the appeal to be heard. The Civil Procedure Rule Committee (CPRC) decided to increase the threshold for permission to appeal to the Court of Appeal, so as to require a 'substantial prospect of success'. However, that decision was rescinded at the March 2017 CPRC meeting and it was agreed that no further action be taken.

The appeal court will not allow an appeal unless it considers that the decision of the lower court was wrong (which typically means an error of law, but may also encompass an error of fact or a serious error in the exercise of the court's discretion), or was unjust because of a serious procedural or other irregularity in the proceedings.

One of the key areas of concern highlighted by the Briggs Report is the workload of the Court of Appeal, which has increased dramatically over the past six years. Following the recommendations of the Briggs Report for easing the burden on the Court of Appeal, the Access to Justice Act 1999 (Destination of Appeals) Order 2016 changed the routes of appeal so that, subject to some exceptions, appeals from both interim and final decisions in the county court will lie to the High Court instead of the Court of Appeal.

## Foreign judgments

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

The procedure necessary to recognise and enforce a foreign judgment in England and Wales depends on the arrangements made with the foreign country in question. The end of the Brexit transition period on 31 December 2020 also brought change in this area, meaning that the position differs depending on whether a given foreign judgment was handed down before or after that date. Examples of the arrangements applicable to foreign judgments from 31 December 2020 or earlier include Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (Recast)), the 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015).

The Brussels Regulation Recast applied to the UK during the UK-EU transition period, but ceased to apply to the UK on a reciprocal basis at the end of the transition period, except as provided for in part three of the UK-EU Withdrawal Agreement in relation to ongoing proceedings.

At the end of the transition period, the Recast Brussels Regulation was converted into UK law as retained EU law, which was amended by UK legislation. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations (SI 2020/1493)) revoked the retained EU law version of the Recast Brussels Regulation, subject to transitional provisions that saved the Recast Brussels Regulation (and, by implication, the 2001 Brussels Regulation) in relation to proceedings commenced before the end of the transition period (as provided for by article 67 of the UK-EU withdrawal agreement).

The enforcement of judgments that are not subject to relevant arrangements is governed by common law, which will thus govern most EU or European Free Trade Area judgments handed down from 1 January 2021, unless and until the UK and EU reach a new agreement. The UK applied to join the 2007 Lugano Convention on 8 April 2020, but the EU (which has a veto over the UK's accession) has not yet approved the application. A European Parliamentary Research Service briefing paper published on 18 November 2021 stated that the European Commission, acting on behalf of the EU, had indicated that it was not prepared to agree to the UK's accession.

As of 10 January 2015, the CPR were amended in line with the Brussels Regulation (Recast) to remove requirements for a declaration of enforceability when enforcing a judgment from a court of an EU member state, though these requirements have continued relevance for judgments in proceedings commenced before that date.

The procedure for making an 'adaptation order', whereby a legal remedy contained in a foreign judgment but unknown to the law of England and Wales may be adapted, for the purposes of enforcement, to a remedy known in English law, has also been included.

The Hague Convention 2005 continues to apply in England & Wales following Brexit, and requires the courts of contracting states to uphold exclusive jurisdiction clauses, and to recognise and enforce judgments given by courts in other contracting states that are designated by such clauses.

**Foreign proceedings**

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

Where a witness located in England and Wales refuses to provide evidence for use in civil proceedings in another jurisdiction, the parties may request that the English courts grant an order requiring production of the evidence. The procedure for obtaining such an order differs depending on the jurisdiction in which the proceedings are taking place.

Requests for evidence for use in EU member states (except Denmark) were previously processed according to EC Regulation No. 1206/2001 of 28 May 2001 (the Evidence Regulation). Following the end of the Brexit transition period, the Evidence Regulation has ceased to apply, by virtue of the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493). As a result, the UK will no longer carry out or consent to requests from EU member states under the Evidence Regulation to take evidence from persons in the UK.

Most EU member states are contracting parties to the Hague Convention of 1970 on the taking of evidence. Requests for evidence for use in such EU member states and in jurisdictions of non-EU contracting parties are processed according to the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to this Convention. An application must be accompanied by evidence and a letter of request from a court in the jurisdiction of the proceedings. The letter of request is submitted either to an agent in this country (usually a solicitor) or the senior master of the Supreme Court, 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**

**UNCITRAL Model Law**

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

The Arbitration Act 1996 (the Arbitration Act) broadly reflects, but does not expressly incorporate, the provisions of the UNCITRAL Model Law, and applies to arbitrations that have their seat in England, Wales or Northern Ireland. The structure and language of the Arbitration Act are similar to those of the UNCITRAL Model Law.

However, the Arbitration Act did not adopt provisions that were considered undesirable or inconsistent with established rules of English arbitration law. Further, the Arbitration Act contains additional provisions, such as the power of the tribunal to award interest. The Arbitration Act also has a broader definition of an arbitration agreement in the sense that it is not confined to agreements in respect of a ‘defined legal relationship’.

The Law Commission announced on 30 November 2021 that it would launch a review of the Arbitration Act in the first quarter of 2022.

**Arbitration agreements**

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

Under section 5 of the Arbitration Act, consistent with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), there must be an agreement in writing to submit present or future disputes (whether contractual or not) to arbitration. The term ‘agreement in writing’ has a very wide meaning;

for example, the agreement can be found in an exchange of written communications.

An arbitration agreement is generally separable from the contract in which it is found, as it is regarded as an agreement independent from the main contract and will remain operable after the expiry of the contract or where it is alleged that the contract itself is voidable (see *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm)). This includes where the contract itself is alleged to have been obtained by fraud (see *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20).

Brexit did not impact the approach to determining governing law or drafting governing law clauses. The instruments that previously determined governing law, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), have been implemented in UK domestic law in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/834).

Courts in England and Wales will stay litigation proceedings in favour of arbitration if there is prima facie evidence of an arbitration agreement between the parties.

Prior to Brexit, the English court could grant an anti-suit injunction only to prevent parties from pursuing litigation proceedings in the courts of another country that was not a member state of the European Union or European Free Trade Area in breach of an arbitration agreement. However, following the end of the transition period, in cases brought under English common law rules and in arbitrations, English courts and tribunals can now grant anti-suit (and anti-enforcement) injunctions in support of their proceedings wherever the foreign proceedings are threatened or issued (including EU countries), making London an attractive seat for international arbitration.

Oral arbitration agreements are recognised by English law, but fall outside the scope of the Arbitration Act and the New York Convention.

Brexit had no effect on the membership of the New York Convention and, therefore, courts in the UK and the EU member states continue to enforce arbitral awards rendered in either jurisdiction in the same way.

**Choice of arbitrator**

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

Under section 15(3) of the Arbitration Act, if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. The parties may agree a procedure for the appointment of the sole arbitrator. If they do not, the default procedure is that one party may serve a written request on the other to make a joint appointment. The appointment must be made within 28 days of the service of a request in writing. If the parties fail to jointly appoint an arbitrator in that period, either party may apply for an order of the court to appoint an arbitrator or to give directions. The court will rarely make an appointment without seeking guidance from the parties. Typically, the parties will each submit a list of potential arbitrators or request that the court direct that the president of the Chartered Institute of Arbitrators appoint a suitable arbitrator.

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;
- the arbitrator does not possess the qualifications required by the arbitration agreement;

- the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his or her capacity to do so; and
- the arbitrator has refused or failed properly to conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

Pending the outcome of a challenge, the tribunal can normally proceed with the arbitration and make an award.

The 2021 International Chamber of Commerce Rules of Arbitration (2021 ICC Rules) entered into force on 1 January 2021. Article 12(9) of these new rules empowers the ICC Court to appoint members of the arbitral tribunal regardless 'of any agreement by the parties on the method of constitution of the arbitral tribunal', in exceptional circumstances.

### Arbitrator options

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

The parties are free to agree on the identity of the arbitrator or arbitrators. They may also specify an appointment authority and particular characteristics or qualifications. There is a deep pool of experienced, expert arbitrators capable of meeting the demands of complex international arbitration. The pool consists of leading practitioners from international law firms, barristers (the most accomplished of which are Queen's Counsel) and academics. The Chartered Institute of Arbitrators in London and the London Court of International Arbitration (LCIA), among other institutions, each maintain lists of arbitrators.

### Arbitral procedure

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

Party autonomy is the overriding objective of the Arbitration Act. It is therefore up to the parties to select the rules of procedure that will govern the arbitration.

However, if no express provision is made in the arbitration agreement, it is for the arbitrator to decide procedural and evidential matters.

The tribunal is at all times bound by the mandatory provisions of due process and duty to act fairly and impartially between the parties.

### Court intervention

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

Under the Arbitration Act, the court's role is strictly supportive, and it may only intervene in the arbitral process in very limited circumstances. The court may provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances to support the arbitration.

The court's powers to intervene extend to arbitrations seated in England and Wales and, in certain limited circumstances, to arbitrations seated elsewhere. For example, in *A and B v C, D and E* [2020] EWCA Civ 409, the Court of Appeal allowed an application under section 44(2)(a) of the Arbitration Act compelling a non-party to an arbitration agreement to provide evidence in a New York-seated arbitration.

The majority of the court's powers can be excluded by the parties by agreement. Schedule 1 of the Arbitration Act sets out a list of mandatory provisions that cannot be excluded.

Several of the court's powers under the Arbitration Act may only be exercised once all arbitral remedies have been exhausted or may only

be invoked within a limited time period after an arbitration award has been made.

Examples of the court's powers in an arbitration include ordering a party to comply with a peremptory order made by the tribunal and requiring attendance of witnesses. Further, the court can order freezing injunctions and other interim mandatory injunctions in support of an arbitration. This was confirmed by the Court of Appeal in *Cetelem SA v Roust Holding Ltd* [2005] EWCA Civ 618, and was followed in *Euroil Ltd v Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm).

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Unless the parties have agreed otherwise, the tribunal has powers to make preliminary orders relating to security for costs, and for the preservation of property and evidence.

If the parties have expressly agreed in writing, under section 39(2) of the Arbitration Act, the tribunal also has the power to order provisional relief, such as payment of money or disposal of property. Most arbitral rules contain an agreement to confer such powers upon the tribunal. Provisional relief is subject to the final decision of the tribunal on the case and may be varied by the tribunal.

Similarly, while the tribunal has no general power to grant interim freezing injunctions under the Arbitration Act, such power may be conferred by express agreement of the parties to the arbitration. Even so, case law has not been conclusive as to whether the parties' agreement to confer on the tribunal the power to grant a freezing injunction will be effective (see *Kastner v Jason* [2004] EWCA Civ 1599).

### Award

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

The parties are free to agree on the form of the award, in accordance with section 52(1) of the Arbitration Act. If there is no agreement, the award must at a minimum be in writing and signed by all the arbitrators, contain the reasons for the award and state the seat of the arbitration and the date it is made.

Unless otherwise agreed by the parties, under section 54 of the Arbitration Act, the tribunal may decide the date on which the award is to be made and must notify the parties without delay after the award is made.

The court can order an extension of time for an award to be made under section 50(4) of the Arbitration Act (although this is done only after available arbitral processes have been exhausted and when the court is satisfied that a substantial injustice would otherwise be done).

Where a material application is made to correct an arbitration award under section 57 of the Arbitration Act or an agreed process to the same effect (such as article 27 of the LCIA Rules), and the application leads to a correction of the award, then the 28-day period for challenging the award under section 68 of the Arbitration Act runs from the date of the award as corrected. Where an application to correct an award fails, the relevant date for commencement of the 28-day period is the date on which it is decided that the award should stand without further clarification (*Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324 (Comm)).

### Appeal

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

There are limited grounds for an appeal of an award to the court.

A party may challenge an award on the grounds of the tribunal's lack of jurisdiction or because of a serious irregularity in the

proceedings that has caused substantial injustice to the aggrieved party. These provisions are mandatory and cannot be excluded by agreement between the parties.

Section 68(2) of the Arbitration Act lists the forms of serious irregularity that the court will recognise. The test for what constitutes serious irregularity is quite onerous, and an award will only be set aside in rare cases (eg, *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm), as applied in *S v A* [2016] EWHC 846 (Comm)). The court in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) confirmed and summarised the position succinctly. Once the applicant has demonstrated that there has been a serious irregularity falling within section 68(2), it must also show that the serious irregularity has caused substantial injustice.

Under section 69 of the Arbitration Act, in limited circumstances, a party may also challenge an award on a point of law. Only appeals on English law are permitted.

An appeal on a point of law must concern an issue of English law, and requires the agreement of all the other parties to the proceedings or the leave of the court. For leave to appeal, the appellant must satisfy four conditions:

- the determination of the appeal will substantially affect the rights of one or more parties;
- the question of law was put to the tribunal;
- the decision of the tribunal was obviously wrong or is a point of general public importance and is at least open to serious doubt; and
- the court is satisfied it is just and proper in all the circumstances to hear the appeal.

Following the hearing of the appeal, the court may confirm, vary or set aside the award, or remit the award to the tribunal for reconsideration.

If the application for leave to appeal is dismissed, the general rule is that only the judge who made the decision can grant leave to appeal to the Court of Appeal.

The parties may – and often do – exclude the right to appeal to the court on any question of law arising out of the award. An agreement to exclude the right to appeal on a question of law is contained in most arbitral rules.

Where the agreement to this effect is included in the arbitration clause, sufficiently clear wording is required: see *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp)* [2009] EWHC 2097 (Comm).

An agreement that the arbitrator need not give reasons for his or her decision is treated as an agreement to exclude the right of appeal. Further, there is no right to appeal to the court on a question of fact: see *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm). The leading case on what amounts to a question of law is *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 QB 503. In that case, the court distinguished between the ascertainment of the facts in dispute and the ascertainment of the law, which includes the identification of all material rules of statute and common law, of the relevant parts of the contract, and of the facts that must be taken into account when the decision is reached. It is only the second category that may be appealed as a question of law. Such an appeal may arise from the arbitrator's statement of the law, or an incorrect application of the law to the facts (*Dyfrig Elvet Davies v AHP Land Ltd and another* [2014] EWHC 1000 (Ch)). An application for permission to appeal an award can be rejected on the basis that the application was made out of time: the time for appealing an award runs from the date of the award, not the date of corrections (*Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd and another* [2018] EWHC 538 (Comm)).

## Enforcement

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

Awards made in a contracting state to the New York Convention will be recognised and enforced in England and Wales following an application by the debtor for an order under section 66(1) of the Arbitration Act to give permission to enforce and subject to the limited exceptions set out in the New York Convention as implemented by section 103 of the Arbitration Act. Similarly, awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) will be recognised and enforced in England and Wales pursuant to the Arbitration (International Investment Disputes) Act 1966, which implements the Washington Convention.

In relation to arbitral awards against a state, the Court of Appeal has held that it is not mandatory for an order permitting the enforcement of an arbitration award to be served in accordance with the provisions of section 12 of the State Immunity Act 1978. While orders permitting the enforcement of an arbitration award are required to be served pursuant to CPR 62.18(8)(b) and 6.44, the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 or 6.28 (*General Dynamics United Kingdom v State of Libya* [2019] EWCA Civ 1110).

A defendant has the right to apply to set aside the enforcement order. However, case law (for example, *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344) has re-emphasised that refusals to enforce will only take place in clear cases where the grounds of section 103(2) of the Arbitration Act are met.

Commercial arbitration awards made in countries that have not acceded to the New York Convention may also be recognised and enforced in England and Wales at common law.

Partial awards disposing of part but not all of the issues are enforceable in the same way as final awards.

The enforcement of arbitral awards in England and Wales as well as the enforcement of awards issued by tribunals seated in England and Wales is not impacted by Brexit, as the United Kingdom remains a party to the New York Convention.

## Costs

### 33 | Can a successful party recover its costs?

Unless the parties agree otherwise, the tribunal can order one party to pay the costs of the arbitration. The general principle is that the loser pays the costs, which include the arbitrator's fees and expenses, the fees and expenses of the arbitral institution concerned and the legal costs or other costs of the parties. However, this is at the discretion of the tribunal, which will take into account all the circumstances of the case, including the conduct of the parties during the arbitration.

Any agreement that one party should pay the costs of an arbitration is only valid if made after the dispute has arisen.

The High Court decision of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) held that third-party funding costs may under certain circumstances be recoverable in arbitration on the basis that they fall under 'other costs' of the parties under section 59(1)(c) of the Arbitration Act. In that case, the successful claimant was allowed to recover all of its third-party funding costs, which included a 300 per cent uplift, though it was emphasised by the court that the costs incurred must be reasonable to qualify for recovery.

Additionally, the court in *Essar* clarified that the question of the recoverability of costs in arbitration should not be construed by reference to what a court would allow by way of costs in litigation under the CPR.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

#### Mediation

This is by far the most popular form of ADR. It is a consensual and confidential process in which a neutral third party, who has no authoritative decision-making power, is appointed to help the parties reach a negotiated settlement. It can also be used as an aid to narrow down the matters in dispute and can be initiated before and after court proceedings or an arbitration has been initiated.

The mediation process can also be used in conjunction with arbitration by the parties using a multitiered clause, which involves mediation and then arbitration if needed.

#### Expert determination

This is the next most popular ADR process and involves the appointment of a neutral third-party expert of a technical or specialist nature to decide the dispute. The third party usually holds a technical rather than legal qualification and acts as an expert rather than a judge or arbitrator. The expert's decision is usually contractually binding on the parties and there is usually no right of appeal.

#### Early neutral evaluation

This is where a neutral third party gives a non-binding opinion on the merits of the dispute based on a preliminary assessment of facts, evidence or legal merits specified to them by the parties. As part of its general powers of case management, the court also has the power to order an early neutral evaluation with the aim of helping the parties settle the case.

#### Adjudication

There is a statutory right to adjudication for disputes arising during the course of a construction project. The adjudicator's decision is binding unless or until the dispute is finally determined through the courts or arbitration proceedings, or by agreement of the parties.

#### Conciliation

This is similar to mediation, except that the neutral third party will actively assist the parties to settle the dispute. The parties to the dispute are responsible for deciding how to resolve the dispute, not the conciliator.

#### Requirements for ADR

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

English courts will not compel a party to engage in ADR if it is unwilling to do so. However, the pre-action protocols require the parties to consider ADR and the parties may be required to provide the court with evidence that ADR was considered. Under the applicable ethical rules, a solicitor should also discuss with his or her client whether ADR may be appropriate.

Once proceedings have commenced, the overriding objective of dealing with cases justly and at proportionate cost requires the court to manage cases, including encouraging litigants to use an ADR process if appropriate (see *Seals and another v Williams* [2015] EWHC 1829 (Ch), where the court encouraged early neutral evaluation).

The court may stay proceedings to allow for ADR or settlement for such period as the court thinks fit.

There may be adverse costs consequences if a party has unreasonably failed to consider ADR, as the court must take into account the conduct of the parties when assessing costs, which will include attempts at ADR. The burden of proof to demonstrate that the use of ADR was unreasonably refused rests with the losing party.

Case law has repeatedly re-emphasised the importance of considering ADR and has examined the cost consequences of failing to do so.

In *PGF II SA v OMFS Company Ltd* [2013] EWCA Civ 1288 (as applied in *R (on the application of Crawford) v Newcastle Upon Tyne University* [2014] EWHC 1197 (Admin)), for instance, it was made clear that simply ignoring an invitation to participate in ADR is generally unreasonable and may lead to potentially severe costs sanctions.

On 12 July 2021, the Civil Justice Council published a report stating that mandatory ADR is compatible with article 6 of the European Convention on Human Rights and could be a 'desirable and effective development'.

## MISCELLANEOUS

### Interesting features

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

Historically, there has been a split legal profession in England and Wales. This has meant that solicitors have tended to focus on the provision of legal services directly to clients, while barristers have specialised in advocacy skills.

While this distinction still exists, there is an increasing overlap and, in particular, solicitors will continue to have an increasing role in advocacy before the courts with the development of the 'solicitor advocate' role. Solicitors are granted rights of audience in all courts when they are admitted or registered. However, they cannot exercise those rights in the higher courts until they have complied with additional assessment requirements. The Solicitors Regulation Authority sets the competence standards solicitor advocates must meet and maintain, authorises assessment organisations to test people against those standards, and sets the regulations under which the scheme of higher rights of audience operates.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

#### Fixed recoverable costs

An extension of the fixed recoverable costs regime is anticipated. The regime is expected to be extended to all civil cases in the fast track up to a value of £25,000 in damages, and to most other simple, fast track cases valued at £25,000 to £100,000 in damages, provided they meet certain criteria.

#### Disclosure Pilot

The Disclosure Pilot has been extended for a further year, and it is anticipated to be adopted in some form as a permanent reform to the Civil Procedure Rules.

**Lugano Convention 2007**

The UK is still waiting for a final decision from the EU as to whether it will be allowed to accede to the Lugano Convention 2007. The EU issued an interim report that indicates that it may not be prepared to agree.

**Online system for dispute resolution**

The Master of the Rolls, Sir Geoffrey Vos, has advocated for changes to court-based dispute resolution, suggesting three tiers within a future online system:

- Tier one is a website or app that directs would-be litigants to the appropriate pre-action portal or appropriate point of entry for an online court. The Online Civil Rules Committee, which the UK government is currently legislating to create, would create this first tier.
- Tier two is the various pre-action portals (eg, the whiplash or personal injury portals) or 'ombuds' processes.
- Tier three is the online court process, which should be 'cohesive, more streamlined, less costly to users' and where 'cases are resolved far more quickly'.

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# Germany

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## LITIGATION

### Court system

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

Except for Germany's highest civil court, the Federal Court of Justice, all civil courts are at state level. The structure is nearly identical in all states: there are district courts, regional courts and higher regional courts. Only in Bavaria is there also a state supreme court, which has jurisdiction over matters that in other states would be decided by higher regional courts.

District courts act exclusively as first instance courts, mainly for disputes with an amount in dispute not exceeding €5,000 (subject to exceptions). Regional courts not only act as first instance courts in most cases falling outside the district courts' jurisdiction, but also have appellate jurisdiction over decisions of district courts. Higher regional courts act as entry-level courts for capital market test cases and for most arbitration-related matters. Their main function, however, is to act as appellate courts for regional court decisions. The Federal Court of Justice, in turn, mainly hears further appeals against appellate decisions.

At district court level, cases are decided by single judges. Regional courts and higher regional courts have chambers composed of three judges; however, in practice, most cases at regional court level are decided by one of the three judges as a single judge. At the Federal Court of Justice, each chamber has six to eight judges, with cases being usually decided by a panel of five.

At higher regional courts and at the Federal Court of Justice, the chambers garner special expertise in certain fields because cases are allocated to the chambers based on subject matter. In addition, for first instance commercial law matters, many regional courts have a specialised chamber that is composed of one professional judge, acting as chair, and two lay judges, who are merchants proposed by the chamber of commerce. Similarly, higher regional courts and the Federal Court of Justice have dedicated chambers for antitrust law disputes.

### Judges and juries

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

There are no juries in civil litigation. The judges control the procedure and, where necessary, render the judgment. Procedurally, they will, inter alia, set the timetable, promote amicable settlements and safeguard the efficiency of the proceedings as well as the parties' due process rights.

Furthermore, judges take a very active role in the taking of evidence. They will hear evidence only on disputed facts that they deem legally relevant, regardless of whether the parties have proffered further evidence. In addition, witnesses and experts are primarily examined by the judge, not by the parties, and expert witnesses are selected and

instructed by the court (while parties may submit expert testimony, this qualifies as pleadings rather than evidence).

However, the judge is in the hands of the parties regarding the subject matter of the dispute and the submission of facts. In particular, the court is bound by the parties' requests for relief. Similarly, the parties may remove the case from the court's consideration. Moreover, in principle, judges may only take into account those facts that have been presented by the parties, and they must accept as true those facts that are undisputed between the parties.

### Limitation issues

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

Under German law, the statute of limitations is a merits issue. The standard limitation period is three years. It begins at the end of the year in which the creditor became or should have become aware of the identity of the debtor and of the circumstances giving rise to the claim. However, different periods apply for certain types of claims. In addition, there are maximum limitation periods that are independent of the creditor's knowledge (mostly 10 or 30 years).

In certain cases, the limitation period may be suspended (eg, during negotiations or legal proceedings) or it may start anew (eg, if the debtor acknowledges the claim). Parties may agree on prolonging limitation periods, but only up to a maximum of 30 years.

### Pre-action behaviour

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

There is no pretrial discovery or disclosure (ie, each party must gather its evidence by its own). However, there are certain other mechanisms mitigating the problem of building one's case if one lacks the requisite information:

- Substantive law may, in some cases, provide the other party with certain information rights.
- Courts have the power to order a party to the proceedings or a third party to submit documents or other objects in its possession. In practice, however, such orders are rarely made.
- A party's burden of substantiating and proving its case may be eased or may even shift to the other party in certain cases; for example, if the party bearing that burden cannot reasonably be expected to have access to the relevant information or evidence, or the counterparty took active measures to prevent it from obtaining such access.

Finally, before filing a claim, a claimant should always contact the opposing party and ask for fulfilment of the claim. Otherwise, if the defendant immediately acknowledges the claim once filed, the claimant will need to bear the costs of the proceedings.



## Starting proceedings

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

Proceedings are initiated by filing a written statement of claim. The statement must indicate at least the parties, the court, the subject matter, the grounds for the claim and the request for relief. However, the matter becomes legally pending only once the statement of claim is served on the respondent by the court. The court will effect service only if the aforementioned formal requirements are met and after the claimant has paid the full court fees.

While German civil courts have a fairly high caseload, they still manage to dispose of cases quite swiftly; on average, first instance proceedings in 2020 took 5.4 months before district courts and 10.5 months before regional courts.

## Timetable

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

The statement of claim is served on the opposing party together with a first court order, which regularly provides the respondent with a deadline of at least four weeks to file a reply. Before an oral hearing takes place, the parties are usually given the opportunity to file a second round of submissions.

Service of the summons for a hearing must occur at least one week prior to the hearing. Normally, the oral hearing begins with the judge summarising the parties' relevant submissions, providing a preliminary legal assessment and exploring the possibility of resolving the dispute amicably. If no settlement is reached, the parties may then exchange oral arguments.

If relevant facts are disputed, the judge will order the taking of evidence, normally to be conducted at one or more subsequent hearings. At the evidentiary hearing or hearings, the judge may hear the witnesses named by the parties, listen to experts and examine other pieces of evidence. Afterwards, the parties and the judge discuss the results of the taking of evidence. Once the court determines that the parties had the opportunity to present their position on all relevant issues, the court issues its judgment, either at the end of the hearing (very rare) or at a later date. The judgment will be sent to the parties electronically (via a mailbox specially set up for lawyers) or by mail.

## Case management

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

Judges enjoy extensive freedom in shaping the procedure, subject only to certain statutory limits. The parties' influence on the procedure is largely limited to requesting extensions of deadlines or postponements of hearings. Within the confines of due process, it is within the court's discretion whether to grant such requests. In practice, courts regularly grant at least one (usually generous) extension for each of the main deadlines. Similarly, courts are generally very open towards staying the proceedings in the case of settlement discussions.

## Evidence – documents

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

All parties have a procedural duty to tell the truth. However, this does not prevent them from making factual pleadings that they only assume (rather than know) to be true. Moreover, parties need not submit all

the facts or evidence that may be relevant to the dispute, provided that this omission does not render their submissions so misleading that it amounts to not telling the truth.

## Evidence – privilege

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

As there is generally no obligation to produce documents, privilege of documents does not exist. However, lawyers have the right to refuse to testify about any circumstances entrusted to them in the context of their appointment. The same applies to in-house lawyers, but only to the extent that such a lawyer became aware of the facts concerned while working for his or her employer as counsel.

## Evidence – pretrial

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

Generally, no.

## Evidence – trial

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

The court will take evidence only if the fact to be proven:

- is pleaded with sufficient specificity (no fishing expedition);
- is disputed between the parties;
- is legally relevant in the court's assessment;
- is not known by the judge to be true based on other proceedings before the judge or based on public knowledge; and
- has not yet been proven through other evidence.

A party proffering a witness must specify the facts on which the witnesses will testify. At trial, the witness is requested to share whatever knowledge they have in relation to those facts. The court will ask questions, where necessary, and subsequently invite the parties to ask questions. There is no witness conferencing and no culture of cross-examination.

Expert testimony is proffered by specifying the facts on which an expert shall be heard. The court will then select a suitable expert (unless the parties agree on an expert). Usually, the person appointed as an expert will submit a written expert opinion. In the case of ambiguities or contradictory opinions of different experts, the experts may be heard at a hearing in accordance with the rules on the examination of witnesses.

## Interim remedies

- 12 | What interim remedies are available?

German law distinguishes between two forms of interim remedies – 'seizure' and 'interim injunctions' – both of which are available while (national or foreign) proceedings are pending or imminent.

Seizure serves to secure payment. It allows for the seizing of individual assets or the restriction of a debtor's freedom of movement. Seizure is tantamount to an interim freezing injunction under UK law.

Interim injunctions mainly serve to secure non-pecuniary claims. They are available when there is justifiable concern that a change of the status quo might frustrate the realisation of the claimed right or make its realisation significantly more difficult.

There is no search order in German civil law. However, if a party has a substantive right to information, it can file an 'action by stages'. This action enables the claimant to combine a claim for performance, for which the claimant still lacks information, with a claim for disclosure

of the relevant information. A judgment granting disclosure can be enforced like any other judgment.

## Remedies

### 13 | What substantive remedies are available?

There are three different types of actions:

- action for enforcement of a claim (eg, payment or the omission of a certain act);
- action for a modification of rights (eg, annulment of a company resolution); and
- action for declaratory judgment (serving mainly to clarify the existence or non-existence of a legal right).

Punitive damages are not available.

Unless substantive law provides for interest from an earlier date, interest accrues as of the date on which the litigation becomes pending.

## Enforcement

### 14 | What means of enforcement are available?

Depending on the obligation that the judgment relates to, available enforcement measures differ.

In relation to payment obligations, the creditor may request that:

- the movable property of the debtor be seized and sold;
- claims of the debtor against third parties be assigned to the creditor; and
- real estate of the debtor be subjected to forced sale or administration, or that a mortgage be registered in favour of the creditor.

For obligations to surrender an object to the creditor, the bailiff takes the object from the debtor and hands it over to the creditor.

In the case of an obligation to perform an act, the creditor may request authorisation to perform the act him or herself at the debtor's expense. If only the debtor personally can perform the act (or if the debtor is obliged to omit a certain act), the court can order a coercive payment or coercive imprisonment to make the debtor perform or omit the relevant act.

## Public access

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

Apart from a few, narrow exceptions (eg, protection of trade secrets), all hearings are public. However, third parties may not access the files of a case without the consent of the parties unless they demonstrate a legitimate interest that outweighs the parties' confidentiality interests.

## Costs

### 16 | Does the court have power to order costs?

The court determines which of the parties must bear which proportion of the court's fees and expenses, and in which proportion either party must (partially or fully) reimburse the other party for its legal fees and expenses. The exact amounts will then be determined in a separate procedure by a judicial officer.

In principle, courts impose costs on the unsuccessful party. If neither party prevails in full, the court will be guided by the percentages by which each party prevailed (comparing the operative part of the judgment with the parties' requests for relief).

Even if a party prevails in full, it will only be reimbursed statutory legal fees (which depend on the amount in dispute), even if the actual fees were higher.

Claimants are required to deposit the full court fees upon filing of the claim. Furthermore, claimants with their habitual residence or seat outside the European Economic Area may be required to provide security for the full costs of the proceedings upon the request of the defendant (subject to certain exceptions).

## Funding arrangements

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

In principle, contingency fee arrangements are not permitted, subject only to narrow exceptions. For example, contingency fees are legal if the client would otherwise be discouraged from pursuing legal action, given the economic situation of the client and the financial risks of the proceedings.

Third-party funding closes the gap left by the general prohibition of contingency fees. Funders usually finance court fees and legal expenses and are entitled to a share in the proceeds. By contrast, it is not customary that a claimant sells a proportion of any recovery to investors in return for a fixed upfront payment (or that a defendant pays a fixed sum to offset a proportion of any liability).

## Insurance

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

In 2020, there were 44 insurance companies across Germany offering different types of legal expense insurance. Private legal protection, for example, covers the costs of a legal dispute as a private person, but is limited to certain areas of law and usually covers only the statutory legal fees. Companies frequently take out more extensive corporate legal protection and directors' and officers' insurance.

## Class action

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

Collective redress was traditionally viewed critically in Germany, particularly in view of American class actions. This changed to a certain extent on 1 November 2018. Since then, certain qualified institutions in Germany have been entitled to file a 'model declaratory action' with the aim of establishing the existence or non-existence of factual and legal preconditions for business-to-customer claims or legal relationships. A decision on those issues has binding effect for individual claims. However, unless a settlement is reached as a result of the model declaratory action, the parties to individual cases will still need to bring their own actions, even though the model declaratory judgment will considerably limit the scope of issues still to be decided in those individual proceedings.

In addition, on 24 December 2020, Directive (EU) 2020/1828 introduced an EU collective action that will not be restricted to declaratory relief. Instead, claims for damages, repair, replacement, price reduction, termination of contract and reimbursement of payment will also be possible. The Directive will come into force in all 27 member states by mid-2023 at the latest.

## Appeal

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

Appeals are available against final judgments delivered by first instance courts. They are admissible only if the value of the subject matter of the appeal is greater than €600 or the first instance court has granted leave to appeal its judgment.

A further appeal may be filed before the Federal Court of Justice against appellate judgments, but only if the appellate court granted leave to appeal or the appellant succeeds before the Federal Court of Justice with a complaint against the denial of leave. The main requirement for leave is that there are points of law that are of fundamental significance or that require a decision by Germany's highest civil court in the interest of developing the law or ensuring the consistency of jurisprudence.

In principle, appellate courts review the appealed judgment based on the facts established at first instance. The parties may only bring forward new arguments and new evidence if they have not been able to do so at first instance or if new statements are uncontested. However, the appeal court is free to evaluate evidence and may even repeat the taking of evidence. By contrast, the scope of the further appeal to the Federal Court of Justice is limited to points of law.

## Foreign judgments

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

Judgments from other EU countries, as well as Switzerland, Norway and Iceland, will be recognised and are enforceable in the same way as German court judgments (pursuant to the Brussels I and IIa Regulations and the almost identical Lugano Convention).

Court decisions from the United Kingdom may be recognised and enforced based on the German-British Agreement of 14 July 1960 on the mutual recognition and enforcement of judgments in civil and commercial matters, the Hague Convention of 30 June 2005 on Choice of Court Agreements or German law. Careful consideration should be given to each individual case in terms of the option available for recognition and enforcement and how best to enforce decisions.

Other foreign judgments are recognised only if they are final (ie, not appealable in their state of origin) and if none of the narrow statutory reasons for non-recognition apply (such as violation of *res judicata*, public policy or basic notions of due process). For a foreign judgment to be enforceable in Germany, the admissibility of its enforcement must be pronounced by a German court.

## Foreign proceedings

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

According to the EU Evidence Regulation (No. 1206/2001), courts in other EU countries may request German courts to take evidence for them. The requested court will execute the request in accordance with domestic law. However, the requesting court may also call for the request to be executed in accordance with a special procedure provided for by its domestic law.

With respect to, *inter alia*, the United Kingdom and Switzerland, the Hague Evidence Convention of 1970 applies. Germany, like most signatories to the Convention, made specific reservations. In particular, it has made a reservation under article 23 of the Convention to the effect that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents.

Apart from that, requests for the taking of evidence may be executed according to the Hague Civil Procedure Convention, any bilateral international treaties or general principles of judicial assistance.

## ARBITRATION

### UNCITRAL Model Law

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

Yes. While the relevant chapter of the German Code of Civil Procedure is not a verbatim translation of the UNCITRAL Model Law, most differences are as a result of legal technicalities. The most notable substantive differences are the following:

- German law requires a stricter form for arbitration agreements involving consumers;
- until the arbitral tribunal is constituted, German law allows each party to request a court ruling on whether the arbitration agreement is valid and covers the dispute at hand; and
- if the arbitration agreement gives one party more influence than the other on the selection of the arbitrators, the other party can request that the court appoint the relevant arbitrator or arbitrators instead.

### Arbitration agreements

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

Unless a consumer is involved, the arbitration agreement meets the form requirement if it is contained in:

- a document signed by the parties;
- an exchange of (not necessarily signed) correspondence between the parties that provides a record of the agreement, in particular letters, telefaxes or emails; or
- a document sent by one party to the other or by a third party to the parties to the arbitration agreement, provided that:
  - there is a common usage whereby the contents of this document are regarded as agreed upon if no timely objection is made; and
  - no such timely objection is in fact made.

In all three cases, it is sufficient if the relevant document refers to another document containing the arbitration agreement, provided that the reference meets the general requirements under German contract law for an incorporation by reference.

If the arbitration agreement involves one or more consumers, it must either be notarised or be contained in a document that is signed by all parties and does not contain any provision unrelated to arbitration.

### Choice of arbitrator

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

Three arbitrators will be appointed, with each party appointing one arbitrator and the co-arbitrators appointing the chair.

The parties are free to agree on the procedure for challenging an arbitrator. If no such agreement exists, any challenge must be submitted to the arbitral tribunal in writing, setting out the reasons for the challenge, within two weeks of the challenging party becoming aware of the facts on which its challenge rests. Moreover, if a party seeks to challenge the arbitrator that it appointed itself, it can only invoke the grounds for challenge that it became aware of after the appointment. If the arbitral

tribunal dismisses the challenge, the challenging party may, within one month, request the court to decide on the challenge.

### Arbitrator options

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

The only restrictions are that an arbitrator must be an individual person and must not be a party to the dispute (or any of its legal representatives).

Otherwise, parties are free to choose any person as arbitrator, unless the parties themselves have agreed on requirements to be met by the arbitrators. Arbitrators not meeting these agreed requirements can be challenged. However, such requirements are rarely agreed as this may dramatically narrow the choice of available arbitrators. In addition, it can sometimes be difficult to ascertain with certainty if a candidate meets the requirements (eg, whether the arbitrator is fluent in a certain language). The most common qualification agreed upon in domestic arbitration is that the arbitrator has obtained a German law degree and has passed the bar exam. In international arbitration, parties sometimes agree that the chair should not have the same nationality as one of the parties.

There is quite a large pool of arbitrators in Germany, comprising not only specialised lawyers but also university professors, judges and (to a much lesser extent) technical experts. A number of arbitral institutions seated in Germany, as well as other organisations such as the International Chamber of Commerce Germany, maintain lists of arbitrators, often for special fields of arbitration.

### Arbitral procedure

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

The main mandatory principles are the same as in the UNCITRAL Model Law; namely, that the parties must be treated equally and must be granted a sufficient opportunity to present their case. In addition, German law guarantees the parties' rights to be represented by counsel and to challenge a tribunal-appointed expert for lack of independence or impartiality.

Provided that those principles are respected, the parties can tailor the arbitral procedure to their needs. To the extent that there is neither an agreement of the parties on the procedure nor a fallback provision in German arbitration law, it is for the arbitral tribunal to devise the procedure in its discretion.

### Court intervention

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

The court will intervene to make a final determination on arbitral jurisdiction, provided that this ruling is requested by a party:

- before the constitution of the arbitral tribunal; or
- within a month of an arbitral award on jurisdiction.

Moreover, the court will remove arbitrators upon the request of a party if:

- they are unable or unwilling to perform their duties in due time but fail to resign (and the parties are unable to agree on removing such arbitrator); or
- they are successfully challenged in court for lack of independence or impartiality within a month of the challenging party being notified of the arbitral tribunal's dismissal of the challenge.

In addition, upon the request of a party, the court will appoint an arbitrator if:

- the arbitration agreement gives the counterparty more influence over the selection of the arbitrators than the requesting party; or
- if the applicable appointment procedure for the arbitrator fails – in particular, if a party does not appoint its arbitrator or if the parties or co-arbitrators fail to agree on an arbitrator.

Furthermore, the arbitral tribunal (or, with its approval, a party) may request assistance from the court in the form of judicial acts that exceed the powers of the arbitral tribunal (eg, compelling appearance of witnesses, administering an oath to a witness or serving of documents by public notice).

The court's powers as described above cannot be overridden by agreement. However, in some cases, the deadline for the relevant application can be changed by agreement of the parties.

Finally, each party may request interim relief from the court notwithstanding an arbitration agreement or a pending arbitration. According to the prevailing view, the parties cannot validly exclude the court's jurisdiction for interim relief even by way of an express agreement.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Yes, unless the parties have agreed otherwise. However, the court retains parallel jurisdiction on interim relief, and it is usually more effective to seek interim relief in court. This is mainly because an arbitral order for interim relief cannot itself be the subject of enforcement measures; instead, this first requires an order from the court.

### Award

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

Unless agreed by the parties, there is no time limit for rendering the award.

The award must be in writing and signed by the sole arbitrator or, in the case of a tribunal, by at least the majority of its members. If not all members of the tribunal have signed the award, the award must indicate the reasons for the missing signatures. While German law also requires the award to indicate the date on which it was rendered and the seat of the arbitration, their omission does not affect the validity of the award. Finally, unless agreed otherwise by the parties, the award must state the reasons on which it is based (failing which, there is a risk that the award may be set aside).

### Appeal

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

Arbitral awards cannot be appealed to the court. Therefore, the court will not hear any argument that the arbitral tribunal's decision is incorrect. However, both domestic and foreign awards may be set aside for the narrow grounds provided in article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and article 34 of the UNCITRAL Model Law. In principle, an application for the setting aside of the award must be filed within three months of receipt of the arbitral award.

### Enforcement

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

Foreign awards, regardless of the country of origin, are recognised and enforced pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, unless another applicable treaty provides more favourable conditions for recognition and enforcement.

Enforcement of a domestic award requires a court order declaring the award enforceable. A request for this declaration will be refused only if there are grounds for setting aside the award (in which case the court will set aside the award in the same proceedings). Importantly, however, if the counterparty has failed to request the setting aside of the award in a timely manner, the court deciding on the enforceability of the award will not take into account any grounds for setting aside except for a lack of arbitrability and a violation of public policy.

### Costs

#### 33 | Can a successful party recover its costs?

Unless agreed otherwise by the parties, the arbitral tribunal has discretion as to who shall bear the costs of the arbitration (in which proportion) and whether a party may (fully or partially) recover its legal fees and expenses from the other.

Often, when deciding on those matters, German arbitrators tend to look primarily at each party's rate of success (ie, a comparison of the requests for relief and the tribunal's decisions thereon). However, other factors (eg, inefficient procedural behaviour) may also come into play. Arbitral tribunals are not bound by (but remain free to take guidance from) the German ad valorem tables on legal fees recoverable in state court proceedings.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

While reliable, up-to-date numbers on the actual use of different ADR methods are difficult to find, some general statements can be made.

First, arbitration, expert determination and (especially in the construction sector) dispute adjudication boards are widespread methods for out-of-court dispute resolution in commercial disputes.

Second, conciliation is a very popular ADR method in business-to-consumer disputes. In particular, there are sector-specific conciliation bodies in industries such as insurance, banking, telecommunications, energy and travel. Moreover, in 2020, Germany created a universal conciliation body for areas in which there is no such sector-specific body.

Third, mediation is still a rather underused ADR method in Germany, even though Germany enacted the Mediation Act in 2012 to further promote the use of mediation. A government assessment of the impact of the Mediation Act in 2017 stated that the number of mediations in Germany had remained at a consistently low level (a survey of more than 1,200 mediators revealed 5,000–7,500 mediations per year). Consequently, while there is a large pool of trained mediators in Germany (at least 70,000, out of which an estimated 7,500 practise as mediators), there are not enough cases to allow a significant number of mediators to make mediation their professional focus.

### Requirements for ADR

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

In principle, there is no legal requirement for parties to consider ADR before initiating court or arbitral proceedings. The only exception, which currently applies in 10 of the 16 German states, relates to very specific scenarios that are rarely relevant to commercial disputes (eg, cases involving amounts in dispute not exceeding €750). In those cases, for a

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claim in court to be admissible, an unsuccessful attempt must have been made to resolve the dispute through conciliation before a certified body.

Once court proceedings have been initiated, however, the court is empowered in all other cases to refer the parties to a specialised judge (otherwise not involved in the proceeding), who will try and help the parties resolve the dispute through ADR processes. If this attempt fails, the court will decide the case (without the involvement of the specialised judge).

In addition, German businesses often agree in their contracts on multi-tier dispute resolution clauses that require, for example, negotiation, mediation or conciliation, or a combination thereof, before a party can initiate arbitration or litigation. Failure to complete any such agreed pre-arbitration or pre-litigation steps will result in the claim being dismissed as inadmissible (without prejudice to filing the claim again later).

## MISCELLANEOUS

### Interesting features

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

The German civil court system is well regarded on an international level. For instance, the World Justice Project's Rule of Law Index 2021 ranks Germany third out of 139 countries in the civil justice system. Similarly, Germany has consistently been ranked by the EU as one of the top EU countries in terms of promoting and incentivising the use of ADR methods (2019: first place; 2020: second place; and 2021: fifth place). In this regard, it should also be noted that the German Institution for Arbitration (DIS) not only offers institutional rules and corresponding services for arbitration, but also for conciliation, mediation, expert determination and adjudication. In addition, DIS has included an interesting additional feature with the last revision of its arbitration rules: a new annex contains Dispute Management Rules, under which, if both parties agree, DIS will appoint an independent dispute manager who will consult with the parties with a view to helping them agree on the most appropriate dispute resolution mechanism.

**UPDATE AND TRENDS****Recent developments**

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

In 2021, the legal profession saw various reforms relating to dispute resolution. Notably, certain (albeit narrow) exceptions were introduced to the general ban on contingency fees, and on 1 August 2022, litigation funding by lawyers will be rendered admissible to a limited extent.

In addition, major steps have been taken in the digitalisation of the German judicial system. In particular, since 1 January 2022, lawyers have been required to use a special electronic mailbox for their correspondence with the courts. As a result, lawyers must generally file their submissions in electronic form only. By 2026, courts and public authorities will have to maintain their files electronically. Finally, the pandemic has significantly increased the use of videoconferencing, which has prompted many courts to install modern technical equipment for this purpose.

# Greece

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## LITIGATION

### Court system

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

In the first instance, Greek courts are subdivided into magistrate courts (justices of the peace), single-member first instance courts and multi-member first instance courts. Though there are a lot of exceptions, depending on the nature and subject matter of the dispute, the general rule is that in the ordinary procedure of the civil courts the magistrate courts are competent for monetary disputes up to €20,000; disputes arising out of lease agreements where the monthly rent does not exceed €600; and disputes between joint property owners up to €20,000. The single-member first instance courts are competent for monetary disputes up to €250,000. The multi-member first instance courts are competent for all disputes for which the magistrate courts and the single-member first instance courts are not competent.

Exceptionally, the magistrate courts are also competent for a number of disputes depending on their nature and subject matter and irrespective of the value of the dispute. Likewise, the single-member first instance courts are competent for a number of disputes depending on their nature and subject matter, even if the value of the dispute is above €250,000, in which case it would normally fall within the competence of multi-member first instance courts, and for some other disputes irrespective of whether the magistrate courts or the multi-member first instance courts would otherwise be competent.

As regards disputes that are heard in the special proceedings before the civil courts, such as family and matrimonial disputes, property disputes (arising out of lease agreements, labour disputes, disputes in connection to the payment of fees and credit instruments) and orders for payment or the surrender of the use of the leasehold, the general rule is that either the magistrate courts or the single-member first instance courts will have competence, depending on the value of the dispute in question. There are very few cases in the special proceedings where the multi-member first instance courts will have competence.

For interim measures proceedings and for cases that are heard in a voluntary procedure of a quasi-administrative nature, as a general rule, the single-member first instance courts will have competence.

In the second instance, the single-member first instance courts are competent for appeals against decisions of the magistrate courts within their territory; the single-member appeal courts are competent for appeals against the decisions of the single-member first instance courts; and the three member appeal courts are competent for the hearing of appeals against decisions of the multi-member first instance courts.

Finally, the Supreme Court (Areios Pagos) is competent for appeals in cassation (on points of law) against decisions of any civil court.

There are no specialist commercial or financial courts, but there are special commercial sections in the ordinary procedure of the first

instance and appeal courts, while special naval sections (in charge of naval disputes) have been established in the First Instance and Appeal Courts of Piraeus. According to article 13 of Law 4529/2018, published on 23 March 2018, another special commercial section will be established in the future for hearing cases regarding actions for damages under national law for infringements of the competition law provisions of EU member states.

### Judges and juries

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

A Greek court, consisting of one or more judges, as the case may be, will act only at the request of a party and decide on the basis of the factual allegations raised and proven by the parties and their motions, unless otherwise provided by law. The court will also order, even *ex officio*, the evidence process by any applicable means of evidence that the law permits, even if these were not invoked by the parties. Any procedural acts are done at the initiative of the parties, unless otherwise provided by law. The court is obliged to encourage at any point of the trial and in any procedure the settlement of the dispute and the selection of mediation as an alternative dispute resolution (ADR) method, and to support any relevant initiatives of the parties and to formulate settlement proposals taking into account the factual and legal situation of each case. The judge will:

- conduct the hearing;
- give permission to the parties to speak;
- examine the parties, their legal representatives, witnesses and expert witnesses;
- seek clarifications by the parties on any allegations that are vague or incomplete;
- order at the request of any of the parties or *ex officio* anything that can contribute to the determination of the dispute, including ordering the parties themselves to be present and to answer questions or provide clarifications;
- declare if and when the hearing has been concluded; and
- issue the decision in due course.

In the voluntary procedure, the inquisitorial system applies and the court may order *ex officio* any measure suitable for ascertaining the facts, even if not raised by the parties, and especially facts that contribute to the protection of the interested parties, their relationship or the greater public interest.

There is no jury in Greek civil proceedings.



## Limitation issues

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

Unless otherwise provided by Greek law, the standard limitation period for bringing civil claims is 20 years. However, a shorter limitation period of five years is provided for certain categories of claims, including:

- the claims of merchants and manufacturers for the sale of goods, the execution of works, taking care of the affairs of others and their expenses;
- the claims of farmers, fishermen and others for the sale of the products of their profession;
- the claims of transporters of people or goods for freight and their expenses;
- the claims of hotel, B&B and other owners for the provision of lodging, food and other services, as well as their expenses;
- the claims of those that do not belong in the above categories but take care of the affairs of others or provide services by profession for their fees and expenses;
- the claims of servants and workers for the payment of their wages and expenses;
- the claims of teachers for their fees and costs;
- the claims of institutions for the provision of teaching, fostering, hospitalisation and caretaking, for the provision of their services and their costs;
- the claims of those that take care, foster and raise people, for their services provided and their costs;
- the claims of doctors, nurses, lawyers, notaries, court bailiffs and persons appointed to conduct the affairs of others, for their fees and expenses;
- the claims of the litigants for any prepayments made to their lawyers;
- the claims of factual and expert witnesses for their fees and expenses;
- interest and dividends;
- any rents;
- all kinds of wages, late amount due, pensions, alimonies or payment made periodically; and
- the claims of persons to whom work is provided for their prepayments made against future claims.

Any limitation period is interrupted if the debtor recognises the claim in any way and if an action is filed before the Greek courts. The parties cannot agree to disapply the statute of limitation or to set a longer or shorter limitation period or to make the terms of the statute of limitation harsher or lighter. However, it is possible to waive the right to invoke the statute of limitations after that time has lapsed.

Owing to the covid-19 pandemic, by law, all limitation periods were suspended from 13 March 2020 to 31 May 2020 as well as from 7 November 2020 to 5 April 2021.

## Pre-action behaviour

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

By means of articles 3, 6 and 7 of Law 4640/2019 published on 29 November 2019, as amended and in force at the time of writing, regarding the prior recourse to mediation, before making a submission to a court, authorised attorneys must notify their clients in writing of the possibility to resolve a dispute, in whole or in part, via mediation. This obligation applies to any civil and commercial disputes of a national or cross-border nature, existing or future, which are at the parties' disposal. In addition, for disputes falling under the mandatory scheme, authorised attorneys must notify their clients in writing of their obligation to attend

the mandatory initial mediation session. Those attorneys' informative notes must be attached to the civil action and submitted to the court. If the attorneys' informative notes are not submitted to the court at the time of filing of the civil action, they must be produced by the time of submission of the claimant's written pleadings and no later than the hearing. The mediation minutes drafted by the mediator must also be produced by the time of submission of the pleadings. If the claimant does not meet either of the aforementioned obligations, the hearing of the case is declared by the court as inadmissible.

As regards the steps available to a party to assist in bringing an action, although pre-action exchange of documents is not provided in Greek law, it is possible for a party to request the production of documents either during the pending trial proceedings or even before, by means of a separate legal action or an application for interim measures in urgent cases, provided that the party making this request pre-action has a legal interest to be informed of the content of a document in the possession of another, that is, if the document was drafted in the interest of the party requesting it or certifies a legal relationship that relates to him or her or relates to negotiations for that legal relationship entered into by the applicant or a third party intervening for the latter.

## Starting proceedings

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

Proceedings are commenced when the writ of action is deposited at the secretary of the court to which it is addressed or is deposited electronically and a copy thereof is served on the defendant.

Greek courts have a long history of issues with handling the caseload in a timely manner and, in spite of a number of reforms and initiatives attempted, those issues remain to a great extent. The last major reform was through Law 4335/2015, effective as of 1 January 2016, which has undergone various amendments, the last of which were effective as of 1 January 2022, and which provided, inter alia, for the abolition of the examination of witnesses at the hearings, as this was thought to cause delays, and for new, shorter timetables.

## Timetable

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

A claim that is heard in the ordinary procedure must be served to the defendant within 30 days or, if the defendant resides abroad or is of unknown address, within 60 days. Written pleadings, together with any supporting documentation, powers of attorney, affidavits, exhibits, etc, drafted in Greek or together with their (full or partial, as the case may be) legal translation in Greek, must be filed by the parties within 90 days, or, if the defendant resides abroad or is of unknown address, within 120 days of the above deadline of the claim's service to the defendant. Additional pleadings and rebuttals can be filed 15 days after the filing of the pleadings, together with any additional documentation. Both the filing of pleadings and rebuttals must take place no later than 12pm on the last day of the above-mentioned deadlines. Subsequent to the above deadlines, allegations or allegations evidenced via documents or judicial confession may be filed through additional pleadings 20 days prior to the hearing at the latest. The rebuttal to the above additional pleadings must be filed 10 days prior to the set hearing at the latest. Interventions (joinders), summonses to the trial, announcements of the trial or counteractions are filed and served on all parties within 60 days, or, if the defendant or any of his or her joinders reside abroad or are of unknown address, within 90 days from the filing of the claim. Interventions made after a summons to the trial, or an announcement

of the trial, must be filed and served on all parties within 90 days, or, if the defendant or any of his or her joinders reside abroad or are of unknown address, within 120 days from the filing of the claim. Within 15 days from the closing of the case file, the judge (or in the case of a multi-member court, the panel of the court and its judge rapporteur) must be appointed and the hearing date must be set no later than 30 days after the end of the above deadline, or if this is not possible because of the caseload of the court, at a later date, as necessary. This 30-day deadline for setting the hearing date is in practice not met by most Greek courts because of their caseload, and delays, ranging from a couple of months to up to one year in some cases, have unfortunately become the norm. The courts' decisions are in writing and are issued after the hearings, usually between three to eight months thereafter.

### Case management

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

The parties can extend the timetable of the procedure, that is, the relevant deadlines set by law or by the court, if the parties agree to that and only if the court also agrees, or if the court so decides absent any agreement of the parties, taking into account the circumstances of each case. Extending deadlines for judicial remedies is not possible.

In addition, at the request of one of the parties, the judge or the court, as the case may be, may also decide to shorten the applicable deadlines if there are serious reasons and the deadline is not one for filing an appeal. The parties can also agree to shorten the legal or court deadlines.

### Evidence – documents

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

There is no specific duty under Greek procedural rules to preserve documents and other evidence pending trial. There is a general duty on the parties and their attorneys to conduct the proceedings in good faith and to set out the facts as they know them, fully and truthfully. The parties and their attorneys are also expected to contribute, with their diligent conduct of the trial and the timely raising of argumentation and submission of means of evidence, to the expedition of the trial and the speedy resolution of the dispute.

### Evidence – privilege

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

Although the notion of privilege exists in Greek law, there are no specific rules in Greek civil procedural law determining whether a document can be characterised as privileged or not. That said, it is specifically provided in the Greek Code of Civil Procedure that priests, lawyers, notaries, doctors, pharmacists, nurses, psychologists and their aides, as well as any advisers of the parties, cannot be examined, when summoned as witnesses, on the facts that were entrusted to them or they ascertained during the exercise of their profession, for which they have a confidentiality obligation, unless the party entrusting the same to them and to whom the secrecy relates allows it. Public officials and military personnel, in service or retired, cannot be examined as witnesses for facts for which they have a confidentiality obligation, unless the competent minister allows their examination. In any event, priests, lawyers, notaries, doctors, pharmacists, nurses and their aides, as well as any advisers of the parties, are entitled to refuse to be examined as witnesses on the facts that were entrusted to them. Relatives up to the third degree (unless they have the same relation to all parties), spouses

(even after the dissolution of their marriage) and those engaged to be married may also refuse to testify. Lastly, any witness may refuse to testify facts that constitute professional or artistic privilege.

In view of the above, documents containing privileged information are not expected, as a matter of Greek law and practice, to be shown to the other party, and any request to the court either to examine as a witness a person covered by privilege or to force a party to produce documents that contain privileged information is not likely in the majority of cases to be accepted.

### Evidence – pretrial

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

The parties have the right to examine under oath witnesses prior to trial before the competent magistrates (justices of the peace), notaries, lawyers or Greek consulates (if the testimony is given outside of Greece). They have a duty to summon the other party to attend, if they wish, the execution of such testimony under oath (affidavit), at least two business days before, and to include in such summons the exact date and place of execution of the affidavit to be given, the action or brief to which it refers, and the name, address and profession of the affiant. The party summoned may obtain a copy of the affidavit at any time after its execution or at the time of its submission to the court by the opponent, together with the latter's pleadings and supporting documentation.

### Evidence – trial

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

Evidence is presented to the court by means of each party's pleadings and additional pleadings and rebuttals, which are filed together with each party's supporting documentation. In respect of claims that were filed after 1 January 2016 that are heard in the ordinary procedure, witnesses and experts no longer give oral evidence and their testimonies are in effect substituted by written testimonies under oath (affidavits) executed before the competent magistrates (justices of the peace), notaries, lawyers or Greek consulates (if the testimony is given outside of Greece). If, after the review of the case file, it is found by the court that the oral testimony of one affiant from each side or, in the absence thereof, of one person proposed by each side, is absolutely required, then an order to repeat the hearing for the purposes of such oral testimony will be given by the court. Witnesses and experts can still give oral evidence in cases heard under the special proceedings, the voluntary procedure or interim measures proceedings.

### Interim remedies

#### 12 | What interim remedies are available?

Interim remedies are available and include:

- the ordering of security for a monetary claim;
- the registration of a prenotation of mortgage;
- the conservatory seizure of movables, immovables, rights in rem thereon, claims and all assets of the debtor either in his or her hands or in the hands of third parties;
- the placement in judicial escrow (custody) of movables, immovables, a group of objects or of a business in the event of a dispute pertaining thereto, such as for their legal ownership or possession;
- the temporary adjudication of certain categories of claims;
- the temporary regulation of a situation via the court's order to do, omit or tolerate a certain act by the party against which the application has been filed;
- the sealing, unsealing, signing or public deposit; and

- the issuance of a European Account Preservation Order pursuant to Regulation (EU) No. 655/2014.

The above remedies are available in support of foreign proceedings provided that the local Greek courts have jurisdiction to order the interim relief sought.

## Remedies

### 13 | What substantive remedies are available?

Substantive remedies include:

- compensatory damages to the injured party for any loss that he or she has suffered;
- restitution in the form of monetary recovery or recovery of property;
- specific performance obliging a party to perform its contractual obligations after a breach has been established; and
- a declaratory judgment declaring the rights or obligations of one party.

Punitive damages, however, are not available under Greek law. In the case of a monetary claim and when the debtor is late in payment, the creditor is entitled to claim the interest provided by contract or by law, without being obliged to prove any damage. In addition to interest, the creditor may also claim, unless otherwise provided by law, any other positive damage that he or she has suffered. In those cases, interest is payable on a money judgment provided that it is formally requested by the court.

## Enforcement

### 14 | What means of enforcement are available?

Enforcement under Greek law includes the following means:

- in the case of an obligation to surrender a movable, via the taking by the court bailiff of such movable from the person against which enforcement is made and the delivery thereof to the appropriate person;
- in the case of an obligation to provide replaceable items or anonymous securities, via the taking by the court bailiff of such items or securities from the person against which enforcement is made and the delivery thereof to the appropriate person;
- in the case of an obligation to provide or surrender an immovable property, ship or aircraft, via the court bailiff expelling the person against which enforcement is made from such immovable property, ship or aircraft and establishing thereon the appropriate person;
- in the case of an act that can be done by a third party, via the creditor doing such act and the relevant cost being incurred by the debtor;
- in the case of an act that can only be done by the debtor, via the court condemning the latter to do such act and in the event that it is not done condemning same to a monetary penalty of up to €50,000 in favour of the creditor and to personal detention of up to one year;
- if the debtor has the obligation to omit or tolerate an act, via a court threatening, in the event that the debtor violates his or her obligation, a monetary penalty of up to €100,000 in favour of the creditor for each violation and to personal detention of up to one year;
- if someone is condemned to a declaration of his or her will (intention), such declaration is considered to have been made when the court's decision became final and unappealable;
- in the case of an obligation to surrender a child, via the court condemning the parent in possession of such child to surrender same under penalty, and in case of such non-compliance, of a monetary penalty of up to €100,000 in favour of the party requesting the child's surrender and to personal detention of up to one year;

- in the case of a monetary claim that must be satisfied, via the seizure of the property against which enforcement is made or via compulsory administration or personal detention; and
- if the creditor's claim cannot be fully satisfied via any imposed seizure of the debtor's property, via obliging the debtor to submit under oath to the court a detailed list of all his or her assets, with their exact location.

## Public access

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

Civil court hearings in Greece are held in public and only the deliberation for the issuance of the court's decision is made in secret. The judge conducting the hearing may determine in his or her judgment the number of persons that can stay within the court and has the power to order the exclusion of minors, persons carrying arms, as well as those that do not behave well in court. The court can order a hearing, or part thereof, to be in closed session if it could be detrimental to good morals or public policy.

Pretrial proceedings and any proceedings outside court are not public, although the parties, their legal representatives and attorneys may attend. Any court documents filed with the court are not available to the public, but only to the parties, their legal representatives and attorneys.

## Costs

### 16 | Does the court have power to order costs?

The court has the power to order costs, and as a rule it is the losing party that is condemned by the court to pay the costs of the winning party. In the case of partial victory and partial defeat of each party, the court will assess the costs according to the extent of their respective victory and defeat. The court can also offset all costs or part thereof when the dispute is between relatives up to the second degree or if it finds that the interpretation of the rule of law that was applied was especially difficult or there is reasonable doubt regarding the outcome of the dispute. For the purposes of the court determining and clearing the amount of costs that should be awarded, each side must produce a table with his or her respective costs.

The claimant is not required by law to provide security for the defendant's costs, but the defendant can make such a request to the court and the court may order security for costs if there is an obvious danger of inability to enforce the court's decision, condemning a plaintiff to pay costs.

## Funding arrangements

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

'No win, no fee' agreements and other similar types of contingency or conditional fee arrangements between lawyers and their clients are available to parties in Greece. In the case of such an agreement, the agreed fee cannot exceed 20 per cent of the value of the dispute and, if more than one lawyer is involved, 30 per cent. The agreement must be made in writing and must be duly filed with the local bar association of the lawyer that has concluded the agreement. It will be valid only if the lawyer has undertaken the obligation to carry out the trial until the court's decision has become final and unappealable, without the

lawyer being entitled to any fee in the case of defeat. Any agreement between the parties for expenses does not overturn the validity of that fee arrangement.

As regards third-party funding, to date it is not directly regulated in Greek law. In the absence of any legislative provision to the contrary and in view of the general principle of contractual freedom, which is respected in Greek law, third-party funding is likely to be viewed as permissible if and to the extent that there are no provisions in the funding agreement that contravene the law.

### Insurance

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

Yes, such insurance is available, subject to the risk profile in question and the amount of coverage.

### Class action

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

Greek law provides for simple and forced collective redress.

In the case of simple collective redress, more than one person can lodge a claim (or face a claim) if they have the same common rights or obligation or if their rights and obligations are based on the same factual and legal cause, or if the subjects of the dispute are claims or obligations of the same kind or obligations based on materially the same historical and legal basis and the court has competence upon each defendant.

Collective redress will be forced when the dispute requires a uniform way of resolution or if the parties can only jointly bring or face a claim or when, because of the circumstances of the case, there cannot be contrary decisions towards the parties. The litigants that do not legally participate in the trial or have been summoned to attend the same will be deemed to be represented by those attending.

In addition to the above, it is also possible under Greek law for consumer unions to bring a class action against suppliers that violate the law. This action can be any kind of action for the protection of the general interests of consumers and usually aims at the issuance of a court decision ordering the supplier in question to cease its illegal activity or pay moral damages.

### Appeal

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

The parties can appeal a decision if they were wholly or partially defeated in the first instance and if the decision was erroneous in fact or in law. The decisions that can be appealed are those of the magistrate courts, single-member first instance courts and multi-member first instance courts. Disputes heard before the magistrate courts with a value under €5,000 cannot be appealed. Only decisions that are either final or refer the dispute to the competent court can be appealed. The deadline for the filing of an appeal is 30 days from the service of the first instance decision or, if the appellant resides outside Greece or is of unknown residence, 60 days. If the decision has not been served, then the appeal deadline is two years from the publication of the first instance decision. During the time period for the filing of the appeal, the first instance decision cannot be enforced, unless the decision was declared by the first instance court as temporarily enforceable against the losing party. An appeal that has been duly filed will suspend the enforcement of the first instance decision, except for any first instance decision that was declared temporarily enforceable against the losing party.

The court will first examine the admissibility of the appeal, then examine the admissibility and soundness of its grounds, and if any of the appeal grounds is found to be sound, the first instance decision will be quashed and the appeal court will keep the case and decide on its merits. The appeal court cannot render a decision that is more detrimental to the appellant if the opponent has not filed its own appeal or counter-appeal. However, the appeal court can render a decision that is more detrimental to the appellant if it quashes the first instance decision and goes ahead with ruling on the merits.

A further appeal in cassation is possible before the Supreme Court, but only on points of law, not fact. The deadline for the filing of such further appeal is 30 days from the service of the appealed decision or, if the appellant resides outside Greece or is of unknown residence, 60 days. If the decision has not been served, then the appeal in cassation deadline is two years from the publication of the decision.

### Foreign judgments

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

Reciprocal agreements for the recognition and enforcement of judgments exist between Greece and the following countries:

- Albania, Armenia, Bulgaria, Germany, Georgia, the successor states of Yugoslavia, China, Cyprus, Lebanon, Hungary, Ukraine, Poland, Romania, the successor states of the USSR, the successor states of Czechoslovakia, Syria, Tunisia, Switzerland, Norway and Iceland (for the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007);
- all contracting states to the Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;
- all contracting states to the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption;
- all contracting states to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;
- all contracting states, including the UK post-Brexit, to the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention 2005);
- all contracting states, including the UK post-Brexit, to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance;
- all contracting states to the Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956);
- all contracting states to the UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997;
- all contracting states to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999;
- all contracting states to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (9 May 1980).

If no international agreement (multilateral or bilateral) exists or if the Regulation of the European Union does not apply to the recognition or enforcement of a certain foreign judgment, that judgment will be recognised and enforced in Greece pursuant to the Greek Code of Civil Procedure (GCCP) (Presidential Decree No. 503/1985, as amended and in force today). However, if an international agreement is in place or if

the Regulation of the European Union is applicable, the rules of such agreement or EU Regulation will supersede and disapply the GCCP.

If the GCCP applies, the following rules and process may come into play.

First, as regards recognition of a foreign judgment issued pursuant to a disputes procedure, pursuant to article 323 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), that judgment is recognised to have force and constitute *res judicata* in Greece without any other procedure, provided that:

- it constitutes *res judicata* according to the law of the country of issuance;
- under the provisions of Greek law, the case was subject to the jurisdiction of the courts of the country to which the court that issued the judgment belongs;
- the party who lost was not deprived of the right to a defence and, in general, of the right to participate in the trial, unless that right was deprived according to a provision that applies equally to the subjects of the country to which the court that issued the judgment belongs;
- it is not contrary to a judgment of a Greek court that was issued in the same case and that constitutes *res judicata* for the parties between which the judgment of the foreign court was issued; and
- it is not contrary to good morals or to public policy.

Although recognition of a foreign judgment is *ipso jure*, that is, without any procedure, provided that the conditions set out in article 323 GCCP are met, there is also the possibility, if there is any legal interest in doing so, to file a civil action seeking a declaratory judgment on whether the *res judicata* of a foreign judgment has or does not have effect in Greece.

Second, as regards recognition of a foreign judgment issued pursuant to the voluntary (uncontested cases) procedure, pursuant to article 780 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (again, if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), it shall *ipso jure* have the same force and effect in Greece as that recognised to it under the law of the country of the court that issued it, provided that:

- the judgment applied the substantive law that should be applied under Greek law and was issued by a court that had jurisdiction pursuant to the law of the country whose substantive law it applied; and
- it is not contrary to good morals or to public policy.

Third, as regards recognition of a foreign judgment relating to the personal status of a party, pursuant to article 905, paragraph 4 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (again, if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), that judgment shall not *ipso jure* have *res judicata* effect in Greece, unlike what is provided under articles 323 and 780 GCCP. For this judgment to acquire that effect, it must be recognised by a judgment issued by the competent Greek single-member first instance court. A foreign judgment will be recognised if:

- it is enforceable pursuant to the law of the country of issuance;
- it is not contrary to good morals or public policy; and
- it meets the conditions of article 323(ii)-(v) GCCP.

As regards enforcement of a foreign judgment, pursuant to article 905 GCCP and subject to what international treaties and EU regulations provide, a foreign judgment can be enforced in Greece after it has been declared enforceable by a judgment of the single-member first instance court of the district within which the domicile of the debtor is or, if there is no domicile, of the debtor's residence, or, if there is no residence, of the Single-Member First Instance Court of Athens. A foreign judgment will be declared enforceable by the competent Greek single-member first instance court pursuant to the above procedure if it is enforceable pursuant to the law of the country of issuance and if it is not contrary to good morals or the public policy of Greece. Finally, for a foreign judgment to be declared enforceable, the conditions of article 323(ii)-(v) GCCP must also be met.

### Foreign proceedings

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

Yes, for civil and commercial matters, this is possible on the basis of Council Regulation [EC] No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters.

## ARBITRATION

### UNCITRAL Model Law

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

Law 2735/1999 on International Commercial Arbitration (Law 2735/1999), applicable to international commercial arbitration proceedings seated in Greece, is the legal act that incorporated the UNCITRAL Model Law in Greek legislation. Law 2735/1999 has not been adjusted to the amendments of the Model Law adopted by UNCITRAL on 7 July 2006.

The GCCP, and in particular articles 867–903, applies to domestic arbitration proceedings and has not been adopted in accordance with the UNCITRAL Model Law.

### Arbitration agreements

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

The arbitration agreement should be in compliance with article 7 of Law 2735/1999, with regard to international commercial arbitration, and article 869 GCCP, with regard to domestic arbitration. Both provisions require the agreement to be in writing. However, the lack of a written agreement may be cured if both parties participate in the proceedings without expressing any objections or reservations.

### Choice of arbitrator

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

In international commercial arbitration, in the absence of any relevant agreement of the parties, the arbitral tribunal shall consist of three arbitrators (article 10 of Law 2735/1999). Each party shall appoint one arbitrator and the two arbitrators shall appoint the third one. If a party does not appoint an arbitrator within 30 days from the receipt of such a request from the other party, or the two arbitrators, appointed by the parties, cannot agree to the appointment of the third one within 30 days from their appointment, any party may request the intervention of the



competent single-member court of first instance to make such appointment (article 11, paragraph 4(a) of Law 2735/1999).

Article 12(2) of Law 2735/1999 provides that an arbitrator may be validly challenged only for justifiable doubts as to his or her impartiality, independence or possession of the qualifications agreed to by the parties. A party may even challenge an arbitrator appointed by itself, or in whose appointment it has participated, but solely for reasons of which it became aware after the appointment had been made.

In domestic arbitration, in the absence of any relevant agreement by the parties, each party may invite in writing the other party to appoint an arbitrator within at least eight days, mentioning in the same document the arbitrator it appoints. Each arbitrator is notified of the name and the address of the other arbitrator. Within 15 days from the last of the aforementioned notifications, the two arbitrators shall appoint the presiding arbitrator and announce such appointment to the parties (articles 872–874 GCCP). If any of the aforementioned appointments fail to be completed within the deadlines provided, any party may request the intervention of the competent single-member court of first instance to make such an appointment (article 878 paragraph 1 GCCP).

In domestic arbitration, the arbitrators may be challenged for reasons related to their prior involvement in the case, any interest they may have in the arbitration, their family relation to the parties or any relationship they may have to the parties that creates any suspicion of bias and their entire or partial incapacity to contract or deprivation of political rights. The party challenging the arbitrator is able to invoke only reasons of which it became aware after the appointment of the arbitrator took place (article 883, paragraph 2 GCCP).

### Arbitrator options

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

Subject to the grounds for challenging an arbitrator (that is, for justifiable doubts as to his or her impartiality, independence or possession of the qualifications agreed to by the parties; or, in domestic arbitration, for reasons related to their prior involvement in the case, any interest they may have in the arbitration, their family relation to the parties or any relationship they may have to the parties that creates any suspicion of bias and their entire or partial incapacity to contract or deprivation of political rights), and any requirements set out by the parties in the arbitration agreement, the parties, any appointing authority or the court are not restricted when appointing the arbitrators. In domestic arbitration, article 871A GCCP provides for specific requirements when judges are selected as arbitrators. In addition, Greek legislation does not place any restrictions on appointing non-nationals as arbitrators in either international commercial or domestic arbitration.

However, article 49 of the Introductory Law of the GCCP, article 16(2) of Law 4110/2013, as amended by article 103 of Law 4139/2013 Government Gazette Vol. A 74/20.03.2013 (which replaced article 6(3A) of Law 3086/2002) and article 8(1) of Legislative Decree 736/1970 list certain requirements for the appointment of arbitrators over disputes arising from contracts concluded with the state or state entities in both international and domestic arbitration. In particular, the state's arbitrator should be only a senior magistrate, a senior member of the State Legal Council, a university professor or a Supreme Court lawyer.

### Arbitral procedure

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

Pursuant to articles 19 of Law 2735/1999 and 886 GCCP, the arbitral tribunal is free to conduct the arbitration in an appropriate manner, subject to any requirements agreed to by the parties. However, the

aforementioned power of the arbitrators is restricted by articles 18 of Law 2735/1999 and 886(2) GCCP, which provide that the parties shall be treated with equality and be given a full opportunity of presenting their case (ie, attending the hearings, submitting and elaborating on their claims, and submitting their evidence). In addition, any other rules considered as public order rules are mandatory in all cases, and cannot be excluded by means of the arbitration agreement (article 890(2) GCCP).

### Court intervention

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

In both international commercial and domestic arbitration, the court's intervention is mainly reserved for cases where the arbitration is at a standstill and the parties or the arbitrators address a relevant request to the court.

First of all, the competent single-member court of first instance may intervene in the arbitration, upon the request of one of the parties, if the arbitrators' selection mechanism agreed by the parties fails, unless the parties' agreement provides otherwise for securing such selection (article 11(3) of Law 2735/1999), or if the parties or the arbitrators have failed to appoint an arbitrator, or the presiding arbitrator respectively, within the provided deadlines (articles 11 (4)(a) of Law 2735/1999 and 878(1) GCCP). The court's decision on the appointment of an arbitrator is not subject to appeal (articles 11(6) of Law 2735/1999 and 878(3) GCCP).

In addition, in international commercial arbitration, if the challenge of an arbitrator, under any procedure agreed upon by the parties or under the procedure provided by law (ie, withdrawal of the challenged arbitrator, agreement by the other party to the challenge, or the arbitral tribunal's decision on the challenge) is not successful, the challenging party may request, within 30 days of having received notice of the decision rejecting the challenge, the competent single-member court of first instance to decide on the challenge, whose decision shall not be subject to appeal. Pending such a request, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and issue an award (article 13(3) of Law 2735/1999). In domestic arbitration, it is the competent single-member court of first instance that decides upon such a challenge in the first place, while such decision is not subject to appeal and the arbitrators postpone the adjudication of the case until the issuance of the court's decision (article 883(2) GCCP). Despite the aforementioned provision, it is accepted that the arbitral tribunal is not obliged to postpone the arbitration, precisely to safeguard the velocity of the arbitral procedure, which is one of its main advantages. In such a case, the arbitral award would be subject to annulment only if the request for challenging the arbitrator was finally accepted by the court.

In international commercial arbitration, if an arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, and if any controversy remains concerning any of these grounds, any party may request the competent single-member court of first instance to decide on the termination of his or her mandate, whose decision shall not be subject to appeal (article 14(1) of Law 2735/1999). If the court accepts that request, the appointment of a substitute arbitrator is effected according to the rules applicable to the arbitrator being replaced (article 15 of Law 2735/1999).

With respect to domestic arbitration, article 880 GCCP provides that any arbitrator or presiding arbitrator who initially accepted his or her appointment may subsequently decline to perform his or her duties for exceptional reasons, upon being granted the court's permission. Permission is granted by the competent single-member court of first instance, upon examination of the arbitrator's or any party's request, in ex parte proceedings. Such decision is not subject to appeal. Article 884 GCCP also allows any of the parties to request the competent court of first instance to order a reasonable deadline for the delivery of the award

if the arbitral proceedings or the issuance of the award are delayed and the arbitral agreement does not set out any such deadline.

Finally, pursuant to article 9 of Law 2735/1999, the arbitration agreement does not prevent a regular court from granting interim relief, before or during the arbitral proceedings. What's more, if a party does not comply voluntarily with the interim relief ordered by the arbitral tribunal, in international commercial arbitration, the other party may resort to the competent court requesting the imposition of interim relief.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

In relation to international arbitration, article 17 of Law 2735/1999 provides that, unless otherwise agreed by the parties, the arbitral tribunal may, upon request of one of the parties, order any interim relief considered necessary in relation to the nature of the dispute. The arbitral tribunal may order any of the parties to provide security in relation to such relief. If a party does not comply voluntarily with the interim relief ordered by the arbitral tribunal, the other party may resort to the competent court requesting the imposition of interim relief.

In domestic arbitration, arbitral tribunals are explicitly prohibited from granting interim relief, and any such agreement between the parties is considered null and void [articles 685 and 889 GCCP].

### Award

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

Greek law does not impose any time limits that the tribunal should respect for the delivery of the arbitral award. However, as regards domestic arbitration, article 884 GCCP allows any of the parties to request the competent court of first instance to order a reasonable deadline for the delivery of the award if the arbitral proceedings or the issuance of the award are delayed and the arbitral agreement does not set out any such deadline. No relevant provision exists with regard to international commercial arbitration.

Under article 31 of Law 2735/1999, the award must be in writing, signed by the arbitrator or arbitrators, and must contain the grounds for the ruling, unless otherwise agreed by the parties or the award is an award on agreed terms. The arbitral award must also state the date and place of the arbitration, and the original must be delivered to each party. The above requirements, together with the statement of the full names of the arbitrators and parties to the arbitration agreement, should be respected in relation to domestic arbitration as well, pursuant to article 892 GCCP. As opposed to international commercial arbitration, in domestic arbitration, the delivery of copies of the arbitration award to the parties is sufficient.

Pursuant to article 32(5) of Law 2735/1999, unless otherwise agreed by the parties and if the award is to be enforced in Greece, the arbitrator or one of the arbitrators (appointed by the tribunal) is obliged to file the original of the award with the secretariat of the competent court of first instance. The same obligation exists under domestic arbitration [article 893 GCCP].

### Appeal

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

In principle, awards of international commercial arbitration are not subject to appeal (ie, challenge on the merits), but the parties have the power to agree recourse against the award before another arbitral tribunal [article 35(2) of Law 2735/1999]. The same applies to domestic arbitration [article 895 GCCP].

In any case, international commercial arbitration awards may be set aside for procedural reasons by virtue of a relevant action filed before

the competent court of appeals. Pursuant to article 34 of Law 2735/1999, an award will be set aside if the applicant claims and proves that:

- a party to the agreement was, under the law applicable to it, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the arbitral award concerns a dispute that does not fall within the arbitration agreement or transcends the arbitration agreement;
- the applicant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or
- the composition of the arbitral tribunal or the arbitral proceedings were not in compliance with the arbitration agreement or, absent such agreement, with Law 2735/1999.

With respect to domestic arbitration, an award may be set aside partially or in its entirety by virtue of a relevant action filed before the competent court of appeals for the following reasons:

- the arbitration agreement is void;
- at the time of issuance of the award, the arbitration agreement was not in force;
- the choice of arbitrators was not in compliance with the terms of the agreement or the provisions of the law or the arbitrators were revoked by the parties or exempted;
- the arbitrators acted transcending their powers pursuant to the arbitration agreement or the law;
- the parties' equality during the proceedings, or the provisions of law with respect to the manner the arbitrators decided or the formal requirements of the arbitral award were not respected;
- the award contravenes public policy or the accepted principles of morality;
- the award is incomprehensible or contains controversial provisions; or
- one of the grounds for the filing of trial de novo under Greek law is met [article 897 GCCP].

In addition, the GCCP allows the parties to challenge an award, requesting the declaration of its non-existence by the competent court of appeals, if:

- there was not an arbitration agreement at all;
- the subject matter of the dispute was not arbitrable; or
- the award was issued in arbitration involving a non-existing individual or legal entity [article 901 GCCP].

### Enforcement

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

The party that intends to enforce a foreign arbitral award in Greece should file an application for its recognition and enforcement before the single-member court of first instance of the residence of the debtor, to be heard in ex parte proceedings. The court has the power to summon any third party that has a legitimate interest to intervene to the trial, rendering such party a litigant of the proceedings. In addition, Greece is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and has transposed the latter to its national legislation by virtue of the Legislative Decree 4220/1962. Therefore, the grounds on which recognition and enforcement of a foreign arbitral award may be refused (if invoked by a party or ex officio, where applicable) are those prescribed in article V of the New York Convention.



In contrast, for the enforcement of a domestic arbitral award, its filing to the secretariat of the single-member court of first instance suffices.

### Costs

#### 33 | Can a successful party recover its costs?

The reimbursement of the parties' costs may be subject to the arbitration agreement. In the absence of a relevant provision in the arbitration agreement, the arbitral tribunal shall decide on the allocation of costs based on the circumstances and the complexity of the case and the outcome of the proceedings. Hence, the arbitral tribunal is free to decide whether it will order each party to bear its own costs, divide the costs proportionally or oblige the losing party to reimburse the successful one for its costs.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

ADR mechanisms have not been commonly used in Greece. Mediation, as well as judicial mediation, was introduced in the Greek legal order in 2010 by virtue of Law 3898/2010, which transposed into Greek law Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters and provided for optional recourse to mediation.

In 2012, the institution of judicial mediation was amended via article 214B GCCP, allowing the parties, at their initiative or following a request by the court, to refer a dispute to judicial mediation at any stage of the proceedings. Effectively, the judge of the court before which the case is pending will act as a mediator and will have separate and joint meetings with each party and their legal representatives and make non-binding suggestions thereto regarding the resolution of the dispute. If the parties reach an agreement, minutes of judicial mediation will be drafted, signed and lodged at the secretariat of the first instance court, so as to become enforceable. The judicial mediation scheme is still in force, although, in practice, it has rarely been applied.

In 2018, Law 4512/2018, containing Regulations Relevant to Mediation, was adopted for the purpose of further harmonising Greek legislation to the provisions of the same directive and making recourse to mediation mandatory for specific types of disputes. However, the Supreme Court held via its Legal Opinion No. 34/2018 that the provision of Law 4512/2018 on mandatory recourse to mediation was unconstitutional, as it violated the right to judicial protection (articles 6, 20 of the Greek Constitution, article 13 of the European Convention of Human Rights and article 47 of the Charter of Fundamental Rights of the European Union). Therefore, the effect of the said provision was suspended twice: first until 16 September 2019, and then until 30 November 2019. On the latter date, Law 4640/2019 introduced a new mandatory mediation scheme and abolished the aforementioned provision, which was never applied.

### Requirements for ADR

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

By virtue of Law 4640/2019, the prior recourse to mediation proceedings is rendered mandatory for the following certain types of disputes, which include:

- disputes in respect of which the parties have validly agreed in writing a mediation clause;
- family disputes, except for those concerning: divorce, cancellation of marriage, recognition of existence or non-existence of marriage, and the relationship between parents and children; and
- disputes resolved under the ordinary procedure, in the following cases: if the object of the dispute exceeds €30,000, if the dispute falls within the competence of the single-member first instance civil court, and, in every case, if the dispute falls within the competence of the multi-member first instance civil court.

The mediation scheme involves the following.

First, the mediator is appointed upon mutual agreement of the parties or by decision of a third party appointed by the parties. The mediation procedure commences upon submission of a relevant request to the appointed mediator by one of the parties.

Subsequently, the mediator determines the date and place of the mandatory initial mediation session, during which the parties are present, each accompanied by a lawyer. The initial mediation session must take place within 20 days from the day following the receipt of the request for recourse to mediation. The parties are free to withdraw at any time from the mediation session, without any justification or sanction. Upon conclusion of the mandatory initial session, the mediator drafts the relevant minutes, which are signed by all participants.

Upon the completion of the initial mediation session, the parties may agree to continue with the mediation procedure, which will have to be completed within 40 days.

If an enforceable agreement is concluded in the context of the mediation procedure, the mediator will draft the relevant mediation minutes, which will be signed by the mediator and the parties.

Pursuant to article 44 of Law 4640/2019 and article 74(14) of Law 4690/2020, this mandatory mediation scheme came into force:

- on 30 November 2019 for disputes in respect of which the parties have validly agreed in writing a mediation clause;
  - on 15 January 2020 for family disputes, except for those concerning:
    - divorce;
    - annulment of marriage;
    - recognition of existence or non-existence of marriage; and
    - and the relationship between parents and children; and
- on 1 July 2020 for disputes resolved under the ordinary procedure, in the following cases:
  - if the object of the dispute exceeds €30,000, if the dispute falls within the competence of the single-member first instance civil court; and
  - if the dispute falls within the competence of the multi-member first instance civil court.

## MISCELLANEOUS

### Interesting features

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

In relation to arbitration, it is noticeable that criminal cases cannot be referred to arbitration under Greek law. With regard to tax disputes, although in principle they are not arbitrable, they can be referred to arbitration where the state has control over the subject of the dispute. Labour disputes are also explicitly exempt from arbitration, except for collective bargaining disputes (article 16 of Law 1876/1990 as amended through Law 4635/2019). In relation to mediation, the mandatory mediation scheme does not apply indicatively to the following disputes:

- disputes falling within the competence of the magistrate court (justice of the peace), namely to disputes of a monetary value up to €20,000 or disputes within the exclusive competence of the said court regardless of their monetary value;
- disputes falling within the competence of the single-member first instance civil court with a monetary value under €30,000;
- disputes of the voluntary (non-contentious) procedure;
- interim measures proceedings;
- special proceedings, namely property disputes, payment order and order for the return of leased property (articles 614 to 645 of GCCP) and specific family disputes (592 of GCCP), that is, concerning:
  - divorce;
  - annulment of marriage;
  - recognition of existence or non-existence of marriage; and
  - the relationship between parents and children;
- appeal or opposition proceedings;
- enforcement proceedings; and
- disputes in which the Greek state, a municipal or regional authority, or a legal entity of public law is a litigant.

Another interesting element about the mandatory mediation scheme regards the suspension of the statute of limitations. As soon as the mediator has been appointed, he or she will send a written notification to the litigant parties regarding the time and place of the mandatory initial session. That written notification will suspend the limitation period for the exercise of relevant claims or rights, as well as the judicial deadlines for filing of pleadings, addendum-rebuttal or intervention. Any agreement of the parties regarding voluntary recourse to mediation will have the same effect. In the case of failure to reach an agreement in the context of the mediation, or termination of the mediation procedure in any other manner, the limitation period shall no longer be suspended and will continue to run from the day following the above events.

As far as the mediation costs are concerned, each party must pay, apart from the payment of its attorney, a note of prepayment of fees amounting to €100 for cases falling within the competence of the single-member first instance court, and €150 for cases ruled by the multi-member first instance court. In principle, the mediator's payment is freely determined by agreement of the parties. If no agreement has been concluded, the mediator's payment amounts to €50 for the mandatory initial session and €80 for every additional mediation hour. If a party does not attend the initial mandatory session, despite being summoned, the competent court before which the dispute is brought may impose on this party a fine ranging from €100 to €500.

No judicial duty is payable. The judicial duty corresponds to 0.8 per mille, plus surcharges, on the total amount claimed and it is currently payable for actions requesting not only the satisfaction of a claim (usually its payment) but also the mere recognition thereof (declaratory judgment).

Finally, the signed mediation minutes constitute an executory title, in accordance with article 904, paragraph 2 GCCP, as of the date of submission to the competent court. Those minutes can also be used as a title for registration or lifting of a mortgage. After the submission of the signed mediation minutes to the court, no civil action can be filed for the dispute in question and any pending trial is cancelled.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The last series of legislative amendments, via Law 4842/2021 (Government Gazette Vol A/190/13.10.2021), effective as of 1 January

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2022, as such law has been amended and is in force at the time of writing, has brought some changes to the Greek e-justice system. Though electronic trials and the remote examination of witnesses are still not possible in Greek civil litigation, a series of legislative efforts over the past years have somewhat facilitated and encouraged the use of technology for the completion of certain procedural acts, for example:

- the service of court documents by court bailiffs through electronic means;
- the exchange of electronic communication between the court secretariat and a litigant for the purposes of the litigant remedying a typical omission;
- the posting of the docket by the court electronically;
- the filing of court documents by parties electronically;
- the issuance of certificates electronically; and
- the release to the parties' attorneys of court decisions and transcripts electronically.

There has also been a change in the procedural rules applicable to disputes before the magistrate courts with a value under €5,000; such claims must be served to the counterparty through court bailiffs within 10 days, or if the defendant resides abroad or is of unknown address, within 30 days, of their filing at the latest. Any supporting documentation and evidence by both parties, as well as written pleadings by the defendant, must be filed within 20 days as of the above deadline of the claim's service to the defendant, while additional pleadings and rebuttals can be filed within five days of the filing of the pleadings.

In the field of case law, there has been an interesting development concerning the judicial duty that is often payable by the plaintiff.

The judicial duty is payable to the Greek state and certain state institutions and corresponds to 0.8 per mille, plus surcharges, on the total amount claimed by the plaintiff. By virtue of Law 4640/2019, the obligation to pay the judicial duty was extended to actions in the ordinary procedure requesting the mere recognition of a claim (by virtue of a declaratory judgment), except for the actions with a claimed amount under €250,000. The obligation to pay judicial duty also applied to actions in the ordinary procedure that had already been filed but had not been heard yet at the time of entry into force of the relevant provision.

A recent court judgment (68/2021 of the Athens Multi-Member First Instance Court) ruled that the extension of the obligation of judicial duty payment to actions that had already been filed before the entry into force of Law 4640/2019 is not in conformity with the Greek Constitution. According to the court, the grounds for the unconstitutionality are that the statutory provision in question does not comply with the principle of legal certainty, which derives directly from the Constitution; a particular

aspect of this principle, which was held to have been infringed in this case, is the principle of protection of the individual's confidence in the state and its institutions.

This judgment has not been the only one to date to find constitutionality issues with the statutory provision in question; nor is it likely to be the last. Although the statute has not yet been amended by the legislature, it is highly likely that if the Greek courts, especially the higher courts (the appeal courts and Supreme Court) continue ruling in this direction, the legislative body is likely to decide to modify Law 4640/2019 accordingly and limit the obligation to pay judicial duty to actions filed after the entry into force of the said law.

# Hong Kong

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## LITIGATION

### Court system

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

The Hong Kong civil court system comprises the following major courts and tribunals:

- **Small Claims Tribunal:** to hear and decide low-value monetary claims involving HK\$75,000 or less. The main types of claims handled by the Tribunal are debt, service charges, damage to property, goods sold and consumer claims. Hearings are conducted informally, and no legal representation is allowed.
- **Labour Tribunal:** to hear and decide employment-related disputes. Hearings are conducted informally, and no legal representation is allowed.
- **Lands Tribunal:** to hear and decide cases relating to possession of premises, building management, land and tenancy disputes.
- **Competition Tribunal:** to hear and decide cases relating to competition law. The Tribunal has all the same powers, rights and privileges as the Court of First Instance.
- **Market Misconduct Tribunal:** to hear and decide cases relating to market misconduct matters including insider dealing, false trading, price rigging, stock market manipulation, disclosure of information about prohibited transactions and disclosure of false or misleading information inducing transactions in securities and futures contracts.
- **District Court:** to hear and decide monetary claims for an amount over HK\$75,000 but do not exceed HK\$3 million. The Family Court in the District Court handles matrimonial cases, for example, divorce, maintenance, custody and adoption of children. There are currently 41 judges in the District Court.
- **Court of First Instance:** unlimited civil jurisdiction and hears appeals from various tribunals, such as the Labour Tribunal and the Small Claims Tribunal. There are currently 26 judges in the Court of First Instance.
- **Court of Appeal:** jurisdiction to hear appeals from the Court of First Instance, the District Court and various tribunals and statutory bodies, such as the Lands Tribunals and the Competition Tribunal. There is currently one chief judge and 13 justices of appeal.
- **The Court of Final Appeal:** the highest appellate court with jurisdiction to hear appeals from the Court of Appeal and the Court of First Instance. There is one chief justice, three permanent judges and 16 non-permanent judges. The court when sitting will comprise five judges, which usually comprise the chief justice, three permanent judges and one non-permanent judge from another common law jurisdiction.

Certain types of cases are classified according to specialist court lists to aid proper and efficient case management; for example, the Commercial

List, the Construction and Arbitration List, the Personal Injuries List, the Intellectual Property List and the Admiralty List.

### Judges and juries

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

##### Judges

Hong Kong courts adopt the common law adversarial system. Parties to litigation present their evidence and arguments to the judge, who will then assess the strengths of the arguments and evidence presented by each side, decide whether the evidential factual and legal standards have been met and, ultimately, determine the dispute.

Judges are appointed by the Chief Executive (head of the Hong Kong government) on the recommendation of the Judicial Officers Recommendation Commission. The Commission is an independent statutory body composed of judges, persons from the legal profession and eminent persons from other sectors.

To retain experienced senior judges and attract qualified private practitioners to join the judiciary, some changes were made to the retirement age on 6 December 2019:

- the normal retirement age for judges of the Court of Final Appeal as well as the Court of Appeal and the Court of First Instance was extended from 65 to 70;
- the normal retirement age for members of the Lands Tribunal, magistrates and other judicial officers at the magistrate level was extended from 60 to 65; and
- the normal retirement age for judges of the District Court was maintained at 65.

##### Jury

Trial by jury in civil cases is very rare. A party may apply to the court for a trial by jury if there is at issue a claim in respect of libel, slander, malicious prosecution, false imprisonment or seduction, or as prescribed under the Rules of the High Court (Chapter 4A). However, there will be no trial by jury where the court considers that the trial requires any prolonged examination of documents or any scientific or local investigation that cannot conveniently be made with a jury.

### Limitation issues

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

Subject to certain exceptions (see below), the broad time limits for bringing various civil claims are:

- contractual claims: six years from the date of breach of contract;
- tortious claims: six years from the date when damage was suffered;
- personal injuries claims: three years from the date of the accident or the date of knowledge (whichever is later) for common law negligence claim, or two years from the date of the accident for claim under the Employees' Compensation Ordinance (Chapter 282);

- recovery of land: 12 years from the date when the right accrued or 60 years if the claim is brought by the government;
- deeds: 12 years from the date of breach;
- cargo claims: one year from the date of damage or loss if subject to Hague-Visby Rules; otherwise, the six-year time limit for contract and tort claims applies; and
- salvage claims: two years from the date on which the salvage operations are terminated; and
- collision of vessels claims: two years from the date of damage, loss or injury.

The Limitation Ordinance (Chapter 347) does not prohibit parties from varying the statutory time limits. It also provides that the time limits can be extended under certain exceptional circumstances, for example:

- where the plaintiff was under a disability, the time limit begins to run from the date the plaintiff ceases to be under a disability or dies (whichever is earlier); and
- where the action is based upon the defendant’s fraud, a relevant fact has been deliberately concealed by the defendant or the action is for relief from consequences of mistake, the time limit begins to run when the plaintiff discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.

**Pre-action behaviour**

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

Before commencing proceedings, it is good practice for a plaintiff to send a pre-action demand letter to the defendant setting out the factual and legal basis of the claim and the relief or remedies being claimed against the defendant.

For personal injuries claims, it is mandatory for a plaintiff to issue a pre-action demand letter to the defendant (and copied to the defendant’s insurer, if known) four months before commencing proceedings.

The parties should also make every reasonable effort to settle their dispute through ‘without prejudice’ settlement negotiations or mediation (which is now compulsory under the court rules unless a party has cogent reasons for not wishing to mediate the dispute). The court may make an adverse costs order against any party that fails to engage in mediation without good reasons.

The court can also, upon application, order pre-action discovery of ‘relevant’ and ‘necessary’ documents to enable the plaintiff to formulate the case properly.

**Starting proceedings**

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

Civil proceedings are usually commenced in the Court of First Instance and the District Court (depending on the quantum of claim) by issuing a writ of summons. Certain types of proceedings can also be commenced by originating summons, originating motion and petition. Generally, there are three methods to serve the writ on a local defendant, namely, by personal service, by registered mail or by ‘insertion through letter box’. If the defendant is a limited company, the plaintiff can serve the writ by posting it to, or leaving it at, its registered office. If the defendant is located overseas, the plaintiff is required to obtain the court’s permission to serve proceedings on a defendant not in Hong Kong.

The judiciary’s figures show that the Court of First Instance alone received 17,906 civil cases in 2020, and 15,008 civil cases in 2021. The

average waiting time (Civil Fixture List), from application to fix date to hearing, increased from 166 days in 2020 to 176 days in 2021.

**Timetable**

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

Civil proceedings are typically commenced by a writ of summons being issued by the plaintiff together with a statement of claim (which the plaintiff can also elect to serve at a later date). After the writ has been issued, it must be served on the defendant within 12 months unless the court has agreed to extend the validity of the writ beyond 12 months. The subsequent steps and deadlines are as follows:

	Action	Deadline
(1)	Defendant to acknowledge service of the writ	Within 14 days from the service of the writ (including the day of service)
(2)	Defendant to file and serve a defence (and counterclaim, if any)	Within 28 days from (1) above
(3)	Plaintiff to file and serve a reply (and defence to counterclaim, if any)	Within 28 days from (2) above
(4)	Close of pleadings	Within 14 days from (3) above
(5)	Discovery (disclosure of documents related to the case)	Within 14 days from (4) above
(6)	Parties to file a timetabling questionnaire	Within 28 days from (4) above

Thereafter, the parties are required to exchange factual witness statements and expert reports (if necessary). The parties may then apply to set the case down for trial. The time frame for a civil claim from the date of commencement of the action to a trial can be approximately 24 months and potentially longer, depending on the complexity of the case, the number of days to be reserved for the trial and the availability of judges (which depends on the volume of cases in the court diary).

**Case management**

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

The court rules give the parties an element of control over the case procedure and timetable. The courts are also vested with active case management powers to increase cost effectiveness and ensure that cases are dealt with as expeditiously as is reasonably practicable.

After ‘pleadings are closed’, the parties are required to exchange and file with the court a timetabling questionnaire setting out their proposed case management directions and timetable. Afterwards, if the parties are able to reach an agreement on the case management directions and timetable, they should seek the approval of the court. Otherwise, the plaintiff is required to take out a case management summons for a case management hearing. At the case management hearing, the court will give case management directions and set a timetable for the parties to comply with those directions.

The case management directions typically specify the timetable for the parties to complete discovery, exchange witness statements and expert evidence (if any), and complete a case management conference, a pretrial review (PTR) and the trial. Parties may by consent or upon application to the court vary the non-milestone events (eg, discovery, exchange of witness statements and expert evidence). Milestone dates

(eg, case management conference, PTR and trial) may only be postponed by the court under exceptional circumstances.

A PTR usually takes place around eight weeks before the trial to ensure that the case is ready to proceed to trial on the allocated dates. At the PTR, the court will typically give directions and deadlines for the plaintiff to file and serve the trial bundles and the parties to file their respective opening submissions.

### Evidence – documents

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

The process of preserving and disclosing relevant documents and evidence pending trial is called 'discovery'. It is a continuing process that begins when litigation is contemplated and continues until the end of the trial. The scope of discovery covers all documents that are relevant to the issues in the action and, therefore, includes documents that both support and are detrimental to a party's case.

There are three main stages of discovery:

- Automatic discovery: after the close of pleadings, each party is required to disclose, by way of a 'list of documents', all documents that he or she has or has had in his or her possession, custody or power relating to matters in question between the parties in the action. If a party fails to make automatic discovery, the court may, upon application, make an order for general discovery.
- Specific discovery: the court may, upon the application of a party, order the other party to disclose specific documents that are in the possession, custody or power of the other party; relate to the issues in the action and are necessary to dispose fairly of the cause or matter; or for saving costs.
- Inspection: a party serving a list of documents is obliged to produce the documents referred to in the list for inspection by the other party, except where the documents are privileged.

Interrogatories are another form of discovery, whereby a party may serve written questions on another party for the purpose of obtaining admissions or evidence of material facts within his or her knowledge and relevant to the dispute. Answers to interrogatories are normally given on affidavit and the other party may rely on the answers as evidence at trial.

### Evidence – privilege

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

Documents that are 'privileged' are protected from disclosure in litigation. The parties only need to disclose their existence (but not the contents) during discovery. The main bases for claiming privilege are:

- Legal professional privilege (LPP): includes litigation privilege and legal advice privilege. Litigation privilege protects confidential communications made between either the client or his or her legal adviser and a third party (eg, factual or expert witness), where those communications have come into existence for the dominant purpose of being used in connection with actual, pending or contemplated litigation. Legal advice privilege protects confidential communications between a client and his or her legal adviser for seeking or giving legal advice. Where an in-house lawyer provides advice to his or her employer in the capacity of legal adviser, that advice is protected by legal professional privilege.
- Without prejudice communications: communications relating to good-faith settlement negotiations are privileged and protected from disclosure.

- Privilege against self or spousal incrimination: no person is compelled to disclose documents if doing so will expose that person or his or her spouse to proceedings for a criminal offence or for recovery of penalty.
- Public interest immunity: disclosure of documents may be withheld if to do so would be prejudicial to public interest.

### Evidence – pretrial

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

The parties exchange factual witness statements before trial in accordance with the court's case management directions. Normally the court directs that the witness statements served by the parties shall stand as the evidence-in-chief of the witnesses at trial. Under special circumstances and with the permission of the court, evidence may also be given by affidavit or deposition.

Expert evidence may be allowed upon the agreement of the parties or with the court's permission. If a party seeks to adduce expert evidence, the court gives expert directions requiring the expert witnesses to exchange and submit to the court written expert reports, attend a joint experts meeting and submit a joint expert report to the court. The court may also direct the parties to appoint a single joint expert where appropriate.

### Evidence – trial

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

Generally, witnesses (factual and expert) are examined orally at trial in open court. The party serving the witness statements decides whether to call the witness to attend the trial. If a witness is not called to give evidence at the trial, no other party may rely on the witness statement of that witness as evidence at the trial. A witness who is called is first examined-in-chief by the party who calls him or her. The other party or parties may then cross-examine him or her. Afterwards, the witness may be re-examined by the party who calls him or her. The scope for re-examining a witness is limited to only those matters raised during cross-examination. It is not another opportunity to go through the evidence provided by the witness.

In special circumstances, and with the court's permission, a witness may be permitted to give evidence and be cross-examined by video link. The court recognised in a recent case – *Au Yeung Pui Chun v Cheng Wing Sang* [2020] HKCFI 2101 – that there are grounds, in view of the covid-19 pandemic, 'for real concern for a person who is being asked to travel a very long distance including taking a flight to attend trial in an unfamiliar place at this time in the midst of the coronavirus outbreak'.

In addition to Practice Direction 29 – Use of The Technology Court, the judiciary has also published a number of guidance notes regarding the use of remote hearings for civil business in civil courts in 2020.

### Interim remedies

12 | What interim remedies are available?

Available interim remedies are as follows:

- Injunctions: court orders requiring a party to do something or refrain from doing something, such as:
  - *Mareva* injunctions (which is now the same as a freezing injunction) to prevent a party from disposing of its assets or removing those assets from Hong Kong. The court can also grant a worldwide *Mareva* injunction that covers assets both in and outside Hong Kong;



- *Anton Piller* orders permitting the applicant to enter the respondent's premises and inspect or preserve specified property; and
- *quia timet* ('because he fears') injunctions to prevent an anticipated infringement of the applicant's legal rights.
- Interim payment: where a plaintiff can show that if the case proceeds to trial, he or she will recover a substantial award of damages from the defendant, the court may order the defendant to make an interim payment into court on account of any damages, debt or other sums that he or she may be held liable to pay to the plaintiff.
- Appointment of receivers: where it appears to the court to be just and convenient to do so, it may appoint a receiver to receive, manage or protect property pending the trial.
- Appointment of provisional liquidators: to safeguard the assets of a company prior to the hearing of a winding-up petition.

The Court of First Instance may also grant free-standing interim relief in relation to proceedings that have been or are about to be commenced outside of Hong Kong and that are capable of giving rise to a judgment that may be enforced in Hong Kong.

## Remedies

### 13 | What substantive remedies are available?

Common substantive remedies include:

- damages: monetary compensation for the innocent party. Damages may also be awarded for prospective losses, inconvenience and injured feelings or as punishment in the form of punitive and exemplary damages;
- specific performance: requiring a party to perform the contractual obligations he or she undertook to discharge;
- restitution: restoring the innocent party to the position they were in before the injury occurred;
- rescission: setting aside a contract and putting the parties back into the position that they were in before entering into the contract;
- quantum meruit: reasonable remuneration for the value of work done or goods supplied;
- injunctions: requiring a party to do or cease to do something;
- declarations: where the court declares the legal position of the parties;
- account of profits: recovery of profits attributable to a breach of a fiduciary relationship; and
- interest: simple interest is usually awarded on the judgment debt from the date of the judgment until its satisfaction at a rate as the court thinks fit (the court may award compound interest in certain cases, such as claims in equity).

## Enforcement

### 14 | What means of enforcement are available?

Even if a plaintiff successfully obtains judgment against a defendant, it does not necessarily follow that the judgment debt will be paid. There are various ways for the plaintiff (the judgment creditor) to enforce a judgment against the defendant (the judgment debtor):

- writs of execution, whereby the court bailiffs can seize property belonging to the judgment debtor;
- garnishee proceedings, whereby debts owed may be enforced by seizure and attachment to debts owed to the judgment debtor;
- charging orders on property, whereby the judgment creditor becomes a secured creditor;
- stop notices or stop orders that prevent dealing in securities in a manner contrary to the interest of the judgment creditor;

- prohibition order to restrain the judgment debtor from leaving Hong Kong (often an effective tool to procure payment of a judgment debt if the individual needs to travel outside Hong Kong);
- committal proceedings to hold the judgment debtor in contempt of court, which can result in a fine or ultimately imprisonment;
- oral examination of the judgment debtor as to his or her assets available to satisfy the judgment; and
- bankruptcy or winding-up proceedings against the judgment debtor.

## Public access

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

The legal system in Hong Kong is based on the principle of open justice, which promotes openness and transparency such that justice should not only be done but be seen to be done. As such, hearings are generally heard in open court. In exceptional cases, hearings are held in closed courts, such as where the subject matter of the proceedings would otherwise be destroyed or for moral, public policy or national security reasons, or where parties' private lives so require.

The only court documents available to the public are the writs filed to commence civil proceedings and court judgments. The substantive case documents (such as pleadings, witness statements, expert reports and court orders) are not available to the public.

## Costs

### 16 | Does the court have power to order costs?

The courts have broad discretion to make costs orders. The general rule is that 'costs follow the event'; that is, the unsuccessful party pays the successful party's costs.

Other cost orders include 'no order as to costs' (where the parties are responsible for their own respective costs), and other more 'bespoke' costs orders depending on the circumstances (eg, the successful party is ordered to pay part of the unsuccessful party's costs where the plaintiff has not succeeded on all of his or her claims or where there is a finding of procedural misconduct by both sides).

In exercising its discretion, the court will generally take into account various factors, such as the parties' conduct during the proceedings, including whether a party had failed to accept a written settlement offer and eventually does not 'beat' the settlement offer in the judgment.

The court is also mandated to exercise its case management powers to encourage and facilitate the use of alternative dispute resolution (ADR) procedures. Notwithstanding that the court can only encourage, but not compel, the parties to use ADR procedures, the court can take into account the refusal of any party to undertake mediation or another ADR procedure (without a reasonable explanation) when awarding costs (eg, to deprive a party of an entitlement to costs).

If the parties are unable to agree on the amount of costs, the receiving party may apply to the court for a taxation of his or her costs (a process for the court to assess the amount of costs payable by the paying party). Effective from 1 December 2018, the Court of First Instance and the District Court substantially increased solicitors' recoverable hourly rates (by more than 40 per cent), which means that a winning party can recover a much higher sum towards payment of his or her actual legal costs from the losing party. In practice, the winning party can usually expect to recover about 60 per cent to 70 per cent of his or her actual costs.

A defendant can apply for an order that the plaintiff provide security for costs at any time before the judgment is final in the following situations (it is preferable to apply early on in the proceedings):

- the plaintiff is ordinarily resident out of Hong Kong;

- the plaintiff is suing for the benefit of a third party and there is reason to believe that he or she will be unable to pay the costs of the defendant if required;
- the plaintiff has changed his or her address during the proceedings to evade the consequences of litigation; and
- the plaintiff is a company (whether incorporated in or outside Hong Kong) and there is reason to believe that it will be unable to pay the defendant's costs from assets within Hong Kong if the defendant succeeds in its defence.

### Funding arrangements

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

#### Contingency or conditional fee arrangement

In Hong Kong, solicitors are not allowed to enter into a conditional or contingency fee arrangement to act in contentious business. Barristers are also not allowed to accept instructions on a contingency fee basis.

#### Third-party funding

Third-party funding is generally not permitted for litigation in Hong Kong courts. It amounts to criminal offences of champerty and maintenance. There are, however, the following exceptions:

- 'common interest' cases, involving third parties with a legitimate common interest in the outcome of the litigation to justify support in the litigation;
- cases involving 'access to justice' considerations (eg, the Supplementary Legal Aid Scheme); and
- other accepted lawful practices, such as insolvency proceedings (where a liquidator can assign a cause of action to a third party) and the doctrine of subrogation as applied to contracts of insurance.

### Insurance

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

Although insurance companies often participate in litigation (via the doctrine of subrogation), legal expense insurance schemes or 'after-the-event insurance' are not prevalent in Hong Kong, in particular where lawyers are not allowed to charge on a contingency fee basis. There are certain types of insurance that may cover the parties' legal costs (eg, professional indemnity insurance and management liability insurance).

### Class action

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

There is currently no specific procedure for class actions in Hong Kong. The only type of collective proceedings permitted under the Rules of the High Court is 'representative proceedings', which enable numerous persons who have the 'same interest' in any proceedings to begin or continue the proceedings by or against any one or more of them representing all or as representing all except one or more of them. A judgment or order made in representative proceedings is binding on all the persons so represented but shall not be enforced against any person who is not a party to the proceedings, except with the leave of the court.

### Appeal

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

Parties to proceedings may appeal on questions of law or fact, or against the court's exercise of its discretion. Higher courts are generally reluctant to interfere with the lower court's exercise of discretion and finding of facts, especially where they are based on the credibility of the witnesses or the preference of one witness' evidence over another, as the lower court has had the advantage of hearing the live evidence at first hand and the judge is in the best position to form a view on the credibility of the witness, having observed the witness giving evidence.

Parties may appeal judgments or orders made by the District Court or the Court of First Instance to the Court of Appeal. For final judgments or orders made by the Court of First Instance, appeal lies 'as of right' (ie, no leave is required) to the Court of Appeal. Leave is required to appeal against interlocutory decisions made by the Court of First Instance or decisions made by the District Court.

A party may also seek leave from the Court of Appeal or the Court of Final Appeal to appeal to the Court of Final Appeal for judgments handed down by the Court of Appeal (whether final or interlocutory). Leave will be granted if, in the opinion of either court, the question involved in the appeal is one that, because of its general or public importance or otherwise, ought to be submitted to the Court of Final Appeal for decision. The Court of Appeal or the Court of Final Appeal may grant leave subject to conditions as it considers necessary.

### Foreign judgments

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

A foreign judgment (other than a Chinese judgment) may be recognised and enforced in Hong Kong under two different regimes:

the statutory regime under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319): judgments from certain specified countries under the Foreign Judgments (Reciprocal Enforcement) Order (Chapter 319A) may be registered and enforced in Hong Kong provided that the specified statutory conditions are satisfied – once the court grants leave for the judgment to be registered, the foreign judgment can be enforced in the same manner as a Hong Kong judgment; or the common law regime: foreign judgments from non-specified countries may be enforced by commencing a writ action relying on the foreign judgment as evidence of a debt between the parties. To be enforceable at common law, there are a number of requirements, such as:

- the foreign judgment must be final and conclusive on the merits of the claim;
- the foreign judgment must be for a debt or definite sum of money;
- the defendant must have submitted to the jurisdiction of the foreign court; and
- the foreign judgment was not contrary to Hong Kong rules of public policy or notions of natural justice.

The enforcement of Chinese judgments in Hong Kong is subject to a separate regime under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Chapter 597). This ordinance gives effect to the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements between Parties Concerned', which was signed on 14 July 2006 (the 2006 Arrangement).

A judgment creditor under a Chinese judgment that satisfies the specified statutory conditions can apply to the Court of First Instance to register the judgment under the ordinance. The conditions include:

- the judgment relates to a commercial contract and was given after 1 August 2008;
- the parties to the commercial contract had a written agreement made after 1 August 2008 specifying that the courts in mainland China have exclusive jurisdiction over the dispute;
- the judgment was given by the Supreme People's Court, a higher or intermediate people's court or certain recognised primary people's courts;
- the judgment is enforceable in mainland China;
- the judgment is final and conclusive; and
- the judgment is for a definite sum of money (not being a sum payable in respect of taxes or similar charges or in respect of a fine or other penalty).

On 18 January 2019, Hong Kong and mainland China signed a further Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR (the 2019 Arrangement), to establish a more comprehensive mechanism for mutual recognition and enforcement of judgments in a wider range of civil and commercial matters. The 2019 Arrangement will be implemented by local legislation and the effective date is yet to be announced. The Department of Justice conducted a consultation exercise on a legislative proposal to implement the 2019 Arrangement that ended on 31 January 2022. The 2019 Arrangement, once effective, will supersede the 2006 Arrangement, unless otherwise agreed by the parties before the effective date of the 2019 Arrangement.

The 2019 Arrangement includes the following significant changes:

- an applicant will need to show the connection between the dispute and the requested place to prove that the original court has jurisdiction over the action (the Jurisdiction Requirement);
- the parties are no longer required to agree on an exclusive jurisdiction clause when signing the contract. A judgment will be enforceable in Hong Kong so long as it meets the Jurisdiction Requirement;
- a judgment of second instance (or a judgment of first instance from which there is no appeal within the statutory time limit) issued by a Primary People's Court in mainland China will be covered by the 2019 Arrangement;
- the 2019 Arrangement adopts an 'excluded matters' approach and covers most civil and commercial cases. Excluded matters mainly include those relating to succession, administration or distribution of estate, corporate insolvency, personal bankruptcy, certain maritime matters and certain matrimonial and family matters; and
- both monetary and non-monetary judgment will be enforceable. In the case of mainland China, any judgment, ruling, conciliatory statement and order of payment are included, but a ruling concerning preservation measures will not be covered by the 2019 Arrangement.

## Foreign proceedings

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

There are no restrictions on taking evidence from a witness in Hong Kong for use in existing foreign proceedings if the witness is willing to give evidence voluntarily. Otherwise, the foreign court must issue a letter of request to the Court of First Instance requiring the witness to give evidence in Hong Kong for civil proceedings instituted or to be instituted before the foreign court. The Court of First Instance has power, on application, to make provision for obtaining evidence in Hong Kong as far as it considers appropriate for the purpose of giving effect to the request.

On 1 March 2017, the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland

and the HKSAR came into force. This arrangement provides that parties must make any request for the taking of evidence through their respective designated liaison authorities.

## ARBITRATION

### UNCITRAL Model Law

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

Yes, the Arbitration Ordinance (Chapter 609) (AO) adopts the UNCITRAL Model Law, with supplemental or modified provisions that are specific to Hong Kong.

### Arbitration agreements

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

An arbitration agreement must be in writing to be enforceable in Hong Kong (AO, section 19). That requirement is met if:

- the content of the arbitration agreement is recorded in any form, irrespective of how the agreement was concluded;
- the content of the arbitration agreement is recorded in electronic communication; or
- reference is made in a contract to any document containing an arbitration clause, which makes the arbitration clause part of the contract.

### Choice of arbitrator

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

The parties are at liberty to determine the number of arbitrators or authorise a third party to make the decision. Otherwise, the Hong Kong International Arbitration Centre (HKIAC) will determine whether one or three arbitrators should be appointed (AO, section 23).

The parties are free to agree on the procedure for challenging an arbitrator. Otherwise, the AO prescribes the procedure for making that challenge, which includes provisions for the challenging party to submit written reasons to the arbitral tribunal and, if unsuccessful, to further request the court or HKIAC to decide on the challenge.

An arbitrator can only be challenged if there are justifiable doubts about his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties.

### Arbitrator options

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

Arbitrators can be chosen from an extensive pool of local and foreign professionals in Hong Kong, who are multilingual and possess expertise in different industries (eg, international trade, construction, maritime and intellectual property). Various arbitral institutions and professional associations (eg, HKIAC, the Hong Kong Bar Association and the Law Society of Hong Kong) maintain arbitration committees or lists to assist parties in choosing suitable arbitrators. The parties are free to appoint arbitrators from abroad if necessary.

## Arbitral procedure

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

Under the AO, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration. In the absence of agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate and in compliance with the following overriding principles (AO, section 46):

- parties' right to equal treatment and the right to be heard;
- the arbitral tribunal must conduct the arbitration independently, fairly and impartially; and
- the arbitral tribunal must use appropriate procedures to avoid unnecessary delay or expense, to provide a fair means for resolving the dispute.

## Court intervention

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

The court may only intervene in arbitral proceedings in limited circumstances prescribed under the AO, including:

- staying court proceedings for arbitration where the matter is the subject of an arbitration agreement;
- determining challenges to arbitrator appointment;
- granting interim measures (eg, injunctions, asset or evidence preservation orders);
- granting orders to inspect, preserve or sell property being the subject of arbitral proceedings; and
- setting aside and enforcing arbitral awards.

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR, which came into effect on 1 October 2019, allows a party to arbitral proceedings administered by a Chinese arbitral institution to apply to the Court of First Instance for interim measures. Similarly, a party to arbitral proceedings in Hong Kong may apply to the intermediate people's court of the place of residence of the other party for interim measures. Hong Kong is the first and only jurisdiction that can seek mutual assistance from China in interim measures in aid of arbitral proceedings.

## Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, the AO empowers arbitrators to grant interim measures, including injunctions, asset or evidence preservation orders.

## Award

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

The AO does not prescribe any time limit for the arbitral tribunal to make and deliver an award. Nonetheless, the arbitral tribunal has an overriding duty to render an award in a conscientious, reasonable and timely manner, and not unduly delay in rendering the award.

The parties may also agree on a specified time limit for the arbitral tribunal to render the award.

An award must be in writing, signed by the arbitrators, dated and stated with the seat of arbitration, and shall provide reasons upon which the award is based unless agreed otherwise. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

## Appeal

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

An arbitral award cannot generally be appealed to the court on the merits. Parties may agree to include the opt-in provisions in Schedule 2 of the AO in the arbitration agreement, which allow a party to challenge an award on the ground of serious irregularity or appeal to the court on questions of law.

## Enforcement

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

With leave of the court, an award (domestic or foreign) is enforceable in the same way as a Hong Kong court judgment. If leave is not granted, an award can still be enforced under common law by bringing an action based on the award (section 84, AO).

Specifically, a Convention award (an award made in a country that is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) can be enforced in Hong Kong following the general procedures in section 84 of the AO (section 87, AO).

After the return of Hong Kong's sovereignty to China in 1997, and with the implementation of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR in June 1999 (the 1999 Arbitration Arrangement), Chinese arbitral awards made pursuant to the Chinese Arbitration Law can be enforced in Hong Kong like a convention award. A similar reciprocal arrangement is in place between Macao and Hong Kong.

On 27 November 2020, the Hong Kong Department of Justice and the Supreme People's Court of the People's Republic of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the HKSAR and the Mainland (Supplemental Arbitration Arrangement). Following the enactment of the Arbitration (Amendment) Ordinance 2021 on 19 May 2021, the Supplemental Arbitration Arrangement is now in full effect.

Important amendments made under the Supplemental Arbitration Arrangement:

- Article 1 of the Supplemental Arbitration Arrangement includes the term 'recognition' when referring to enforcement of arbitral awards under the 1999 Arbitration Arrangement, in line with the two-stage approach (ie, the recognition stage and the execution stage) under the New York Convention.
- Article 2 of the Supplemental Arbitration Arrangement clarifies the scope of the arbitral awards that may be mutually recognised and enforced in mainland China and Hong Kong. It removes the condition of 'recognised Mainland arbitral authorities', and hence all awards issued in mainland China pursuant to its Arbitration Law can be enforced in Hong Kong. Also, all arbitral awards (ie, both ad hoc and institutional) rendered in Hong Kong pursuant to the AO can be enforced in mainland China.
- Article 3 of the Supplemental Arbitration Arrangement enables parties to make simultaneous applications to enforce the arbitral award in both Hong Kong courts and mainland Chinese courts. Previously, parallel enforcement of an arbitral award was not permitted under the 1999 Arbitration Arrangement.
- Article 4 of the Supplemental Arbitration Arrangement clarifies that the enforcing courts can impose interim measures before or after the court's acceptance of an application to enforce an arbitral award.

## Costs

### 33 | Can a successful party recover its costs?

An arbitral tribunal has discretion to give directions on costs in an award. The general practice of 'costs follow the event' is usually adopted. Only reasonable costs are allowed, which may include costs in the preparation of the arbitral proceedings prior to commencing arbitration. A tribunal may also direct a specified limit to the recoverable costs.

Under section 74 of the AO, a provision of an arbitration agreement to the effect that the parties, or any of the parties, must pay their own costs in respect of arbitral proceedings arising under the agreement is void, unless the provision is part of an agreement to submit to arbitration a dispute that had arisen before the agreement was made.

Furthermore, under section 56(1)(a) of the AO, unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may require a claimant to give security for costs of the arbitration.

The AO does not specify a list of factors that an arbitral tribunal will consider when determining whether or not to order security for costs. However, section 56(2) of the AO expressly excludes the following grounds for seeking an order for security for costs:

- a natural person ordinarily resident outside Hong Kong; or
- a body corporate or association incorporated or formed under the law of a place outside Hong Kong, or whose central management and control is exercised outside Hong Kong.

Through the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (which came into effect on 1 February 2019), third-party funding of arbitration is allowed in Hong Kong. Such funding can cover arbitral proceedings and any related court proceedings. Funding can be in the form of money or any other financial assistance in relation to any costs of the arbitration. The funding agreement must be in writing and must be disclosed to the parties to the arbitration and the arbitral tribunal. A Code of Practice was further issued on 7 December 2018, setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration in Hong Kong.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

Common forms of ADR in Hong Kong are conciliation, mediation, adjudication and arbitration. Arbitration and mediation are the most popular types of ADR in Hong Kong for reasons of confidentiality and availability of experienced arbitrators and mediators in the jurisdiction.

The Hong Kong courts strongly encourage the parties to attempt to resolve their disputes by mediation. Unreasonable refusal to participate in mediation before trial may attract adverse costs consequences in subsequent court proceedings.

Arbitration is commonly used to resolve disputes involving international parties, such as disputes arising out of the international sale of goods. Specialist arbitrations are also well established in Hong Kong, such as intellectual property arbitration, domain name arbitration, maritime arbitration, construction arbitration and investment arbitration.

Lastly, adjudications are commonly used to determine construction disputes.

## Requirements for ADR

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

ADR is a voluntary process. The courts usually do not compel the parties to participate in an ADR process. However, one of the underlying objectives of the Rules of the High Court is to facilitate the settlement of disputes by encouraging the parties to use an ADR procedure. Parties to litigation are encouraged to attempt mediation (Practice Direction 31). The court also has broad case management powers to impose adverse costs consequences on parties who unreasonably refuse to attempt mediation.

## MISCELLANEOUS

### Interesting features

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

Hong Kong's dispute resolution system aims to facilitate resolution and settlement in a cost-efficient manner. Some interesting features are highlighted below:

- Sanctioned offers and sanctioned payments under the court rules: these are designed to encourage the parties to actively consider settlement and avoid prolonging litigation. They involve procedures allowing one party to make offers or payments into court to settle a dispute. If the other party does not accept the sanctioned offer or payment, he or she bears the risk of costs and interest sanctions if he or she subsequently fails at the trial to do better than the sanctioned offer or payment, even if he or she wins at trial.
- Apology Ordinance (Chapter 631): Hong Kong was the first Asian jurisdiction to enact an apology legislation (effective from 1 December 2017). Its objective is to prevent the escalation of disputes and facilitate their amicable resolution. Under the Apology Ordinance, an apology does not constitute an express or implied admission of a person's fault or liability in connection with the matter and must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person making the apology. The Apology Ordinance applies to various civil proceedings, including judicial, arbitral, administrative, disciplinary and regulatory proceedings, but not criminal proceedings.
- Hong Kong continues to be a renowned international dispute resolution hub: Hong Kong has an international and diverse pool of legal and dispute resolution talent with over 11,500 practising solicitors and barristers, together with more than 85 foreign law firms and 1,500 registered foreign lawyers from 33 jurisdictions. Several reputable international legal and dispute resolution institutions have set up offices in Hong Kong, such as:
  - the Hong Kong International Arbitration Centre (HKIAC);
  - the International Court of Arbitration of the International Chamber of Commerce;
  - the China International Economic and Trade Arbitration Commission;
  - the China Maritime Arbitration Commission;
  - the Permanent Court of Arbitration;
  - the Hong Kong Maritime Arbitration Group; and
  - eBRAM International Online Dispute Resolution Centre.
- On 21 September 2020, the Baltic and International Maritime Council (BIMCO) announced the adoption of the BIMCO Law and



Arbitration Clause 2020. The Law and Arbitration Clause 2020 replaces the Dispute Resolution Clause 2017. Hong Kong is named under the new Arbitration Clause as one of the four designated arbitration venues, alongside London, New York and Singapore, evidencing Hong Kong's strength as a reputable maritime arbitration centre.

- Referring to HKIAC's statistics in 2021, a total of 514 matters were submitted to the HKIAC in 2021, where 277 were arbitrations (183 of those were administered by the HKIAC), 225 were domain name disputes and 12 were mediations. The total amount in dispute across all arbitrations was HK\$54.6 billion. The average amount in dispute in administered arbitrations was HK\$193.8 million. Arbitrations filed in 2021 continued to be predominantly international, featuring parties from 41 jurisdictions. Eighty-two per cent of all arbitrations and 93 per cent of administered arbitrations were international (a 10 per cent and 7 per cent increase from 2020 respectively). The vast majority of the arbitrations were seated in Hong Kong, while other seats included Moscow, Singapore, and England and Wales. Disputes were subject to 13 different governing laws.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

#### Key policy and legislative developments

On 14 May 2021, the Supreme People's Court of the PRC (SPC) and the Hong Kong SAR government signed the 'Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region' (the Record), providing the framework for mutual recognition and assistance to corporate insolvency proceedings between Hong Kong and mainland China. The SPC and the Hong Kong SAR government have each issued an opinion and practical guide to give further guidance on the matter. Under the opinion issued by the SPC, the Shanghai Municipality, the Xiamen Municipality and the Shenzhen Municipality are designated as 'pilot' areas given their close trade ties to Hong Kong, and the Intermediate People's Courts of these areas may recognise and assist insolvency proceedings in Hong Kong. This is an evolving area of jurisprudence in Hong Kong and mainland China.

On 20 August 2021, China enacted the Personal Information Protection Law of the PRC 2021 (PIPL 2021), which became effective on 1 November 2021 and forms part of the Chinese fast-evolving regulatory regime on data privacy, together with the Cybersecurity Law of the PRC 2016 (CSL 2016) and the Data Security Law of the PRC (DSL 2021), which became effective on 1 September 2021. Notably, these laws contain provisions that have extraterritorial effect, including in Hong Kong. The PIPL 2021 establishes the framework to regulate online data, regulate cross-border data transfer and protect personal information. The DSL 2021 focuses on the processing of data and data security. The Chinese data protection framework has a profound impact on the business environment in China, as non-compliance with these data privacy rules will be subject to a wide range of civil liability, administrative penalties and criminal sanctions. Foreign institutions that process the personal information of individuals in mainland China for the purposes of offering products or services to them, or analysing and assessing their behaviours, are subject to the PIPL 2021. These foreign institutions are required to establish designated agencies or appoint representatives onshore in mainland China.

On 29 September 2021, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was implemented in Hong Kong through the Sale of Goods (United Nations Convention)

Ordinance (Chapter 641). To give time for legal and business sectors to familiarise themselves with the CISG, the date of commencement of the Ordinance has yet to be announced by the Secretary for Justice and is anticipated to be in mid-2022. Notably, the CISG differs from the Sale of Goods Ordinance (Chapter 26) and the common law in some aspects, such as in oral evidence of the formation of contracts and acceptance, and will not apply to transactions between Hong Kong and mainland Chinese parties.

On 8 October 2021, section 64 of the Personal Data (Privacy) Ordinance (PDPO) was amended to introduce doxxing-related criminal offences. The Privacy Commissioner for Personal Data (PCPD), who enforces the PDPO, was also granted the power to carry out criminal investigation and institute prosecution in doxxing cases, conferred statutory powers to demand cessation or restriction of doxxing content, and may also apply for injunctions if the PCPD is satisfied that there may be large-scale or repeated offences. Furthermore, the PCPD has also been given extraterritorial powers to demand cessation and restriction on online platforms and service providers both in Hong Kong and overseas. Notably, the new doxxing offences include the protection of a victim's immediate family members, and the amendment allows for the PCPD to request an internet service provider to block access to relevant platforms from Hong Kong in extreme cases.

On 29 November 2021, the Asian-African Legal Consultative Organisation (AALCO) Hong Kong Regional Arbitration was officially established, with the objective of promoting international commercial arbitration in the Asian-African regions and providing for the conducting of international arbitrations. Adding to the five existing regional arbitration centres of the AALCO (in Cairo, Kuala Lumpur, Lagos, Tehran and Nairobi), the Hong Kong regional centre will seek to integrate itself in the AALCO dispute settlement system and perform a variety of tasks, including providing facilities for alternative dispute resolution services and assisting in the enforcement of arbitral awards, and to also promote the growth and effective functioning of arbitration and other dispute resolution services, including online dispute resolution services.

On 15 December 2021, the Law Reform Commission published a report titled 'Outcome Related Fee Structures for Arbitration', recommending the lifting of prohibitions that would prevent lawyers from entering into outcome-related fee structures (ORFSs) for arbitration. The recommendations are limited to arbitration and related court proceedings, such as applications to the Hong Kong courts to set aside or enforce an arbitral award. The proposed reform does not extend to any other Hong Kong court proceedings. The report recommends permitting conditional fee agreements (CFAs) (where parties agreed to pay a success fee when clients succeed in a case), damages-based agreements (DBAs) (where the lawyers receives payments with reference to the financial benefit obtained in the matter involved), and hybrid DBAs (which combine elements of CFAs and DBAs) with appropriate safeguards. The report further suggests amendments should be made to the Arbitration Ordinance, the Legal Practitioners Ordinance, the Hong Kong Solicitors' Guide to Professional Conduct, and the Hong Kong Bar Association's Code of Conduct, to enable lawyers to use ORFSs. As other major arbitral seats permit some forms of ORFSs, the proposed reforms would allow Hong Kong to offer what its competitors offer to uphold Hong Kong's competitiveness as a leading arbitral seat. The Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 was gazetted on 25 March 2022 and introduced to the Legislative Council on 30 March 2022.

On 1 December 2021, the Rules of the High Court and the Rules of the District Court (Chapter 336H) were amended to abolish the fraud exception rule (Rule 1(2)(b)) to summary judgment, in which summary judgment proceedings were originally unavailable for a claim based on an allegation of fraud.

The Hong Kong courts have introduced various measures to address the challenges created by travel and other restrictions owing to the covid-19 pandemic and to enhance the efficiency of civil litigation, including:

- the use of remote hearings: since April 2020, remote hearings via telephone or videoconferencing facilities have been progressively adopted in all levels of civil courts and tribunals. The 'browser-based' videoconferencing facility was also introduced in January 2021; and
- e-court: the Court Proceedings (Electronic Technology) Ordinance (Chapter 638), while passed but not yet in force, is expected to implement an integrated court case management system to allow for the creation, submission and use of electronic documents in court proceedings.

### Key cases

Among the many mutual arrangements between Hong Kong and mainland China for the purposes of judicial assistance, on 3 September 2021, the District Court in Hong Kong in the recent fraud case *Su Xin & another v Qian Xiaochun* [2021] HKDC 1056 granted leave for the plaintiffs to serve the defendant by 'substituted service' by way of public announcement in mainland China. This judgment helpfully affirms that when a mainland-resident defendant to proceedings is unable to be located, public announcement is a permitted mode of substituted service of the writ on the defendant.

Several developments in cross-border insolvency include *Re China All Access (Holdings) Limited* [2021] HKCFI 1842 and *Li Yiqing v Lamtex Holdings Ltd* [2021] HKCFI 622, where the Hong Kong court allowed the appointment of Hong Kong liquidators of a foreign company to seize control over subsidiary assets in mainland China, and the adoption of a more flexible approach in considering a company's centre of main interest (COMI) where recognition of insolvency proceedings is contested between a company's COMI and place of incorporation.

On 20 July 2021, the Court of First Instance handed down its decision in *Re Samson Paper Company Limited (in Creditors' Voluntary Liquidation)* [2021] HKCFI 2151, approving the first application for a letter of request to be issued by the Hong Kong Court for judicial assistance to facilitate the liquidators to be recognised by the Shenzhen Bankruptcy Court under the Record. On 15 December 2021, the Shenzhen Bankruptcy Court formally recognised the liquidators.

On 16 September 2021, the Court of First Instance recognised in *Re HNA Group Co Limited* [2021] HKCFI 2897, for the first time, reorganisation proceedings commenced in mainland China under the mainland Enterprise Bankruptcy Law. The Court of First Instance (Mr Justice Harris) emphasised that, unlike mainland China, the Hong Kong common law recognition regime does not require reciprocity, and the fact that Hainan (where the company was headquartered) was not one of the pilot areas under the Record would not prevent the proceedings from being recognised in Hong Kong.

On 17 December 2021, the Court of First Instance handed down its decision in *Nuoxi Capital v Peking University Founder Group Company Limited* [2021] HKCFI 3817, addressing for the first time the interplay and potential conflict between the issue of recognising foreign insolvency proceedings and the contractual rights of creditors who sought to enforce exclusive jurisdiction clauses in favour of Hong Kong under certain keepwell deeds (a common form of credit enhancement used by Chinese companies to facilitate the issuance of offshore bonds by subsidiaries). This case has been described as a landmark decision, enshrining the principle of 'one country, two systems'. As Justice Harris remarked in his judgment, 'the applications give rise to issues of some importance', as this subject is an increasingly common feature of the financing arrangements entered into by mainland Chinese business groups and foreign lenders. While the Hong Kong court recognised the

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reorganisation proceedings in respect of the debtor before the Beijing No. 1 Intermediate People's Court, the Hong Kong court refused to stay the Hong Kong proceedings to determine the rights of the plaintiffs under the keepwell deeds, which are governed by English law and contained Hong Kong exclusive jurisdiction clauses.

The reasonings were threefold:

- The Hong Kong court would not deprive a party of its contractual right to rely on an exclusive jurisdiction clause unless a compelling reason was demonstrated.
- The administrators could not demonstrate a compelling reason for the Hong Kong court to depart from the exclusive jurisdiction clause. Mr Justice Harris dismissed the administrators' submission that the Hong Kong proceedings should be stayed because the plaintiffs had submitted proofs of debt in mainland China reorganisation proceedings. There was a distinction between legal proceedings to adjudicate contractual rights and proceedings to recover a debt from a debtor subject to foreign insolvency proceedings, and the submission of a proof of debt in foreign insolvency proceedings did not create an absolute bar to a creditor seeking adjudication of the claim that was not the insolvency jurisdiction.
- The Hong Kong court would be better placed than the Beijing court to determine issues of English law.

At [70], Mr Justice Harris suggested that the court would welcome a coordination with the Beijing court as 'it may be possible for the courts to agree the way in which the issues are to be determined, with the Hong Kong court dealing with issues of construction of the keepwell deeds', and directed the administrators to provide a copy of this decision to the Beijing court.

On 30 December 2021, the Court of First Instance in *Tam Sze Leung & Ors v Commissioner of Police* [2021] HKCFI 3118 held in the context of an application to apply for judicial review that the 'letter of no consent' regime used by the Hong Kong Police Force to effectively freeze bank accounts holding suspected proceeds of crime (commonly known as the 'no consent regime') was, among other things, ultra vires, unlawful and interfered with rights protected by the Basic Law. Prior to this, the 'no consent regime' was a quick and effective procedure to preserve funds held by banks so that the victim of the fraud has 'breathing space' to



take steps in civil proceedings to recover the funds. However, the court is still to give its decision following further submissions by the parties to the court on the issue of appropriate relief.

On 6 April 2022, the Court of First Instance in *Re Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924 granted the first application pursuant to the cross-border insolvency mechanisms for mutual recognition and assistance between the Hong Kong courts and the mainland China courts for a letter of request to be issued by the Hong Kong court to the Shanghai Court. The Shanghai Municipality is one of the three designated 'pilot' areas under the Mutual Recognition of Insolvency Proceedings Framework. With reference to his earlier decision in *Re Samson Paper Co Ltd* [2021] HKCFI 2151, Mr Justice Harris held that issuing a letter of request in this case would be consistent with the already established principles and that it was desirable that the liquidators' appointment should be recognised and assisted in Shanghai.

# India

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## LITIGATION

### Court system

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

India is primarily a common law jurisdiction, although some personal laws (ie, laws followed by and applicable to only persons of a particular faith or religion) are based on customary practice and religion.

Civil courts in India are governed by the procedure set out in the Code of Civil Procedure 1908. Criminal offences are covered by the Indian Penal Code 1860, and criminal courts are governed by the procedure set out in the Code of Criminal Procedure 1973.

India's judicial system is broken up into three distinct streams – criminal cases, civil cases and other cases that may be referred to specific statutorily constituted courts and tribunals depending on the subject matter and the statutes concerned. Jurisdiction of a court is dependent on its territorial and pecuniary limits and may also be circumscribed by subject matter. Some courts and tribunals are conferred with exclusive jurisdiction over matters and disputes of a particular subject matter.

The principal court of original jurisdiction is a city civil court (in metropolitan areas) and a court of civil judge, senior division (in non-metropolitan areas).

There are 25 high courts covering the 29 states and seven union territories of India (established under article 214 of the Constitution of India). A high court is a court of appeal and has supervisory jurisdiction over all lower courts and tribunals in the state or union territory over which it has territorial jurisdiction. The High Courts of Bombay, Delhi, Calcutta, Madras and Himachal Pradesh also have original jurisdiction.

The Supreme Court of India (established under article 124 of the Constitution) has authority over all high courts, lower courts and tribunals in India, and is the final court of appeal.

Presently, there are a total of 32 judges of the Supreme Court, instead of 34, which is the prescribed number. Each high court has different number of judges; there are 702 high court judges in 25 high courts, rather than the prescribed 1,104.

The jurisdiction of Indian courts is limited by territory, the pecuniary value of the claim or dispute, and the subject matter. A court has territorial jurisdiction over a dispute if the defendant habitually resides, carries on business or works for gain within its territory or, if the cause of action arises or immoveable property is the subject matter of the claim, within the territorial limits of such court.

The pecuniary jurisdiction of a court is determined by the relevant state in which the court is situated. The valuation of a plaintiff's claim (and the defendant's counterclaim, if any) determines which court has pecuniary jurisdiction over the case.

Subject matter also plays a part, and exclusive jurisdiction may be statutorily conferred upon certain courts or tribunals, to the exclusion of regular civil courts, depending on the type of claim or dispute.

The Commercial Courts, Commercial Appellate Courts Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the Commercial Courts Act 2015) was enacted to establish specialised commercial courts and divisions for expeditious adjudication of commercial disputes in a timely manner. Commercial disputes of a specified value (ie, 300,000 rupees or above [amended and reduced from 10 million rupees originally]) are adjudicated by such commercial courts.

Certain statutes exclude civil court jurisdiction and confer exclusive jurisdiction on statutorily constituted tribunals or quasi-judicial bodies, such as the National Company Law Tribunal and National Company Law Appellate Tribunal, which deal with matters of company law and insolvency, and the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals, which deal with expeditious adjudication for the recovery of debts owed to banks and financial institutions. There are other tribunals set up to decide matters in relation to competition and unfair trade practices, environmental issues, real estate, electricity tariffs, etc.

### Judges and juries

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

Indian court proceedings are adversarial (ie, where parties present their case before a judge who must remain impartial). As India follows the common law system, judges do not generally act as inquisitors, which may be the case in a civil law jurisdiction. However, it is not uncommon for judges to put questions to a witness or direct parties to lead evidence or make disclosure on certain issues, meaning they are not completely passive in their role.

India abolished the jury system for civil and criminal proceedings in the late 1960s, and currently, only matrimonial disputes relating to the Parsi community involve jury proceedings.

Only an Indian citizen may be appointed as a member of the judiciary. A citizen, having held judicial office for at least 10 years, or an advocate, registered as an advocate of a high court for more than 10 years, may be appointed as a judge of a high court. To be appointed as a judge of the Supreme Court, a citizen must have served as a judge of a high court for more than five years or have practised as an advocate of a high court for more than 10 years, or must, in the opinion of the President of India, be a distinguished jurist. The age of retirement of a high court judge is 62 years, while for a Supreme Court judge it is 65 years.

Representation of women in the judiciary is fairly low, with there being currently only four women judges in the Supreme Court – although one of them, Justice B V Nagarathna, is set to become the first female chief justice of India in 2027. This lack of representation has been a systemic issue throughout the judiciary and the Bar, but there has recently been a conscious effort to increase diversity and have more equitable gender representation.

## Limitation issues

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

Under the Limitation Act 1963, the general period of limitation for civil suits is three years from the date on which the cause of action first arose. The period of limitation varies in certain specific instances: for instance, 12 years for a suit to recover possession of immovable property, 12 years for execution of a decree, one year for an action based on tort and 30 years for suits by or on behalf of the government. Limitation for filing an appeal varies from 30 to 90 days.

Limitation may be extended under certain circumstances, for instance, where there has been a part-payment or acknowledgement in writing of a debt before the expiry of the prescribed period of limitation, or where a party has wrongly but in good faith pursued an action in a court that does not have jurisdiction.

Courts do not have the power to extend the period of limitation; a suit filed after its expiration is bound to be dismissed even if limitation has not been taken up as a defence. However, a court may, under certain limited circumstances, condone a delay in filing appeals.

During the covid-19 pandemic lockdown, the Supreme Court, in exercise of its powers under article 142 of the Constitution, suspended the period of limitation for all claims for a period of about one-and-a-half years, thereby permitting these claims to be brought even after the strict period of limitation had lapsed, subject to certain rules for the calculation of such limitation.

## Pre-action behaviour

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

Under the Commercial Courts Act 2015, no suit may be instituted until the plaintiff has exhausted pre-institution mediation, unless the plaintiff seeks urgent interim relief, in which case they may apply without exhausting the mediation process.

There are no specific pre-action steps that are required before initiating other civil proceedings (which are not considered commercial disputes), except for those prescribed in section 80C of the Code of Civil Procedure mentioned below.

Certain statutes prescribe mandatory pre-action steps to filing of certain proceedings, for instance:

- the Code of Civil Procedure 1908: no suit may be instituted against a government or public officer for official acts without two months' written notice containing the cause of action, the name, description and residence of the plaintiff, and the relief claimed;
- the Insolvency and Bankruptcy Code 2016: an operational creditor must issue a 'demand notice', giving the debtor 10 days to respond, before filing any proceedings against a debtor; and
- the Negotiable Instruments Act 1881: prior to initiating proceedings owing to a cheque for insufficiency of funds, the drawee must issue a written demand notice to the drawer along with the relevant bank details showing that the cheque has been returned unpaid. Fifteen days thereafter, if the payment is not made by the drawer of the cheque, the drawee can initiate proceedings.

## Starting proceedings

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

Civil proceedings are commenced by filing a plaint before the court of competent jurisdiction. The defendant is notified of the initiation of

proceedings through a writ of summons issued by the court, along with a copy of the plaint.

The backlog of cases is a widespread problem and is faced by every judicial and quasi-judicial body in India. This is largely attributable to a dearth of judicial officers, inadequate infrastructure, a lack of proper case management systems and parties filing frivolous litigations. The latest data suggests that there are over 70,000 cases pending before the Supreme Court. According to the National Judicial Data Grid, there are about 4.3 million civil cases pending before various high courts and about 39 million cases pending before district and subordinate courts.

Proposals to ease backlog of cases include implementation of the e-Courts Mission Mode Project by the central government, which encourages the adoption of digital solutions to help reduce the backlog of cases. Further, arrears committees are being set up in high courts to clear cases that have been pending for over five years. There has been a call for a robust alternate dispute resolution mechanism.

The serving attorney general, K K Venugopal, has also recommended the establishment of a National Court of Appeal, which would function as an intermediary court between the high courts and the Supreme Court, and would relieve the Supreme Court of some appellate functions. The Supreme Court would then only consider cases involving substantial questions of law relating to the Constitution.

## Timetable

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

The Code of Civil Procedure 1908 governs the procedure and timeline for civil cases. A civil suit is instituted by the presentation of a plaint (in the format set out in the Code), which must include details of the cause of action, the facts showing that the court has jurisdiction and that the suit is filed within the period of limitation, and the relief claimed, along with a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees.

The plaint should have annexed to it a list of documents referred to or relied upon by the plaintiff that are relevant to the dispute and the claim.

A suit must include the whole of the claim that the plaintiff is entitled to make in respect of the cause of action; if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, their claim, they are precluded afterwards from suing in respect thereof (unless they have obtained leave of the court for that purpose). The plaint must be supported by an affidavit deposed by the plaintiff verifying the correctness of facts.

The defendant must issue its defence by way of filing a written statement within 120 days of receipt of the writ of summons. If the defendant does not appear or does not file a written statement, the court may proceed to hear the case, and may even pass judgment, *ex parte*.

The procedure thereafter is broadly as follows:

- Disclosure of documents: each party discloses, under oath, documents referred to and relied upon. The counterparty is entitled to inspect these documents and has the right to request the court to direct further disclosure or inspection. A party also has the right to request the other party to provide particulars or to answer interrogatories.
- Framing of issues: the court, in consultation with the parties, frames issues for determination in the suit.
- Evidence: oral testimony and witness evidence-in-chief is filed by way of an affidavit of evidence-in-chief, with a right of cross-examination by the counterparty.
- Hearing: the plaintiff, ordinarily, has the right to begin, and the other parties reply in turn. The party beginning has the right to reply generally on the whole case after all parties have stated their case.

A judgment must be pronounced within 30 days of the date of the conclusion of arguments, which is extendable to 60 days in exceptional circumstances. A decree must be drawn up within 15 days thereafter. The time taken for civil trials varies depending on the court and can be anywhere from five to 10 years (or shorter, if the proceeding is before a commercial court or division).

There is a right of first and second appeal, and they can take several years for adjudication.

### Case management

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

Under the Code of Civil Procedure, parties cannot control the procedure or the timetable. However, power is given to the courts to extend time-lines and to limit litigation delays through costs under the provisions of the Code.

Under the Commercial Courts Act, case management hearings are conducted to decide the next steps and timeline for the litigation, which are speedier than ordinary civil suits.

### Evidence – documents

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

Yes. During pendency of trial, parties have a duty to preserve documents and other evidence. Each party is required to share copies of the evidence relied on with counterparties and make the originals available for inspection. The Code of Civil Procedure also provides for discovery and interrogatories, and parties must produce documents unhelpful to their case if called upon to do so. Additionally, during cross-examination, a witness can be compelled to produce a document. The court also has the power to impose exemplary costs against a defaulting party that fails to disclose essential documents or wrongfully withholds or refuses to produce them.

### Evidence – privilege

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

Evidence in India is governed by the Indian Evidence Act 1872, which sets out categories of privileged communications and documents that (except in specific circumstances) cannot be disclosed, including:

- communications between spouses made in the maintenance of marriage;
- professional communications between a legal professional (including their employees) and their client, which are privileged unless the communication was in pursuit of an illegal purpose, or the commission of a crime or fraud has been observed by that legal professional since commencement of his or her engagement. Communications and advice rendered to employers by in-house lawyers employed full-time can, in certain cases, be treated as privileged, particularly if created for the purposes of litigation; and
- some official government communications and documents are also privileged, including unpublished official records relating to state affairs and communications with a public officer in their official capacity when disclosure of this information would be detrimental to public interests, and additionally, a magistrate, police officer or revenue officer cannot be compelled to disclose the source of information regarding commission of an offence.

### Evidence – pretrial

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

The general practice is to have direct evidence recorded through witness statements as affidavits filed prior to trial. Parties may introduce both factual and expert witness evidence.

### Evidence – trial

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

Oral evidence is now commonly recorded through affidavits of evidence-in-chief. Thereafter, the counterparty may cross-examine every such witness in open court. Often, this process is carried out before a court-appointed commissioner rather than in open court before the judge for efficiency.

### Interim remedies

#### 12 | What interim remedies are available?

The power to grant interim relief stems from the Code of Civil Procedure, whereby interim relief is available in the form of injunctions (including for the freezing of accounts), the attachment of property, the appointment of receiver, the furnishing of security, etc. Search and seizure orders may also be granted in certain cases. These interim remedies are not available in support of foreign proceedings.

### Remedies

#### 13 | What substantive remedies are available?

Substantive remedies are available in the form of:

- declarations;
- injunctions;
- specific performance;
- monetary relief in the form of damages or compensation, or both; and
- interest on the claimed amount.

Yes. Punitive or exemplary damages may be awarded by the courts, but in practice they are rarely awarded.

### Enforcement

#### 14 | What means of enforcement are available?

A decree can be executed by various means, including the payment of money, the delivery of possessions, the arrest and detention of the judgment debtor, and the attachment of property and sale.

Wilfully disobeying a court order amounts to civil contempt under the Contempt of Courts Act 1981 and is punishable with imprisonment of up to six months or with a fine of up to 2,000 rupees, or both.

### Public access

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

Court proceedings are usually held in 'open court', meaning that hearings are held in public, subject to the court's discretion as to the existence of circumstances that justify holding proceedings behind closed doors or in camera as set out in the Code of Civil Procedure. Instances that may necessitate in camera proceedings include sensitive matters of family law, those involving the reputation of the parties or issues involving privacy or business. Further, the confidentiality of

proceedings may also be maintained pursuant to an application made by a party to the proceedings.

Ordinarily, operative parts of judgments are pronounced in open court. Orders and judgments of the Supreme Court, high courts and district courts are available in the public domain, with digital copies being uploaded to their respective websites; pleadings, witness statements and documents relied on by parties may be specifically procured by filing an application with the relevant court and explaining the need for such document.

## Costs

### 16 | Does the court have power to order costs?

The general rule for the grant of costs is that costs follow the event (ie, the loser pays), and when departing from this rule, courts are to record the reasons therefor in writing. The Code of Civil Procedure and the Commercial Courts Act provide for awarding costs at the court's discretion. While ascertaining costs, the court takes into account the conduct of the parties. The Commercial Courts Act specifies that the costs that may be awarded are reasonable costs relating to witness fees and expenses, legal fees incurred and any fees incurred in connection with the proceedings. Interest can also be awarded on costs.

Under the Code, the court on its own motion or on an application of the defendant may pass a reasoned order directing the plaintiff to provide security for costs incurred or likely to be incurred by the defendant.

## Funding arrangements

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

The Bar Council of India Rules forbid advocates from agreeing to share the proceeds of litigation or a contingency fee. Contingency fees have been held by courts to be void and opposed to public policy and professional ethics as such an arrangement leads to a violation of an advocate's fiduciary duty towards clients.

There is no express legislation permitting third-party litigation funding in India, but the general consensus (with some detractors) is that it is permitted. This is born of certain provisions in the Civil Procedure Code and the Arbitration and Conciliation Act 1996. Judicial precedents have ruled that the principles of champerty and maintenance are not applicable in India, and accordingly, unless the funding agreement is particularly onerous, usurious or otherwise opposed to public policy, it should be permissible.

Lawyers cannot take up matters on a contingency or success fee basis and are not permitted to fund litigations in which they represent a litigant thereto. The Supreme Court in *BCI v A K Balaji* ([2018] 5 SCC 379) noted that advocates themselves cannot fund litigation on behalf of clients, but there is no restriction on third parties doing so.

## Insurance

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

Insurance that covers parties' legal costs is not uncommon in India, but it is unlikely to be blanket cover that protects an entity from any litigation. Instead, there are insurance policies that cover the legal costs of entities arising from or in relation to certain specific actions. For example, directors' and officers' liability insurance protects individuals

from personal losses arising out of them serving as directors or officers in an organisation (and may also cover the costs of the organisation in defending this claim), while employment practice liability insurance covers disputes arising between an employee and his or her employer.

## Class action

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

Yes, the ability of a group of plaintiffs to seek collective redress is available. The remedy of class actions enables an action to be brought by a few in the name of, and for the benefit of, many. Relevant statutes and provisions are briefly set out below.

## Representative actions

The Code of Civil Procedure enables plaintiffs to collectively bring a claim to court in a representative capacity for the benefit of a group or class of persons. Similar provisions enable a group of representative defendants to enter a defence on behalf of the entire group.

A representative action needs the permission of the court to proceed. Notice must be given to all persons interested, so that any person on whose behalf, or for whose benefit, the suit is instituted (or defended), may apply to be made a party, particularly as any decree passed will be binding on all members of the class.

## Public interest litigation

Public interest litigation filed by a few petitioners for the general benefit of the public is often filed for the enforcement of fundamental rights under the Constitution. This remedy is only available against government entities in performance of their duties. This route is not available against private entities performing private functions or for the enforcement of private or contractual rights. As this action is filed on behalf of the public at large, the petitioners are not required to have suffered the legal injury complained of or to be part of the affected class.

## Consumer protection

The Consumer Protection Act 2019 introduced the remedy of consumer class action, in which one or more consumers can file a class action on behalf of a group. Complaints may be filed in relation to any goods sold or delivered, provided the consumers have the same interest or grievance and seek the same relief on behalf of or for the benefit of the group.

The central and state governments are also empowered to file a complaint either in their individual or in their representative capacity for the interests of consumers in general.

## Companies Act 2013

Members and depositors of a company may, either individually or as a class, join together for redress and seek appropriate relief from the National Company Law Tribunal. There is a numerical threshold to be met as a condition to using this remedy: namely, a minimum of 100 members or 10 per cent of the total members of a company.

Relief may be sought against the company and its directors, auditors, experts, advisers or consultants for any fraudulent, unlawful or wrongful act, including monetary compensation or damages for commission of fraudulent acts or those that are prejudicial to the interests of the company or its members or depositors, or against public interest. Orders passed are binding on everyone concerned.

There is no maximum cap on the compensation or damages that may be awarded, or the manner in which they may be distributed among the applicants; this is left to the discretion of the Tribunal.

### Industrial Disputes Act 1947

Representative actions are permitted to be brought by workers' unions as a mechanism to promote collective bargaining to improve the conditions of workers. There also is a voluntary arbitration mechanism, whereby the appropriate government may (if satisfied that the parties in voluntary arbitration are the majority) also invite non-parties to present their cases to the arbitrator for adjudication of the dispute.

### Appeal

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

Decrees of civil courts are appealable by way of a first appeal to a higher court, unless specifically barred by statute. Thereafter, if there is a substantial question of law involved, a second appeal will go to a high court. A first appeal is a matter of right, while a second appeal is generally discretionary and more limited in scope. Appeals may go to the Supreme Court under the Constitution on a substantial question of law concerning a matter of public interest. Additionally, the Supreme Court may grant special leave to appeal any judgment, decree, determination, sentence or order passed by any court or tribunal in India if it involves a substantial question of law in the public interest.

### Foreign judgments

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

A foreign judgment is deemed to be conclusive unless proven otherwise. Under the Code of Civil Procedure, foreign judgments passed by superior courts in a reciprocating territory (identified by the government through gazetted notifications) can be enforced in India. Presently, only 13 countries are deemed to be reciprocating territories, including the United Kingdom, Singapore and the United Arab Emirates. A judgment from such territories is enforceable as a decree of an Indian court, unless:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- the proceedings in which the judgment was obtained are opposed to natural justice; or
- it has been obtained by fraud, etc.

The onus of proof in this regard is on the judgment debtor who is opposing enforcement.

The enforcement of a judgment from a non-reciprocating country must be through filing a substantive suit in India before the appropriate court on the back of this judgment. In such a case, the foreign judgment will be persuasive but will not be binding in the same way that it would have been if it had been a judgment from a reciprocating territory.

### Foreign proceedings

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

A request to examine a witness or obtain evidence situated within the jurisdiction of a particular high court in India in furtherance of civil proceedings before a foreign court may be communicated to that high court through: a letter from the highest consular officer of that country in India; a letter from that foreign court transmitted through the central government; or a party to those foreign proceedings producing such a letter from the foreign court before the high court. If a foreign court wishes to obtain evidence from a witness residing within the local limits of a particular high court in India in civil proceedings, that high court may, under the Code of Civil Procedure, issue a commission to examine

the witness on an application by a party to the foreign proceeding or on an application by a state government law officer.

Additionally, India is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, under which, on receipt of a letter of request issued by a foreign court for obtaining evidence, the letter must be transmitted to the authority appropriate to execute this request.

## ARBITRATION

### UNCITRAL Model Law

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

Yes, the Arbitration and Conciliation Act 1996 (the Arbitration Act) is based on the UNCITRAL Model Law, as is seen in its preamble.

The Arbitration Act is split into two parts: Part I applies to arbitrations seated in India and contains provisions setting out timelines and the broad procedure to be followed, and provisions relating to challenge and enforcement of awards; and Part II deals with enforcement of foreign awards and referring parties to arbitration (foreign-seated arbitration) where there is an arbitration agreement in existence.

### Arbitration agreements

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

An arbitration agreement (whether as a clause in a contract or a separate agreement) is one where the parties agree to submit all or specified disputes to arbitration that have arisen or may arise between them in the future relating to a defined legal relationship (whether contractual or not) and that are considered commercial. An arbitration agreement must be in writing (including through electronic means) and is deemed to be in writing if it is in a document signed by the parties, there is an exchange of communications recording this agreement or it is in statements of claim and defence in which one party has alleged the existence of an arbitration agreement and the other does not dispute this fact.

### Choice of arbitrator

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

Parties may agree upon any odd number of arbitrators to be appointed, the default position being a sole arbitrator. If there is no agreed procedure for the appointment of the tribunal or the parties cannot agree on an arbitrator, the appointment is made on the application of a party by the Supreme Court (for international commercial arbitrations) or a high court (in other cases).

India has incorporated much of the IBA Guidelines on Conflict of Interest into the Arbitration Act through the Fifth and Seventh Schedules (covering ground from the orange and red lists of the Guidelines). A challenge to an arbitrator's appointment is maintainable if there are circumstances giving rise to justifiable doubts as to his or her independence or impartiality (Fifth Schedule) or if he or she does not possess the qualifications agreed between the parties. Additionally, notwithstanding any prior agreement, if the prospective arbitrator falls afoul of the grounds of the Seventh Schedule, he or she is ineligible for appointment, unless the parties waive this condition by an express written agreement after the dispute has arisen.



## Arbitrator options

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

The parties are free to appoint any arbitrator of their choice, including both legal and technical experts. Generally, in the case of an international commercial arbitration, it is common for the sole or presiding arbitrator to be of a neutral nationality.

## Arbitral procedure

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

The procedure set out in the Arbitration Act broadly follows the UNCITRAL Model Law, but parties are free to agree to any procedure subject to compliance with the non-derogable provisions of the Arbitration Act. In the absence of agreed procedure, tribunals are empowered to conduct proceedings in a manner considered appropriate, which includes the power to determine the admissibility, relevance, materiality and weight of the evidence adduced. The Arbitration Act further states that tribunals shall not be bound by formal rules of civil procedure or evidence under Indian law.

## Court intervention

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

The Arbitration Act seeks to minimise judicial intervention and interference such that no judicial authority may intervene, except where specifically provided.

If a party unsuccessfully challenges the appointment of an arbitrator before the tribunal itself, it may thereafter apply to the court to set aside the final award. Parties may also apply to the court to decide on the termination of an arbitrator's mandate if he or she becomes *de jure* or *de facto* unable to perform his or her functions or fails to act without undue delay.

Recourse to the courts by way of appeal is available from orders of the court refusing to refer parties to arbitration, granting or refusing to grant interim relief and setting aside or refusing to set aside awards, and from orders of the tribunal ruling on its own jurisdiction or scope of authority and granting or refusing to grant interim relief.

## Interim relief

### 29 | Do arbitrators have powers to grant interim relief?

Yes. Interim relief under the Arbitration Act can be granted by courts and by arbitrators, with both having the same powers. Interim relief can be granted by arbitrators for:

- an interim measure of protection in respect of preservation;
- the interim custody or sale of any goods that are the subject matter of the arbitration agreement;
- securing the amount in dispute in the arbitration;
- detention, preservation or inspection of any property or thing that is the subject matter of the dispute; or
- an interim injunction or the appointment of a receiver.

Insofar as emergency arbitration is concerned, orders or awards passed by an emergency arbitrator in India-seated arbitrations are enforceable (as ruled by the Supreme Court in *Amazon.com* [(2021) SCC OnLine SC 145]). Emergency orders and awards passed in foreign-seated arbitrations are treated as not being directly enforceable, and it is usual to file a separate application for identical interim relief from a court on the basis of the emergency order or award.

Additionally, Indian courts have the power to grant interim relief in support of foreign-seated arbitrations, unless the relevant provisions are expressly excluded by agreement of parties to the contrary.

## Award

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

For purely domestic arbitrations (ie, between Indian parties), the award is to be made within 12 months of the date of completion of the pleadings, with an extension of six months by consent of the parties. Any further extensions must be by way of application to the court. In the case of international commercial arbitrations, the award is to be made expeditiously, with an endeavour to meet similar timelines.

Provision is also made for a fast-track procedure, wherein the tribunal dispenses with technical formalities and proceeds with a documentary hearing – with written pleadings, submissions and documents, and oral hearings only at the request of all parties or if deemed necessary. The award is required to be made within six months of the date upon which the tribunal enters reference.

An award must be in writing, stating its date and place of arbitration, and signed by all members of the tribunal (it is enough for the majority to sign the award as long as the reasons for omitting any signature is stated). The award must state the reasons therefor, unless otherwise agreed by the parties or if it is in pursuance of a settlement. A signed copy of the award will be delivered to each party.

The tribunal is empowered to make an interim award on any matter on which it can render a final award; unless otherwise agreed, tribunals may grant reasonable interest on whole or part of money forming part of the award, and for the whole or part of the period from the cause of action arising to the date of the award.

## Appeal

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

Section 34 of the Arbitration Act contains the limited grounds on which a party can challenge an award and seek that it be set aside (rather than appealed). The scope of review of an award is very narrow (along the same lines as set out in the New York Convention) and there is no review available on merits.

An award may be set aside if, on the basis of the tribunal's record, it can be established that:

- a party was under an incapacity;
- the arbitration agreement is invalid under the applicable law;
- a party was not given proper notice of the appointment of the arbitrators or the proceedings, or was unable to present his or her case; or
- the award deals with a dispute not falling within the scope of the reference to arbitration.

The court may also set aside the award if it finds that the subject matter is non-arbitrable, the enforcement thereof would be contrary to public policy or (in cases of domestic awards) the award is vitiated by patent illegality on the face of it.

The court, in exercise of its powers to set aside an award, cannot modify the award given the absence of a specific statutory provision.

An application to set aside an award must be made within three months of the date of receipt of the award (extendable by a further 30 days by the court, for sufficient cause).

An appeal is available against an order setting aside or refusing to set aside an award.

There is no provision for a second appeal; although, an aggrieved party may approach the Supreme Court for special leave to appeal

against any order or judgment on a substantive question of law in the public interest.

### Enforcement

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

A domestic award can be enforced once the time limit to challenge the award (ie, within three months of the date of receipt of the award) has lapsed or an application to set aside the award has been refused. An award is enforceable in the same manner as a decree of the court under the Code of Civil Procedure.

Pending adjudication of a set aside application, an award can be enforced unless it is stayed by the court on an application of the aggrieved party. The stay is usually conditional upon deposit of the award amount by the award debtor who filed the challenge.

An application for enforcement of a foreign award may be filed in any high court with jurisdiction over the location of the award debtor's assets. The enforcing party must produce the original or authenticated copy of the award, the original or certified copy of the arbitration agreement, and evidence that it is a foreign award before the executing court.

Indian law follows a two-step process for enforcement of foreign awards – the award must be made in a country that is a signatory to the New York Convention and this country must have been specifically notified as a reciprocating country by the Indian government in the Official Gazette.

Enforcement of a foreign award can be refused (on the grounds set out in the New York Convention) if the award debtor establishes that:

- it was under an incapacity;
- the arbitration agreement is invalid under the applicable law;
- a party was not given proper notice of appointment of arbitrators or the proceedings or was unable to present his or her case;
- the award deals with a dispute not falling within the scope of the reference to arbitration; or
- the composition of the tribunal was not according to the agreement (or to the law of the country of arbitration, if there is no such agreement).

Additionally, enforcement may also be refused if the subject matter is not arbitrable or if its enforcement would be against Indian public policy.

### Costs

33 | Can a successful party recover its costs?

The general rule is that costs follow the event, and the unsuccessful party is ordered to pay costs of the successful party, subject to a contrary order of the court or the tribunal with written reasons therefor. The award of costs is discretionary, and the costs that may be awarded include reasonable costs relating to the fees and expenses of arbitrators and witnesses, legal fees and expenses, any administrative fees of any institute supervising the proceedings and any other expenses that may have been incurred by the party in connection with the proceedings and award. While ascertaining costs, the court or tribunal considers the conduct of the parties, whether a party raised frivolous claims that delayed proceedings and whether any reasonable settlement offer was refused. From a practical perspective, actual costs are not granted in most cases, although that is changing.

There is no judicial precedent in relation to recovery of other costs, including third-party funding costs.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

Apart from arbitration, other forms of ADR that are popular and widely adopted in India are *Lok Adalats*, mediation and conciliation.

### Requirements for ADR

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

Under the Commercial Courts Act, no suit is to be instituted unless the plaintiff exhausts the remedy of pre-institution mediation, unless the suit contemplates urgent interim relief.

Although there is no mandate for ADR prior to filing a suit or invoking arbitration under the Code of Civil Procedure or the Arbitration Act (it is based solely on the contract between the parties), both courts and arbitral tribunals encourage parties to settle their disputes.

Part III of the Arbitration Act provides for conciliation and provides that a settlement agreement through conciliation may be enforced in the same way as an award with the consent of the parties.

Last year, the government issued the Mediation Bill 2021, which mandates pre-litigation mediation before approaching any court or certain tribunals as notified. The Bill also provides that mediated settlement agreements will be final, binding and enforceable in the same manner as court judgments.

Additionally, some statutes contain requirements for pre-institutional ADR or empower the court to encourage amicable settlement even during proceedings.

## MISCELLANEOUS

### Interesting features

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

The Indian dispute resolution system has a few interesting features of arbitration and litigation, including:

- the Fourth Schedule of the Arbitration Act determines the fees for arbitrators appointed by the court based on the value of the dispute; and
- article 142 of the Constitution is a catch-all provision that gives the Supreme Court wide authority to do what it deems necessary for 'doing complete justice' in any case. This is a power to be used sparingly, and it is usually invoked only if absolutely necessary.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

### Key decisions of the Supreme Court

There were three cases of note in 2021:

- The Supreme Court in *PASL Wind Solutions v GE Power Conversion* ([2021] 7 SCC 1) clarified a long-disputed position of law, ruling that two Indian parties are free to agree to arbitrate in a foreign seat, and that this agreement was not in derogation of the Indian

Contract Act or the Arbitration Act. Additionally, the Court also held that it would be open to the parties to these proceedings seeking interim relief from the courts in India.

- The Supreme Court in *Amazon.com NV Investment Holdings v Future Retail* [(2021) SCC OnLine SC 557] confirmed that an award rendered by an emergency arbitrator in an India-seated arbitration is enforceable as an interim order passed by a domestic arbitral tribunal under the Arbitration Act.
- The Supreme Court in *Lok Prahari v Union of India* [(2021) SCC OnLine SC 333], ruled that article 224A of the Constitution can be invoked to appoint retired judges to various high courts on an ad hoc basis to reduce the number of vacancies and deal with the backlog of pending cases. While doing so, the court also stated that these appointments cannot be a substitute for regular appointments.

#### Policy and legislative developments

The Arbitration and Conciliation (Amendment) Act 2021 introduced two major changes:

- It replaced the provision setting out norms for the accreditation of arbitrators (inserted by the 2019 Amendment), with a provision stating that these stipulations would be as set out in the regulations.
- It clarified that a court, in exercise of its powers to enforce a domestic award, must stay such enforcement unconditionally, pending the disposal of the proceedings to set the award aside, if it finds prima facie that the arbitration agreement forming the basis for the award or the making of the award was induced or effected by fraud or corruption.

By virtue of the Insolvency and Bankruptcy Code (Amendment) Act 2021, the pre-packaged insolvency resolution process for micro, small and medium-sized enterprises was introduced, which enables the debtor to be in control during the insolvency resolution process. The process itself also has a stricter timeline.

The Tribunal Reforms Act 2021 was enacted to amend several statutes, including the Protection of Plant Varieties and Farmers' Rights Act 2001, the Cinematograph Act 1952, the Trade Marks Act 1999, the Copyright Act 1957, the Customs Act 1962, the Patents Act 1970, the Airports Authority of India Act 1994 and the Geographical Indications of Goods (Registration and Protection) Act 1999. The Tribunal Reforms Act dissolves certain existing appellate tribunals and transfers their functions to other existing judicial or quasi-judicial bodies, with a view to rationalising and consolidating the functioning of the tribunals.



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# Indonesia

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## LITIGATION

### Court system

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

The court system is administered by the Supreme Court as one of the two institutions (the other being the Constitutional Court) authorised to administer Indonesia's judicial system, pursuant to Law No. 48 of 2009 regarding Judicial Authority (the Judiciary Law). Under the authority of the Supreme Court, the courts of first instance are divided into general courts, religious courts, state administrative courts and military courts.

General courts adjudicate criminal and civil matters, comprising district courts as the courts of first instance, high courts as the appellate courts and the Supreme Court as the court of cassation and the highest judicial authority. A minimum of three judges, in an odd number, must comprise a judicial panel at each level of the court system, unless stipulated otherwise by law. Simple claims involving disputes of a value less than 500 million rupiahs are heard by a single judge (instead of a three-member panel). Attached to the general courts are special courts administered to examine and adjudicate specific matters related to criminal and civil matters:

- Industrial relations courts adjudicate disputes arising from or in relation to an employment relationship, including disputes over the termination of employment and disputes involving labour unions. An ad hoc judge will be appointed in each case before the industrial relations court, but the case will still be presided over by a career judge. Decisions of the industrial relations courts may not be appealed, and parties may only pursue the cassation process at the Supreme Court.
- Commercial courts adjudicate matters concerning intellectual property rights, the suspension of debt payment obligations (PKPU) and bankruptcy. For PKPU and bankruptcy, the commercial courts do not have an appeals process to the high courts, but parties may pursue cassation directly at the Supreme Court.
- Anti-corruption courts adjudicate corruption cases. There may be ad hoc judges assigned to examine and adjudicate cases.

Religious courts adjudicate civil and commercial matters based on Islamic law. The parties to disputes examined and adjudicated by religious courts must be Muslim or *shariah*-based institutions.

State administrative courts adjudicate matters related to state administrative objects.

Military courts adjudicate criminal acts committed by military personnel and compensation owed to the parties injured, as well as administrative disputes within the military.

### Judges and juries

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

Juries are not recognised in Indonesia. As a civil law country, Indonesian courts are largely inquisitorial. However, judges in civil proceedings adopt a more passive role compared to judges in criminal proceedings, only deciding on disputes and arguments brought forth by the disputing parties and granting relief that is sought by the disputing parties. Judges in civil proceedings decide a dispute based on the preponderance of evidence; they are not empowered to request additional evidence beyond what the parties have formally presented. However, judges may enquire further into the relevance and materiality of each factual piece of evidence underpinning every claim as necessary to reach a legal conclusion. Each panel of judges is selected by the chief of the court after a case is registered. The chair of the panel will be a senior judge deemed capable according to the assessment of the chief of court.

In response to the small number of new judges being appointed, the Supreme Court issued Regulation No. 2 of 2017 regarding the Appointment of Judges, as amended by Supreme Court Regulation No. 1 of 2021. The regulation sets out the authority of the Supreme Court to appoint judges, the procedure and selection process, the process of recommendation and appointment of judicial candidates and the status of candidates that fail the mandatory training. This regulation is pending the approval of the Indonesian legislature.

Judges are often transferred to different courts in various regions in Indonesia every three to five years. Judges may be transferred earlier (ie, after two years) for personal reasons, such as a compelling family matters or an urgent medical condition involving the judge or a member of their family.

### Limitation issues

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

Pursuant to article 1967 of the Indonesian Civil Code, civil claims relating to both rights in rem and in personam are subject to a 30-year statute of limitations. The time limit may be suspended by law in certain cases, namely under articles 1986 to 1992 of the Indonesian Civil Code. The 30-year time limit generally applies to obligations that by nature are valid for an indefinite period. The time limit may be suspended by agreement of the parties, and the civil claim shall expire upon lapse of the agreed time limit.

Certain laws provide shorter time limits for specific types of claims. Claims related to shipping, as provided in articles 741, 742, and 743 of the Indonesian Commercial Code, have limitations of one, two, three or five years, depending on the nature of the claim. Aviation claims are subject to a limitation of two years for claims relating to domestic flights, as provided in article 177 of Law No. 1 of 2009 regarding Aviation, and two years for claims relating to international flights, as provided in article 35(1) of the 1929 Warsaw Convention, which was ratified by

Indonesia in 1933. Claims for certain professional services, such as those provided by doctors, lawyers, teachers and notaries, are subject to a two-year limitation, as provided in articles 1968 to 1970 of the Indonesian Civil Code.

### Pre-action behaviour

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

Before a contractual claim is submitted, the defendant will usually have been served up to three warning letters by the plaintiff, essentially alleging breach of contract followed by a request for compensation. This requirement does not apply if the contract specifies the conditions, circumstances or actions that automatically amount to a breach of contract.

### Starting proceedings

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

As regulated under article 118 of the Indonesian Civil Procedural Code (HIR) and article 10 of the Civil Procedural Code for islands outside of Java, proceedings are commenced when the plaintiff submits a statement of claim for registration to the district court. If the plaintiff is represented by counsel, it should also submit a legalised power of attorney. The district court shall then determine the exact date and time to start the examination of the case. Article 122 of the HIR further regulates that the bailiff, at the instruction of the district court, will summon the disputing parties to appear before the panel of judges. The timing of service of the defendant with the claim documents depends on the distance of the defendant's domicile from the court. It can be eight, 14 or 20 days before the date of first hearing, which shall be determined on a case-by-case basis. In pressing circumstances, the defendant may be summoned to appear earlier, but not less than three days before the start of the hearing phase. Service to defendants domiciled outside of Indonesia is governed by the cooperation scheme between the Supreme Court and the Ministry of Foreign Affairs, which was manifested in a memorandum of understanding dated 20 February 2018 (2018 MOFA-SC MOU). Indonesian courts, through the Supreme Court, shall issue a request for service of court documents addressed to the destination country. The service requirements shall follow the procedure of the destination country, where the Indonesian mission in that country will coordinate with the relevant judicial authority to affect the service.

Parties are usually summoned and served with court documents via mail. However, the Supreme Court issued Regulation No. 1 regarding Electronic Administration and Court Proceedings 2019 (PERMA 1/2019), which facilitates online case registration via the Court Information System. If the plaintiff chooses to register the lawsuit online using PERMA 1/2019, the parties will be electronically summoned by the bailiff and court documents will be served through the 'electronic domicile' (email addresses) of the parties.

In the statement of claims submitted, the plaintiff must provide information on the identity of both parties, the type of claim (either breach of contract or tort or unlawful act) and the relief requested.

The courts are generally capable of listing disputes in a timely manner, but proceedings are regularly delayed. To address the issue of delays, the Supreme Court, through Circular Letter No. 2 of 2014, mandated district courts to resolve cases within five months and appeals in the high courts to be decided within three months. District court judges may request an extension with the approval of the chief of the relevant district court.

### Timetable

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

During the first day of a hearing, if all the parties named in the lawsuit are present, the parties will be required by the panel of judges to undergo a court-mandated mediation to try and reach an amicable settlement. The proceedings will be adjourned for 30 days for the mediation process. If the mediation is unsuccessful and no extension of up to an additional 30 days is requested, the proceedings will commence with the plaintiff's claims.

Hearings for civil disputes are normally conducted with a one- to two-week interval between each phase, in the following order:

- The plaintiff reads the statement of claims.
- The defendant submits its statement of defence to the plaintiff's claims and may also submit a counterclaim. If the defendant raises a jurisdictional or procedural challenge at this stage and it is accepted, the court will render an interlocutory judgment declining the plaintiff's claims for further examination. The plaintiff is given the right to appeal the interlocutory judgment to the high courts.
- The plaintiff submits its rejoinder to the defendant's statement of defence and its defence to the defendant's counterclaim.
- The defendant submits a response to the rejoinder and any rejoinder to the plaintiff's defence to the defendant's counterclaim.
- The parties – the plaintiff first and the defendant second – submit their respective documentary evidence to be verified by the court.
- The court will examine the parties' witnesses (ie, factual witnesses and experts). The witnesses and experts are to present their testimony orally and must be presented under oath.
- The parties have the option to submit a concluding memorandum.
- The panel of judges will determine a date to render the final judgment.

Within 14 days of the district court rendering its final judgment, the dissatisfied party may file a notice of intention to appeal to the high courts. Appeals in the high courts should be decided within three months.

Simple claims for disputes of less than 500 million rupiahs are heard in an expedited procedure that must be concluded within 25 days of the date of the first hearing.

### Case management

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

Article 2(4) of the Judiciary Law imposes on the courts the duty to conduct proceedings in a straightforward, expedient and cost-efficient manner. However, in a civil dispute, the parties can suggest and agree on a timetable for the hearings. This timetable would then have to be approved by the panel of judges.

### Evidence – documents

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

Indonesian court procedure does not regulate the discovery process. Parties do not have an obligation to share or disclose evidence or documents before the proceedings.

### Evidence – privilege

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

Advocates are obliged to maintain the confidentiality of any information communicated by their clients as part of attorney-client privilege,

as stated in article 19 of Law No. 18 of 2003 regarding Advocates (the Advocates Law). This includes documents and correspondence exchanged with and obtained from clients during an advocate's professional legal services. In-house lawyers are regarded as employees providing legal services to employers rather than as advocates as defined in the Advocates Law. Therefore, their advice to their employers is not subject to attorney-client privilege.

### Evidence – pretrial

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

Parties do not have an obligation to share or disclose evidence or documents before the proceedings. No written statements of witnesses and experts are exchanged in advance. Evidence must be directly addressed by the parties through their arguments during trial.

### Evidence – trial

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

The evidentiary hearing commences after the exchange of written arguments. Presentation of documentary evidence is a sufficient means to prove a civil case. Documents submitted as evidence must be presented at trial, and the counterparty is entitled to review the documents submitted but not to receive copies thereof.

Witness testimony is classified as evidence under article 1866 of the Indonesian Civil Code and article 164 of the HIR for civil disputes. Witness testimony must be given orally and in person at the hearing. This means the testimony must be presented by the witness without any representation and it cannot be made in writing. Witnesses have a legal obligation to appear during court proceedings; the law imposes sanctions for witnesses who fail to appear after being properly summoned. Judges will postpone the hearing or set another hearing date for the examination of witnesses who fail to appear at the initial hearing. Experts appointed by the parties must also present their evidence orally. For proceedings conducted under the framework of PERMA 1/2019, the examination of witnesses may be conducted remotely, which will have the same effect as an examination conducted in open court. However, remote hearings under PERMA 1/2019 still require the parties' agreement.

### Interim remedies

12 | What interim remedies are available?

The Indonesian laws on civil procedure lack any definition of interim remedies, provisional measures or rules defining the conditions warranting these measures. Nevertheless, courts regularly grant measures to protect the parties' rights forming the subject matter of a claim or to preserve the object of dispute while proceedings are ongoing. This includes granting restraining orders and security attachments over a defendant's assets. These remedies are not available in support of foreign proceedings. However, foreign courts may request certain judicial assistance from Indonesian courts with respect to searching and identifying individuals and assets, as facilitated by the cooperation scheme under the 2018 MOFA-SC MOU.

### Remedies

13 | What substantive remedies are available?

The available substantive remedies for contractual claims are compensation for losses, interests and costs. This includes loss of profits or loss of opportunities, if they are quantifiable. Substantive remedies for

unlawful acts (tort) are compensation for material and non-material losses. Article 1250 of the Indonesian Civil Code also stipulates a moratory interest on a monetary judgment (ie, 6 per cent per year calculated from the date of judgment). Specific performance or injunctive relief is very rare in the Indonesian courts as it is difficult to enforce and execute. There have been no known instances where the Indonesian courts granted punitive damages.

### Enforcement

14 | What means of enforcement are available?

Once a judgment is deemed final and binding, the winning party must submit an application for enforcement to the district court where the losing party is domiciled. The district court will issue an execution warning based on article 196 of the HIR, ordering the losing party to comply with the judgment within eight days. If the losing party fails to comply, the court may issue an attachment order against the losing party's assets or property that are identified in the application for enforcement. These assets will be confiscated, usually with the assistance of the police, and publicly auctioned. Enforcement of bank account assets may be done by notifying the court of the target bank and account number, and blocking and encashing the account.

### Public access

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

Most court hearings are held in public, except for certain matters such as divorce cases. The open nature of court hearings means that court documents should be readily accessible by the public. However, in practice, documents related to the proceedings will only be made available to, or with the written authority of, the parties concerned.

### Costs

16 | Does the court have power to order costs?

Indonesian civil procedure has no specific rules governing the power of the court to order costs. The losing party must pay the court fees, which comprise the operational costs of proceedings and the registrar's (administrative) fees (eg, stamp duty, the conveyance of documents submitted and the cost to deliver notices). As held in Supreme Court Case No. 3557 K/Pdt/2015, Judgment of 29 March 2016, each party is responsible for bearing its own legal costs. For that reason, the Supreme Court in that case refused the request that the losing party bear the winning party's legal costs. Security for costs is not recognised in the Indonesian legal system.

### Funding arrangements

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

Indonesian civil procedure is silent on litigation financing and, therefore, there is no express prohibition against certain arrangements. Litigants usually fund their own cases, sometimes involving certain arrangements with their lawyers. They may agree on a fixed lump sum, hourly rates or another type of arrangement, including retainers and contingency fees.

Indonesia does not currently have any regulations pertaining to third-party funding for disputes. To date, there is no publicly available jurisprudence of the Indonesian courts relating to the use of third-party



funding. There are also no associations or companies in Indonesia recorded as having a formal presence in the business of providing third-party funding for litigation.

### Insurance

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

Indonesia does not currently have regulations pertaining to insurance specifically for litigation costs. However, professional individual insurance is generally available to indemnify a party's litigation costs.

### Class action

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

Litigants may bring a class action lawsuit if there is a large number of people who wish to submit a claim with the same facts, circumstances and legal basis, pursuant to article 1(a) of Supreme Court Regulation No. 1 of 2002. The class representative must represent the interests of the members of the group that must be protected. Class actions adopt the opt-out procedure, meaning class members can opt out of the claim after being notified by the class representative. Class actions in Indonesia are most often initiated in connection with environmental disputes or consumer protection matters.

### Appeal

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

A party may submit an appeal to a high court if they find the judgment of the district court incorrect or unfair. The party should file a notice of intention to appeal within 14 days of the district court rendering a judgment. The appealing party can submit a memorandum of appeal outlining the arguments on appeal in writing, but this is not mandatory.

Pursuant to article 23 of the Judiciary Law, right of further appeal is provided in the form of cassation to the Supreme Court. A request for cassation should be submitted to the Supreme Court through the district court that issued the first judgment in the case. The timeline for submitting a request for cassation is the same as the timeline for submitting an appeal to a high court (ie, within 14 days of the high court rendering its appeals judgment). However, submission of a memorandum of cassation, as well as a counter-memorandum of cassation, is mandatory at this stage.

In certain cases, a final and binding judgment can also be challenged by filing for a judicial review in the Supreme Court based on limited grounds pursuant to article 67 of the Judiciary Law. These limited grounds include the existence of fraud or forgery tainting the judgment, the discovery of new and material evidence, an excess of power by the judges, the failure to provide proper legal consideration, a contradictory ruling with a previous judgment on the same subject matter and the occurrence of a manifest error or mistake.

### Foreign judgments

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

Pursuant to article 436 of the Civil Procedural Code for islands outside of Java, foreign judgments are not immediately recognised and enforced in Indonesia, except if this recognition and enforcement mechanism is provided by a convention or reciprocal agreement with another country that binds Indonesia. At the time of writing, Indonesia is not party to any such convention or agreement. Therefore, to enforce a foreign judgment,

a litigant must commence a new lawsuit and relitigate the case at the relevant district court in Indonesia, where the foreign judgment may be presented as evidence. The only other exception is foreign judgments pertaining to the calculation and apportionment of general average claims, where they shall be recognised and enforced by Indonesian courts pursuant to article 724 of the Indonesian Commercial Code.

### Foreign proceedings

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

Indonesia is not a contracting party to the 1970 Hague Evidence Convention. Foreign courts may request assistance from Indonesian courts to obtain the testimony of witnesses located in Indonesia through a mechanism established in the 2018 MOFA-SC MOU. Requests for judicial assistance are made in the form of letters rogatory, where the Ministry of Foreign Affairs shall assist foreign courts in the exchange of letters rogatory through diplomatic channels to the Supreme Court, which will forward the letters to the Indonesian courts for their follow-up. This mechanism is silent on the maximum time limit for judicial assistance.

## ARBITRATION

### UNCITRAL Model Law

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

Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (the Arbitration Law) is not based on the UNCITRAL Model Law. There has been no formal proposal to amend the Arbitration Law and incorporate provisions of the UNCITRAL Model Law. Discussions surrounding this matter have largely been academic.

### Arbitration agreements

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

Pursuant to article 1 of the Arbitration Law, an arbitration agreement must be made in writing. It may be in the form of an arbitration clause within a written contract or, if the arbitration agreement is concluded after a dispute has arisen, in a separate written agreement to arbitrate. In cases where the parties cannot sign the separate written agreement, the arbitration agreement must be executed in notarial deed form (article 9(2) of the Arbitration Law). Article 9(3) of the Arbitration Law imposes formal requirements for a separate written agreement to arbitrate, which must contain:

- the issue or issues in dispute;
- the full names and places of residence of the parties;
- the full name and place of residence of the arbitrator or arbitral tribunal;
- the place where the arbitrator or arbitral tribunal will make decisions;
- the full name of the tribunal secretary;
- the time limit of dispute resolution;
- a statement of intent from the arbitrator; and
- a statement of intent of the disputing parties to bear all costs required for dispute resolution through arbitration.

Failure to fulfil the above formal requirements shall render the arbitration agreement null and void. There is no similar formal requirement with respect to an arbitration clause.

## Choice of arbitrator

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

In the absence of an agreement on the number and method of appointing arbitrators in the arbitration agreement or the arbitration rules, article 13 of the Arbitration Law provides for the chief of the relevant district court to appoint the arbitrator or tribunal. The Arbitration Law provides the default mechanism to appoint a sole arbitrator or the three arbitrators constituting a tribunal. For arbitration agreements providing for a sole arbitrator, the chief of the relevant district court can appoint the sole arbitrator if the parties are unable to designate the person within 14 days of the claimant notifying the respondent of the dispute. If the arbitration agreement provides for three arbitrators, each of the parties will appoint one arbitrator and the two arbitrators must appoint a third and presiding arbitrator. If they fail to do so, the chief of the relevant district court can appoint the third arbitrator.

Appointment of an arbitrator can only be challenged within 14 days of his or her appointment by way of a written objection filed to the other party and to the arbitrator concerned. Article 22 of the Arbitration Law provides that the appointment of an arbitrator can be challenged based on sufficient reasons and authentic evidence giving rise to justifiable doubts as to the arbitrator's independence or impartiality. An appointment can also be challenged if a party can prove that the arbitrator has a family, financial or work relationship with the other party or its attorneys. There is no restriction on the right to challenge an arbitrator appointment.

## Arbitrator options

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

Article 12 of the Arbitration Law establishes that arbitrators must be at least 35 years old and have at least 15 years of experience in their field of expertise. These requirements have been subject to criticism owing to the vagueness of the benchmark for competence and the rationale behind a minimum age restriction, unnecessarily limiting the pool of qualified young arbitrators. The Indonesian National Arbitration Board (BANI) has its own pool of over 100 arbitrators consisting of Indonesian and foreign nationals.

## Arbitral procedure

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

Article 36 of the Arbitration Law stipulates that, by default, arbitrations under Indonesian law are to be documents-only proceedings, and an oral hearing may be held only with the approval of the parties or if the tribunal deems it necessary. Article 48 of the Arbitration Law imposes a 180-day time limit on the arbitral proceedings, which may be extended as necessary and with agreement of the parties. In the absence of an agreed procedure, the arbitration shall be conducted in accordance with articles 38 to 48 of the Arbitration Law, which largely mirrors the civil court procedure but with greater flexibility afforded to the arbitrators.

## Court intervention

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

Article 11(2) of the Arbitration Law precludes courts from intervening in any dispute subject to an arbitration agreement. Notwithstanding

this, some district courts still entertain cases subject to an arbitration agreement. This was the case in the *Himpurna* dispute in 1999, where the Central Jakarta District Court issued an injunction to suspend an ongoing UNCITRAL arbitration case despite the lack of authority under the Arbitration Law.

## Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators are empowered to grant interim relief pursuant to article 32(1) of the Arbitration Law, namely to regulate the order of proceedings, including granting the attachment of assets, ordering the deposit of goods to a third party or ordering the sale of perishable goods. However, the Arbitration Law does not provide for court-ordered interim measures or enforcement mechanisms for interim awards. Thus, the parties do not have recourse to the Indonesian courts to obtain or enforce such measures.

## Award

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

An award rendered in Indonesia must be delivered in writing with a header that states 'for the sake of Justice based on belief in the Almighty God', pursuant to article 54 of the Arbitration Law. An award must also contain:

- the case title;
- a brief summary regarding the background of the dispute;
- the positions of the parties;
- the full names and addresses of the arbitrators;
- the reasoning and conclusion of the arbitrators resulting in a specific order or instruction; and
- any dissenting opinion.

Failure to fulfil any of the above requirements shall render the award unenforceable.

## Appeal

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

An award is final and binding and may not be subject to appeal, cassation or review (article 60 of the Arbitration Law). Nevertheless, a party may request the relevant district court to set aside an award based on the grounds of article 70 of the Arbitration Law (ie, false or forged letters or documents submitted in the arbitration hearings, discovery of material documents intentionally concealed by a party after the award is rendered or where an award was rendered as a result of fraud committed by one of the parties to the dispute). The judgment on the setting aside may be appealed to the Supreme Court, which will make a final decision.

## Enforcement

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

Pursuant to article 59 of the Arbitration Law, domestic awards must be registered within 30 days to the district court of the respondent's domicile and requested with an enforcement order. Awards that have been signed by the chief of the district court with an enforcement order shall be enforced in accordance with the procedure for enforcing final and binding court judgments. An Indonesian court can refuse the enforcement of a national award if the underlying arbitration agreement is absent or invalid, the dispute is not commercial in nature, the dispute cannot legally be resolved through arbitration (eg, family law

matters and criminal offences) or the award contradicts public policy in Indonesia (article 62(2) of the Arbitration Law). A decision refusing the enforcement of a foreign award may be challenged directly to the Supreme Court for cassation.

The enforcement of foreign awards in Indonesia is regulated by articles 65 to 69 of the Arbitration Law and Supreme Court Regulation No. 1 of 1990 regarding the Procedure for the Enforcement of Foreign Arbitral Awards (PERMA 1/1990), which is the implementing legislation of the New York Convention in Indonesia. Enforcement of foreign awards must be pursued before the Central Jakarta District Court, and the decision to enforce a foreign award may not be subject to appeal or cassation. Enforcement of foreign awards can be refused pursuant to article 66 of the Arbitration Law if the award:

- was rendered in a country not bound by any bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards with Indonesia;
- does not fall within the scope of commercial law under Indonesian law; or
- contradicts public policy in Indonesia.

In addition, Indonesian courts have directly applied the grounds to refuse enforcement provided in article V of the New York Convention, but it is not possible to identify a consistent approach taken by Indonesian courts in dealing with the issues enumerated therein. For example, in assessing the rights of the party to present its case and whether there is any irregularity in the procedure during enforcement proceedings, Indonesian courts tend to apply Indonesian laws instead of looking at the law of the seat. In *Trading Corporation of Pakistan Limited v PT Bakrie and Brothers* (Case No. 64/Pdt/G/1984/PN.Jkt.Sel), the South Jakarta District Court refused to enforce an award rendered in London, reasoning that the tribunal failed to hear both parties adequately pursuant to the requirement under Indonesian law. Indonesian courts also conduct similar assessments of Indonesian laws when refusing enforcement based on violation of Indonesian public policy under article V(2)(b) of the New York Convention. The only definition of Indonesian public policy is found in article 4(2) of PERMA 1/1990, which states that 'An *exequatur* (enforcement order) shall not be granted if the award violates the fundamental basis of the entire legal system and society in Indonesia (public order).' This broad definition of Indonesian public policy renders any incompatibility with mandatory provisions of Indonesian law or Indonesia's national interests as a ground to refuse enforcement under article V(2)(b) of the New York Convention. In practice, this definition gives Indonesian courts considerable discretion to take an expansive approach to what constitutes violation of public policy (eg, violation of the prevailing laws and regulations in Indonesia), harm to national interests (eg, harm to the national economy) or a violation of Indonesian sovereignty.

## Costs

### 33 | Can a successful party recover its costs?

Indonesia does not currently have regulations pertaining to cost recovery or third-party funding for arbitration. The BANI Rules are silent on these matters. They may be governed by the arbitration rules selected by the parties.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The main ADR methods in Indonesia are mediation, adjudication and conciliation, with mediation being the most popular. Most Indonesian



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parties attempt to settle disputes amicably through discussion and negotiation without a particular ADR framework. ADR is commonly used in sectors such as construction and mining. Construction disputes are often settled through adjudication, but there is currently no formal adjudication mechanism or regulation in Indonesia.

## Requirements for ADR

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

Court-annexed mediation is mandatory at the start of court proceedings, where each court maintains a list of approved mediators to be appointed if the parties do not appoint one. Mediation held in the court premises using a mediator provided by the court is free, where the mediator is typically another judge not sitting in the case concerned. The procedure for court-annexed mediation follows the procedure set out in Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure.

Article 45 of the Arbitration Law requires arbitrators to attempt an amicable settlement of the parties' dispute at the beginning of the arbitration. However, the Arbitration Law does not further specify the procedure or time limit for such amicable settlement. This is usually at the discretion of the arbitrator and the willingness of the parties to settle the dispute amicably. Mediation is also encouraged before resorting to litigation or arbitration, although there is no mechanism to compel mediation during the proceedings.

## MISCELLANEOUS

### Interesting features

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

No.

**UPDATE AND TRENDS****Recent developments**

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The Indonesian Ministry of Defence filed a claim before the Central Jakarta District Court resisting an International Chamber of Commerce arbitral award rendered in April 2021. The arbitration arose from an aborted military satellite project, where the Singapore-seated tribunal rendered an award in favour of the claimants (the Hungarian technology group Navayo Group and the Hungarian state-owned export credit agency MEHIB). The tribunal ordered the Ministry, as the respondent, to pay US\$20 million plus interest, as well as US\$1.85 million in costs, including the claimants' third-party funding costs. The Ministry failed to apply to the Singapore courts to set aside the award, and Navayo filed recognition proceedings in Jakarta in December 2021. Curiously, in the Central Jakarta District Court proceedings, in Case No. 64/Pdt.G/2022/PN Jkt.Pst, the subject matter of the lawsuit was titled 'setting aside of arbitral award' despite the award being rendered in Singapore and not in Indonesia. This is a high-profile case, where Indonesian officials at the same time were investigating possible embezzlement and misuse of power at the Ministry of Defence over the cancelled contracts.

In the context of civil litigation, Indonesian courts have begun to recognise and accept submissions from amici curiae, which previously were usually submitted only for criminal and administrative proceedings. The proceedings initiated before the District Court of Padang Sidempuan in Case No. 9/Pdt.G/LH/2021/PN Psp attracted five amicus curiae briefs filed by academics, foreign experts and civil society organisations. The plaintiff claimed damages for unlicensed zoo business activities and the illegal control and display of an endangered species (the Sumatran orangutan). The case was reportedly the first lawsuit over animals launched in Indonesia.

# Israel

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## LITIGATION

### Court system

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

The Israeli court system, in the civil branch, is comprised of three instances. Magistrate courts are the lowest level of trial courts, and they preside over most cases, in particular monetary claims that are under 2.5 million shekels. Cases in the magistrate courts are heard by a single judge.

The district courts are an intermediate level instance. They serve as an appellate court for the magistrate courts (normally in panels of three judges) and serve as the court of first instance for monetary claims exceeding 2.5 million shekels (typically with one judge hearing the case). In addition, the district court has jurisdiction in certain matters defined by the law, including real estate ownership claims, certain corporation matters, corporations' bankruptcy and administrative matters. Furthermore, the district court has residual jurisdiction over civil matters that are not covered by the magistrate courts; that is, jurisdiction to hear any matter that is not within the jurisdiction of another court.

There are several specialised courts, such as traffic, labour, juvenile, military, family, and municipal courts. Cases of personal status are typically decided by religious courts that have exclusive jurisdiction in matters of matrimony and divorce, and may have consensual jurisdiction on matters such as maintenance, guardianship and adoption. This applies to couples from the same religion, who are obligated to the tribunals of their religious communities (eg, Jewish rabbinical courts, Muslim Sharia courts, Druze religious courts and ecclesiastical courts of the recognised Christian communities in Israel).

The Supreme Court is the ultimate appellate jurisdiction nationwide. In civil matters it normally sits in panels of three justices, except for certiorari requests that are normally decided by one justice. In rare cases, the Supreme Court enlarges its panel with an uneven number of justices (eg, in cases of retrial). In constitutional cases, the Supreme Court often serves as the court of first instance when presiding as a High Court of Justice.

### Judges and juries

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

Israeli civil courts are comprised of professional judges. There is no jury system. The legal system is basically adversarial. Nonetheless, the judges have discretion to exercise some inquisitorial elements and characteristics. Hence, occasionally, during the pretrial the judge may even cross-examine a key witness or a party in certain circumstances to decide on some of the issues at an early stage. Also, later, during the cross-examination of witnesses, the judge may intervene and ask witnesses some questions. This may be attributed to the classification

of the Israeli system as a mixed legal system, with Anglo-American and continental influences. Following a recent civil procedure reform (2021), the judges received broadened authorities to conduct legal proceedings in an efficient and just manner. This reform, which is in its nascent stages, is likely to be implemented in a manner that is more inquisitorial than beforehand.

### Limitation issues

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

The default limitation time for bringing civil claims to court is seven years, according to the statute of limitations. Certain claims are subject to shorter or longer limitation periods. For example, the limitation period for real estate claims is 15 or 25 years, depending on the type of land registry, and in insurance claims the limitation period is three years. In rare cases, a lawsuit may be dismissed due to delay, even if it was submitted within the time frame of the statute of limitations.

The parties may contractually agree, in an agreement that solely addresses this matter, on a longer limitation period, or on a shorter longer limitation period if the matter is not related to real estate and the limitation period is longer than six months.

### Pre-action behaviour

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

In civil proceedings, there are normally no prerequisites for submitting a lawsuit. Administrative petitions, however, require the exhaustion of remedies with the relevant public authority before filing the petition.

In cases of a special relationship between the parties (eg, a partnership), a plaintiff may submit a preliminary claim for accounts to quantify his or her damages.

### Starting proceedings

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

Civil proceedings commence when the plaintiff submits a statement of claim to the competent court. The statement of claim, along with a summons to court, is served to the defendant either by courier service or by registered mail.

The courts in Israel are under a heavy workload. The workload affects the management of the cases and their duration, which normally takes several years to be fully conducted. Some tools to alleviate the burden in courts are mandatory mediation in most cases submitted to magistrates' courts, constant pressure by judges to reach settlements and referral of disputes to arbitration.

## Timetable

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

Once the plaintiff submits his or her statement of claim to court, and the defendant is duly served, a statement of defence must be submitted within 30–120 days, depending on the kind of the claim, as follows:

- small claims: 30 days;
- rapid procedures: 45 days;
- regular claims: 60 days; and
- medical malpractice claims: 120 days.

Once all statements of defence are submitted, in regular claims the plaintiff may (but does not have to) submit a reply to the statement of defence within 14 days.

After the last pleading is filed in court (either the last statement of defence or the reply to statement of defence), in regular claims the parties have 30 days to exchange demands for disclosure of documents and questionnaires. Each party should reply to these demands within 30 additional days. Following such demands and responses, motions may be submitted with regard to them, according to a strict timetable prior to the first pretrial hearing. Thereafter, such motions and other procedural issues may be decided in pretrial.

Usually, pretrial hearings are scheduled according to the judge's calendar pursuant to the submission of the last statement of defence or reply to statement of defence and following disclosure of documents between the parties.

## Case management

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

The parties have limited control over procedures and timetable. Normally, the timetable is set by regulations and the decisions of the court. If the parties grant time extensions to each other or reach procedural agreements, the court may accept them, but it may also reject such motions and insist on enforcing another timetable. Nonetheless, time extensions are frequently requested and granted, particularly if no previous time extension was requested.

## Evidence – documents

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

Parties are obliged to full mutual disclosure of the documents that are relevant to the case. During the disclosure phase, each party must disclose to the other party all the documents and correspondence relevant to the case in its possession – including those unhelpful to their case. Following a recent civil procedure reform (2021), the parties must mutually disclose documents in a joint meeting, similar to depositions, which should take place within a month of the submission of the last statement of defence (or reply to statement of defence).

## Evidence – privilege

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

'Privileged documents' include attorney–client correspondences or documents that were prepared towards legal proceedings. Nonetheless, it is customary to let the other party to know about their existence, and to indicate that these documents are privileged. As for attorney–client privilege, the client may waive confidentiality. Advice from an in-house lawyer is usually considered to be part of attorney–client privilege. Other

privileges and immunities include clergy, psychologists, spouses, journalists and self-incrimination.

## Evidence – pretrial

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

In most cases, instead of oral testimony, the witnesses (including experts) submit their testimony in the form of a written affidavit (or a written expert opinion). The witnesses and experts are then subjected to cross-examination in court. Following a recent civil procedure reform (2021), preference will be given to hearing oral evidence.

## Evidence – trial

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

The court has discretion to rule whether witnesses shall give oral evidence or file affidavits. In most cases, witnesses submit affidavits that serve in lieu of oral testimony. Nonetheless, following a recent civil procedure reform (2021), preference will be given to hearing oral evidence. The affidavits (or expert witness written opinions), including the documents that are attached to them as appendices, serve as evidence, as long as the witness is willing to be subject to cross-examination. The opposing party may object to the admissibility of documents that were attached to the affidavits, or that were submitted as part of a cross examination, if these documents were not disclosed during preliminary proceedings.

## Interim remedies

### 12 | What interim remedies are available?

There are several interim remedies available, including temporary restraining orders, temporary foreclosure decrees, stay of exit orders, seizure of assets orders, *Mareva* orders, *Anton Piller* orders, etc. Typically, an interim remedy intends to maintain the status quo at the time the lawsuit is filed and until the lawsuit is settled, to ensure the implementation of the final judgment when granted. Usually, there is no such formal procedure that supports foreign proceedings.

## Remedies

### 13 | What substantive remedies are available?

There is a variety of remedies available. These include enforcement of contracts, where applicable and appropriate, and declaratory relief. Damages are a common remedy, but are normally limited to actual damages. Punitive damages are rare.

Once a party receives a monetary judgment, he or she is entitled to linkage differentials and interest as set forth by law.

## Enforcement

### 14 | What means of enforcement are available?

The enforcement of court judgments and especially monetary compensation according to a judgment is made via the execution and collection authority, which has tools to enforce judgments and collect money (eg, foreclosures, the limitation of driver's licence and a stay of exit order).

If a court order or a court decision is disobeyed, the court has the authority to issue a contempt order against that party. If the party disobeys the court order, the court has the authority to fine him or her or sentence him or her to jail. However, contempt orders are usually not applicable with respect to monetary verdicts.



## Public access

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

In general, court hearings are open to the public. In certain cases, court hearings are held behind closed doors, for example, to protect a minor or helpless people, to maintain national security or to protect trade secrets.

Once a hearing is held in open court, the decisions and final judgment may be accessible to the public online. The parties have further access to all court documents. If a third party wishes to access court documents, he or she may submit a relevant request to court.

## Costs

- 16 | Does the court have power to order costs?

The court has the power to order costs.

The winning party may submit proof of its actual expenses (eg, fee agreement and receipts), which in principle should be reimbursed if they were reasonable and required. Nonetheless, the court has discretion whether to order full costs or just a partial amount, and it is very common that the court rewards partial or even no costs to the winning party, according to the circumstances. Following a recent civil procedure reform (2021), the court's criteria for ordering costs have been slightly altered, and as there is no sufficient data on the implementation of these criteria, it is hard to determine if there has been any practical shift in this regard.

The defendant may request the court, at the beginning of the proceedings, to order the plaintiff to deposit collateral for expenses. This is prevalent in cases where the plaintiff is a limited liability company, where the burden of proof to demonstrate that the plaintiff should be exempted from depositing the collateral lays upon the plaintiff. When the plaintiff is a human, there is a heavy burden of proof on the defendant to persuade the court that the plaintiff should deposit collateral to guarantee the defendant's expenses.

## Funding arrangements

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

There is great flexibility in setting fee agreements between lawyers and their clients, including 'no win, no fee' or other types of contingency or conditional fee arrangements. Some areas of law set limitations or caps on such arrangements (eg, claims for social security benefits or car accident compensation). In any case, lawyers are barred from paying court fees or giving loans to their clients. Third-party financing of claims is permissible and has become prevalent in recent years. An assignment of a right of action can be done in certain circumstances.

## Insurance

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

Insurance is available to cover legal costs. Terms may vary in accordance with the insurance policy coverage.

## Class action

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

Class actions are available for litigants with similar claims and with respect to certain areas of the law. Class actions are common in matters such as banking, securities, insurance, environment, antitrust and consumer protection. The class action lawsuit makes it possible to conduct legal proceedings that would otherwise not have been carried out if each of the litigants had to represent themselves. Some causes of action are also available for litigants against the state, in cases of tax overcharge.

## Appeal

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

The right to appeal on a final civil judgment is typically automatic for the first appeal, while a second appeal requires certiorari. Grounds for appeal are usually focused on legal mistakes in the judgment, as the appellate court does not tend to intervene in factual findings. Certiorari is usually granted when the issue at hand involves a legal question that goes beyond the applicant's private case or if a gross injustice or overwhelming mistake was made. Following a recent civil procedure reform (2021), the court is authorised to dismiss an appeal without even hearing the other party.

## Foreign judgments

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

Enforcement of foreign judgments is regulated by the Enforcement of Foreign Judgments Act (1958). It may rely upon bilateral agreements, which exist between some countries and Israel. If a final judgment is given in a foreign country, in which the parties had due process and fair access to court, an Israeli court would tend to recognise the foreign ruling. There is a requirement for reciprocity to recognise the judgments from a particular country (except in exceptional cases).

Considerations that may bar the recognition and enforcement of a foreign judgment relate to those rulings the enforcement of which is likely to infringe on Israel's sovereignty or security; judgments that are unenforceable in their country of origin; rulings that their content may contradict public policy, etc.

## Foreign proceedings

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

Israel is a signatory to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. It provides apostille services and recognises legal documents from foreign countries that are party to the convention, which were authenticated according to the Convention.

## ARBITRATION

### UNCITRAL Model Law

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

The Arbitration Act (1968) was founded primarily on British law and was not based upon the UNCITRAL Model Law.

## Arbitration agreements

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

The Arbitration Act (1968) requires a written agreement for arbitration. The writing requirement can be fulfilled as a clause in a general agreement. If the parties' intent to resolve their differences via arbitration is clear and was not neglected, the court will enforce the arbitration clause.

## Choice of arbitrator

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

If the arbitration clause is silent on the matter, and the parties fail to agree on the identity of the arbitrator, then any party may request the competent court to appoint a single arbitrator. The court has discretion to appoint whoever it sees fit as an arbitrator. The court may remove an arbitrator from his or her position if the arbitrator is not worthy of the trust of the parties (eg, there is a conflict of interest), if the arbitrator's conduct during the arbitration causes distortion of justice or if the arbitrator is unable to fulfil his or her role.

## Arbitrator options

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

Unless the parties agree on the identity of the arbitrator, the court appoints him or her. There is no formal pool of arbitrators from which the court chooses candidates. Nonetheless, the court will often appoint a retired judge or an esteemed lawyer who has the necessary qualifications to adjudicate on the matter.

There are also several arbitration establishments that have a pool of arbitrators. If the parties agreed to hear the case via these institutions, typically the president of the establishment will appoint an arbitrator from the arbitrators' list or offer a few options from the list to the parties.

## Arbitral procedure

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

The Arbitration Act (1968) sets default rules for arbitration, some of which may be consensually altered. The default rules exempt the arbitrator from civil procedure rules, substantive law and evidence law, and require the arbitrator to detail his or her reasoning.

## Court intervention

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

Normally, the court does not intervene during an arbitration except for in specific circumstances; for example, if the removal of the arbitrator is being requested by one of the parties.

In addition, the court has auxiliary powers to assist the arbitrator in areas such as the invitation of witnesses; contempt of court against witnesses; the collection of evidence; the foreclosure of assets; temporary restraining orders; and interim relief.

However, if a party addresses the court during a pending arbitration process, the arbitration proceedings are not ceased unless the court instructs otherwise.

## Interim relief

29 | Do arbitrators have powers to grant interim relief?

Generally, the arbitrator may request the competent court to use its auxiliary powers for granting interim relief. In addition, he or she may grant interim relief in some cases.

## Award

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

The arbitration award must be in writing and signed by the arbitrator indicating the date of signature. The arbitration award should be given within six months of the beginning of the arbitration. However, this requirement seldom occurs, as the parties usually agree on a longer period.

## Appeal

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

There are three alternative appeal options with respect to an arbitration award:

- There are 10 narrowly tailored grounds for the cancellation of an arbitration award. Each arbitration award is subject to cancellation due to these grounds within 45 days of its delivery (or within 14 days of a request to authorise the award – the earlier of the two). The cancellation grounds include, for example, lack of authority to decide on a specific issue, lack of reasoning if the parties agreed that the arbitration award will include reasoning, the award contradicts public policy, the arbitrator was not appointed lawfully and a party was not granted the opportunity to argue his or her arguments and present his or her evidence.
- The parties may agree that an appeal will be heard by an appellate arbitrator. In this case, the award shall be final, unless there are extraordinary circumstances that may justify the reopening of a final court judgment (eg, evidence of bribery).
- If the arbitration agreement stipulated a right to appeal to court, the parties may request to appeal to the court in cases where a fundamental mistake in the application of the law made by the arbitrator caused grave injustice. Once a court decides on an appeal on an arbitration award or on a request to cancel an arbitration award, further appeal requires certiorari.

## Enforcement

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

A domestic award can be authorised and enforced if submitted by the winning party to the competent court for approval, and if the other party does not submit a request for cancellation within 15 days of being served with the request to authorise the award, or within 45 days of the receipt of the award (the earlier of the two). If a request for cancellation was submitted and declined, the court will authorise the award even if was not requested by the winning party.

A foreign award may be approved according to the New York Convention. Israel is a party to the Convention, and it was incorporated into domestic law in 1978 in the regulations for the enforcement of the New York Convention.

## Costs

33 | Can a successful party recover its costs?

A successful party can recover its costs. The arbitrator is entitled to determine costs, similarly to a judge in court.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The most common ADR processes in Israel are mediation and arbitration. Mediation is most common, and even mandatory in most cases in a magistrates' court. A special regulation exists in family courts that mandates the parties to file a request for settlement prior to submitting a claim. The family courts also have an auxiliary unit, with specially trained social workers, who attempt to bring the parties to a settlement.

### Requirements for ADR

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

It is very common for the court to ask the parties to consider ADR before or during proceedings. The Civil Procedure Regulations set forth a mandatory mediation meeting in most cases in a magistrates' court to be held by a court-appointed mediator, prior to the first hearing of the case. However, if this meeting was not successful, the court will not compel the parties to continue to participate in the ADR process.

## MISCELLANEOUS

### Interesting features

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

Israel is considered a mixed legal system. It had great British influence, as the laws from the British mandate served as its default rules upon establishment of the state in 1948. Nonetheless, it has Turkish law residues, continental influences (particularly in fields of private law) and American influences (particularly since the 1980s, and in areas of commercial law and corporation law). These eclectic features make Israel a very diversified legal system.

## UPDATE AND TRENDS

### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

In January 2021, a civil procedure reform took place. The reform replaced the 1984 Civil Procedure Regulations in a manner that is partly innovative and partly mimicking the old regulations. In general, the regulations aim to give judges broader discretion to manage their cases and emphasise the efficiency of the proceedings. Since this reform is in its early stages, it is hard to determine to what extent it will bring substantial changes to the manner in which civil cases are heard.



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# Japan

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## LITIGATION

### Court system

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

In Japan, all judicial power is vested in the Supreme Court and the lower courts, such as the high courts, district courts, family courts and summary courts. The courts are the final adjudicators of all legal disputes. There are about 3,800 judges in Japan. Summary courts have jurisdiction over proceedings where the contested amount is not more than ¥1.4 million. The district courts will hear appeals from the summary courts and as the court of first instance for all matters with a value above ¥1.4 million and those dealing with real estate. The family courts have jurisdiction to hear non-monetary family law claims. Appeals from the district and family courts are heard by the high courts. In addition to the existing eight high courts, the Intellectual Property High Court was established as of 1 April 2005. Finally, the Supreme Court hears appeals on certain matters from the high courts. There is no specialist commercial or financial court other than the Intellectual Property High Court. Although the Tokyo District Court and the Osaka District Court have divisions that specialise in commercial cases or intellectual property cases, such a division is merely one of the divisions of the Tokyo District Court or the Osaka District Court and is not an independent district court that has been established or formed exclusively by a special law.

### Judges and juries

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

Japan has no jury system for civil proceedings. Judges analyse the facts, apply the law and issue judgments. In civil proceedings, judges have to rely on the factual information provided to the court by the parties and will not, as a rule, collect information themselves. They do not, therefore, have an inquisitorial role, but they are not passive either, as they will evaluate all arguments and all the evidence before them. A filed lawsuit is allocated to one of the divisions of the court at its sole discretion. It is practically impossible for the parties to request for a change of the judges in charge, unless such judges are prohibited from examining the case pursuant to the Code of Civil Procedure (eg, a judge who is the spouse of one of the parties).

### Limitation issues

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

As a general rule, contract claims are time-limited to 10 years. However, contract claims arising from commercial transactions are limited to five years. Tort claims are limited to 20 years from the occurrence of the event giving rise to the claim, or a limitation period of three years from the time of knowledge of the damage and of the identity of the party responsible for said damage (whichever period ends first). In addition,

there are various shorter limitation periods for certain specific claims under the Japanese Civil Code, such as two years in the case of accounts receivable related to movable assets.

Time limits can be suspended by a court action, attachment and provisional attachment or provisional disposition as well as by acknowledgement of the claim. Following suspension, the above-mentioned limitation periods will start to run anew from the time when the cause of such suspension ceases to exist.

In cases of a private claim (eg, to obtain payment), the limitation period will only be suspended if court action is taken within six months from demand for payment.

On 26 May 2017, an amendment bill to the Civil Code, which includes amendments to provisions concerning the statute of limitations, was finally passed by the Diet and enacted into law. The new law came into force on 1 April 2020. An outline of the amendments as it relates to the limitation period is as follows:

- As a general rule, contract claims from commercial transactions and contract claims from all other transactions will be time-limited to the earlier of five years from the time when the creditor comes to know of the possibility to exercise the claim or 10 years from the time when the claim becomes exercisable.
- Time limit for tort claims concerning damage to life or body will be extended. Specifically, such tort claims will be time-limited to the earlier of five years (currently three years) from the time when the victim or his or her statutory agent comes to know of the damage and the identity of the party responsible for said damage or 20 years from the time of tort.
- Various shorter limitation periods under the existing Civil Code, such as two years in the case of accounts receivable related to movable assets, will be abolished.
- In addition, the amendments will newly allow for suspension of time limits by an agreement in writing between the relevant parties. In principle, a one-year suspension from the time when such an agreement is made will be allowed. If such agreements are repeatedly made, suspension can be extended; however, such extension is limited to a maximum of five years from the original time limit.

### Pre-action behaviour

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

There is no obligation to take any pre-action steps in Japan. While there is the advance notice system, which enables the exchange of allegations and evidence between prospective litigants in advance of the actual initiation of a lawsuit, it is rarely used. Although, under the advance notice system, the court may order a holder of documents to disclose relevant documents upon request from the claimant, such holder is not subject to penalties even if it refuses to do so without a justifiable reason. Another step available for a party to assist in the institution of a

suit is a petition for preservation of evidence. Upon such a petition, if the court finds circumstances where, unless the examination of evidence is conducted in advance it will be difficult to use or collate the evidence, the court may conduct an examination of the evidence. In situations where a party plans to file a certain type of lawsuit in which a certain kind of evidence might be easily falsified (eg, a medical malpractice lawsuit in which medical records are typically submitted to the court as evidence), courts also often accept such a petition to examine the evidence. Except for such cases, this procedure is not frequently used. In practice, the claimant usually sends a content-certified letter (notice where contents and delivery are certified by the post) through the post, which states the issue at cause and demands some action to be taken.

Interlocutory measures, which are designed to secure the enforceability of the judgment, are available under Japanese law. There are two types of interlocutory measures: provisional attachment (used to preserve the property at issue that belongs to the debtor for securing a monetary claim); and provisional disposition (used to preserve disputed property and to establish an interim legal relationship between the parties).

### Starting proceedings

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

Civil proceedings are initiated by filing a complaint with the court that has jurisdiction to hear the claim. Depending on the size of the claim, appropriate stamps need to be attached to the formal complaint. The defendant is notified of the commencement of civil proceedings by receiving a summons and the complaint from the court. The court generally serves a summons and the complaint on the defendant approximately 10 days after the filing of the complaint. In general, Japanese courts, especially those located in big cities such as Tokyo and Osaka, deal with a lot of cases, and have some difficulty reading legal briefs and documentary evidence in detail. One of the proposals is that the courts substantially increase the number of judges, but the current court budget is not sufficient to realise this proposal. However, under the Act on the Expediting of Trials, the expediting of trials shall be achieved by enhancing the human resources of the courts, and the government must take the necessary financial measures required to achieve this purpose.

### Timetable

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

After the filing of the complaint, the court clerk will examine whether the correct form for the complaint has been used and whether the appropriate amount of stamps have been affixed on the complaint (the amount of the stamps depends on the amount of the claim). The clerk will then contact the plaintiff or the plaintiff's attorney and, depending on his or her availability, will decide the date of the first oral hearing. The court will then serve a summons and the complaint on the defendant. The first oral hearing will typically be held 40 to 50 days after the filing date. Before the hearing, the defendant must file a defence, which will deny or accept each claim and factual information relied upon in the complaint. At each key event in the proceedings (particularly after the witness examination), the judge may ask the parties whether they have an intention to settle the case.

Following the first hearing, there will be a court hearing of (on average) 10 to 15 minutes once a month or once every few months. In addition to an oral hearing, the judge may hold a preparatory court

hearing, at which the judge and both parties will discuss the issues at hand for a relatively long time in chambers.

The examination and cross-examination of witnesses will follow. After this, each party will file its closing brief. The oral proceedings will then close and the court will issue its judgment. On average, judgment is rendered one-and-a-half to two years following the filing of the complaint.

### Case management

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

The parties have no control over the procedure or timetable in a civil trial, but the judge will consider the parties' requests for changes to the procedure or timetable and may make changes to the procedure or timetable to the extent allowed by applicable laws.

### Evidence – documents

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

There is no legal obligation to preserve documents for the purpose of pending or foreseeable litigation. However, a party's destruction of valuable documents related to pending or foreseeable litigation may lead the judge to find an adverse inference against such a party.

### Evidence – privilege

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

No; the concept of 'privilege' in the context of document disclosure does not exist in Japanese law. In Japan, document disclosure is only intended for specific documents by means of a court's document production order.

Attorneys-at-law, patent attorneys, foreign attorneys licensed to practice in Japan, medical doctors, etc, are exempt from the obligation to submit documents containing confidential information disclosed by their clients. In addition, if the documents are related to matters concerning technical or professional secrets, a holder of such documents is exempt from the obligation to submit them.

### Evidence – pretrial

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

No. However, a judge often instructs a party that is requesting examination of a live witness to submit an affidavit of the witness prior to oral testimony.

### Evidence – trial

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

Witnesses and experts give oral evidence, although a judge has discretion whether to hear the evidence. Documentary evidence can be presented to judges at the hearing or the preparatory hearing to be held once a month or once every few months.

### Interim remedies

12 | What interim remedies are available?

Interlocutory measures, which are designed to secure the enforceability of the judgment, are available under Japanese law. There are two types

of interlocutory measures: provisional attachment (used to preserve the property at issue that belongs to the debtor for securing a monetary claim) and provisional disposition (used to preserve disputed property and to establish an interim legal relationship between the parties).

In addition, it is also possible in some cases to obtain an interim judgment, which is binding on the court (ie, the court that renders an interim judgment will be bound by the interim judgment when rendering the final judgment) but is not enforceable. The purpose of such interim judgment is to focus on particular issues in the proceedings and to prepare for the final judgment by first resolving some issues between the parties. However, the court has sole discretion to decide whether to issue an interim judgment, and in practice, Japanese courts seldom do so, except to admit international jurisdiction over the claims.

## Remedies

### 13 | What substantive remedies are available?

Actual but not punitive damages are the most common form of remedy under Japanese civil procedure. Various types of injunctions are also available.

Interest is payable on monetary judgments. In the event of a claim arising from a contractual obligation, the interest rate follows the contract rate. Otherwise, in general, the default interest rate will be 5 per cent, while for contract claims arising from commercial transactions, the default rate will be 6 per cent.

On 26 May 2017, an amendment bill to the Civil Code, which includes amendments to provisions concerning the default interest rate, was finally passed by the Diet and enacted into law. The new law came into force on 1 April 2020.

Under the amendments concerning the default interest rate, the default interest rate for contract claims arising from commercial transactions and for claims arising from other transactions or torts will be 3 per cent. However, the default interest rate will be reviewed every three years and may be amended by taking into consideration the past five years' average rate of interest on short-term loans. Unless otherwise agreed by the relevant parties, the default interest rate at the time when the first interest accrues to the claim will continue to apply to the claim, even after the default interest rate is amended.

Notwithstanding the above, in the same way as under the existing Civil Code, if relevant parties agree to an applicable interest rate, such interest rate will apply to the contract claim, unless such interest rate violates laws and regulations that restrict excessive interest rates (eg, the Interest Rate Restriction Act).

## Enforcement

### 14 | What means of enforcement are available?

There are different enforcement procedures for monetary and non-monetary claims. Monetary claims are enforced by attachment of the assets of the defendant. This is achieved by acquiring possession of the property for movable goods and, in the case of immovable goods, through a court declaration that the property in question is attached. The attached property will then be converted into money by way of auction. In the case of attachment of a claim against a third party, a garnisher may collect the claim by filing a lawsuit against the third party or may receive assignment of the claim with permission from a court.

For non-monetary judgments, enforcement can take various forms. The judgment ordering the party to transfer property can be realised by direct enforcement. The court or bailiff will seize the property in question and hand it to the plaintiff. A judgment that obliges someone to do something can be enforced by substitute performance at the expense of the defendant. An obligation not to do something can

be enforced by indirect enforcement, that is, the imposition of fines until the defendant complies.

Japanese civil procedure does not provide for criminal sanctions for contempt of court in the event of non-compliance with the court's directions.

## Public access

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

Oral hearings are held in public, except for cases where trade secrets need to be protected in relation to patent and other IP cases. Preparatory hearings and hearings for family cases are also generally held in private. Court documents are available to the public. Anyone can inspect court documents regardless of their relationship to the parties to the case, and a person who proves to have an interest in the case can take copies of those documents. If either party to the case needs to restrict such inspection from a third party, a petition should be filed in court on the ground that the documents contain trade secrets or material secrets regarding the personal (namely, private) life of the party.

## Costs

### 16 | Does the court have power to order costs?

The court can order costs to be paid by one party to the other, but that does not cover attorneys' fees. In tort cases, the plaintiff can add a certain portion (usually 10 per cent) of attorneys' fees as part of the damage that it has suffered.

The judge assesses the costs. These will cover the cost of the stamps that need to be attached to a complaint and other costs admitted by the rules of the court, but will not cover the actual costs borne by the parties. The costs are assessed after either party makes a petition to fix the amount of costs.

Security for costs is only available in special cases, such as in lawsuits between shareholders and directors where the defendant asks the plaintiff to place a bond as security. This procedure is also available where the plaintiff does not have an office address or a residence in Japan, unless otherwise stipulated by an applicable treaty.

There is no new rule governing how courts rule on costs.

## Funding arrangements

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

'No win, no fee' arrangements are not specifically prohibited under Japanese civil procedure law and the Law of Lawyers. However, lawyers' rules of ethics may be interpreted as being against such arrangements. In practice, 'no win, no fee' arrangements are rare in Japan. Conditional fee arrangements are not rare in Japan, especially for boutique firms dealing with only domestic cases. The parties may bring proceedings using third-party funding, but it may cause a problem under the Law of Lawyers if the third party takes a share of any proceeds of the claim. A defendant may share its risk with a third party, although such arrangements may be subject to insurance regulation.



## Insurance

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

There is no insurance available to cover all or part of a party's legal costs incurred in relation to all types of litigation. Insurance for product liability, directors and officers or professional malpractice, etc, may cover legal costs for relevant litigation.

## Class action

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

Previously under Japanese law, a class action was not allowed, and therefore each person had to be an individual plaintiff, although there was no restriction on the total number of plaintiffs named in one complaint. For example, hundreds of plaintiffs may file a complaint against a national or municipal government or a certain industry allegedly causing environmental problems or pharmaceutical side effects. In 2007, an amendment to the Consumer Contract Act introduced 'consumer organisation proceedings', which allowed certain qualified consumer unions and non-profit organisations to seek injunctions, for the benefit of the relevant consumers, against business operators to prevent them from performing unfair acts, such as soliciting for the execution of a consumer contract that contains an unfair provision.

On 4 December 2013, the Diet passed a bill that introduced a new class action system (the New System). This new Act on Special Civil Procedure for Collective Recovery of Consumers' Damage Act came into effect on 1 October 2016. The New System is aimed at providing remedies in respect of damages suffered by a considerable number of mass-market consumers. The New System consists of two stages. The first stage is a procedure to determine the common issues of law and fact between a business operator and the relevant class of aggrieved consumers (namely, whether the business operator is obliged to make payment to consumers). This first-stage procedure can only be filed by a 'specified qualified consumer organisation' (SQCO), and can generally only be filed against business operators that have privity of contract with the consumers on behalf of whom the procedure is filed (nevertheless, in cases of tort claims, certain business operators, such as those who solicited consumers to enter into contracts with other business operators, can be defendants even if they do not have privity of contract with the consumers). If the SQCO successfully obtains a declaratory judgment in its favour, the proceedings may continue to the second stage, which determines the existence and amount of the individual claims. The second stage is commenced by a petition filed by the SQCO, after which the SQCO will make an announcement encouraging consumers to join the second stage. After consumers join the proceedings, the court determines the existence and amount of the individual claims through a prompt and simple procedure. Claims that can be brought under the New System are limited to certain types of monetary claims resulting from a consumer contract, and do not include claims for compensation for life or bodily damage or for damage to property other than that which is the subject of the contract.

## Appeal

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

Judgments and decisions of the district court can be appealed to the high court and then to the Supreme Court. The grounds for appeal from the district court to the high court are that the first judge made an error in a factual finding or in the application of the law. The Supreme Court will hear appeals from the high court on grounds of error in

interpretation of the law and other violations of the Constitution. In addition, violations of the civil procedure rules, such as an error in jurisdiction, lack of reasoning, etc, will also give rise to a right of appeal to the Supreme Court. The parties may also file petitions to the Supreme Court, which gives the Supreme Court discretion to accept cases if the judgment being appealed is contrary to Supreme Court precedents or contains significant matters concerning the interpretation of laws and ordinances.

## Foreign judgments

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

Japanese courts recognise foreign final and conclusive civil judgments for claims obtained in a foreign court and will issue an enforcement order provided that:

- the jurisdiction of such court is recognised under Japanese law or applicable international conventions;
- the defendant received due notice of the foreign proceedings or voluntarily appeared before the foreign court;
- such judgment or the proceedings at the foreign court are not contrary to public policy as applied in Japan; and
- reciprocity exists as to recognition by the foreign court of a final judgment obtained in a Japanese court.

If the enforcement order is rendered, it will be possible for the plaintiff to proceed with enforcement procedures against the defendant's assets just as they would be able to in the case of a Japanese domestic court judgment.

## Foreign proceedings

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

There are two procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions. One is to request a Japanese court to provide judicial assistance and obtain evidence in accordance with the Convention Relating to Civil Procedure or bilateral international agreements. The Japanese court may examine a witness based on written questions annexed to a request from a foreign court via the Minister of Foreign Affairs. The other procedure is to take depositions at consular premises in accordance with the Consular Convention between Japan and the United States or the Consular Convention between Japan and the United Kingdom. Obtaining evidence for use in other jurisdictions in any manner that is not in compliance with international conventions is generally considered to constitute a violation of Japan's judicial sovereignty.

## ARBITRATION

### UNCITRAL Model Law

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

Yes. Japan enacted the new Arbitration Law on 1 March 2004 (the enactment date) based on the UNCITRAL Model Law.

### Arbitration agreements

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

The Arbitration Law requires that an arbitration agreement be in writing (article 13). Electronic records of agreements are deemed to be in writing.

### Choice of arbitrator

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

The Arbitration Law has adopted the same rules as stipulated in the UNCITRAL Model Law. Most of the commercial arbitration institutions in Japan appoint an arbitrator from among the candidates listed on their own panel of arbitrators. In addition, parties are permitted to appoint an arbitrator who is not listed on the panel, subject to the rules of the individual commercial arbitration institutions.

### Arbitrator options

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

Most of the commercial arbitration institutions in Japan have a candidate list that includes not only lawyers (such as attorneys-at-law, former judges and law professors) but also other experts, such as business experts and technical experts, and accordingly, this is generally sufficient to meet the various qualifications and needs of complex arbitration matters.

### Arbitral procedure

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

The Arbitration Law contains almost the same procedural rules as those of the UNCITRAL Model Law. It stipulates that the 'equal treatment principle' be the basic substantial rule of procedure (article 25). Besides this principle, parties are free to agree on procedural rules, subject to ensuring that there is no violation of public policy principles contained in the Arbitration Law. If the parties' agreement on the procedure is silent, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration in a manner it considers appropriate.

### Court intervention

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

In addition to the scope of intervention and jurisdiction stipulated by the UNCITRAL Model Law, the Arbitration Law has a set of concrete rules, that is, basic rules for hearing procedures, procedures to appeal arbitral awards, etc. According to these rules, district courts that exercise jurisdiction over a place of arbitration or to which parties have agreed shall have jurisdiction over the arbitration. Other than the appointment procedures of the arbitrator (including challenges and removal), the court does not have any power to intervene during an arbitration procedure. Its role is only to support the examination of evidence and witnesses upon the application of either party.

### Interim relief

- 29 | Do arbitrators have powers to grant interim relief?

Yes. The Arbitration Law introduced the possibility for arbitrators to grant interim relief. However, owing to the legislation being relatively new, it is not yet clear how interim relief will be enforced. Concrete enforcement procedures of the interim measures may be determined by future legislation or amendments to the Arbitration Law.

### Award

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

As stipulated in the UNCITRAL Model Law, the arbitral tribunal must render a reasoned award in writing and signed by the arbitrators. A copy signed by the arbitrators must be delivered to each party after the award date.

### Appeal

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

No, there is no right of further appeal. The parties to the arbitration have a right to set aside the award only when certain specific events stipulated in the Arbitration Law occur (the events are identical to those in the UNCITRAL Model Law). In *Descente Ltd v Adidas-Salomon AG et al*, 123 Hanrei Jiho 1847 (2004), the court decided, obiter, that there are no grounds for setting aside an award other than those already contained in the Arbitration Law.

### Enforcement

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

As stipulated in the UNCITRAL Model Law, an arbitral award can be enforced when the relevant court recognises an award (article 45). Substantial requirements for recognition are almost the same as stipulated in the UNCITRAL Model Law. When the court recognises the award, the court renders an enforcement decision. With respect to the procedure for obtaining an enforcement decision, the Arbitration Law provides that the court may call for oral arguments. In Japan, enforcement procedures have not generally been affected by changes in the political landscape.

### Costs

- 33 | Can a successful party recover its costs?

The parties can decide to split costs by mutual agreement. The Arbitration Law states that the arbitral tribunal shall determine the allocation of actual costs based on the agreement of the parties. The scope of allocable and recoverable costs is determined by a mutual agreement between the parties or an applicable arbitration institution's rule, and may broadly include various types of costs as long as such costs are actually paid in relation to the arbitration procedure (article 49). When an agreement is silent on the subject, each party shall bear its respective costs with respect to the arbitration procedure. Unless otherwise agreed to by the parties, the arbitral tribunal may order the parties to deposit an estimated cost amount with the arbitral tribunal prior to the arbitration proceedings (article 48).

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

In the context of an international commercial transaction, arbitration would be the most popular type of ADR, although many Japanese parties still prefer to go to state court (eg, the Tokyo District Court). For domestic disputes, the preference for mediation and conciliation is very strong; furthermore, even Japanese arbitrators, unless experienced parties or counsel remind them otherwise, recommend the parties to settle without rendering an award.

Recently, new types of ADR have been introduced in Japan. For example, turnaround ADR has been created for the rehabilitation of companies suffering financial difficulties. This proceeding assists with the coordination between the financial creditors and debtors and is carried out under independent specialists; the participation of trade creditors is not required. In spite of the name, this proceeding does not necessarily involve the resolution of disputes.

In addition, financial ADR has also been introduced to assist in the resolution of disputes between financial institutions and customers. The characteristics of this ADR are that:

- a financial institution cannot refuse to participate in dispute resolution proceedings without a justifiable reason if a customer files a petition with a designated dispute resolution institution;
- a financial institution cannot refuse to give an explanation or to submit related documents without a justifiable reason if requested by a designated dispute resolution institution; and
- a designated dispute resolution institution may, at its discretion, make a special conciliation proposal, which the financial institution must accept unless it chooses to file a lawsuit.

### Requirements for ADR

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

No, the parties do not have to consider ADR before litigation except in family cases and certain cases such as rent review. However, for particular types of cases, such as construction disputes and medical malpractice, if the courts find the case suitable for mediation and conciliation, they may suggest the transfer of the case to the court's special division for mediation and conciliation, where the courts have a list of experts in such technical fields.

### MISCELLANEOUS

#### Interesting features

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

The revised Code of Civil Procedure came into force on 1 April 2012. It introduced a new set of provisions stipulating the international jurisdiction of Japanese courts in civil and commercial matters. Considering the disparity in bargaining power, the revised Code of Civil Procedure provides special rules on jurisdiction over lawsuits relating to consumer contracts and employment relationships. With respect to lawsuits relating to consumer contracts, where a consumer files a lawsuit relating to a consumer contract against a company, Japanese courts will have jurisdiction if the domicile of the consumer at the time of the conclusion of the contract or at the time of filing the suit is Japan. On the other hand, a company can only file a lawsuit relating to a consumer contract against a consumer if the consumer is domiciled in Japan.

With respect to lawsuits relating to employment relationships, where an employee files a lawsuit relating to an employment relationship against his or her employer, Japanese courts will have jurisdiction if the place where the labour was supplied under the employment contract (or, if no such place is specified, the office that hired the employee) is located in Japan. On the other hand, an employer can only file a lawsuit relating to an employment relationship against an employee if the employee is domiciled in Japan.

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### UPDATE AND TRENDS

#### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Under Japanese judiciary proceedings, before the covid-19 pandemic, court hearings were always held in person and with all documents, such as complaints and briefs, submitted in hard copy. The parties had to take into account travel time, which made scheduling quite cumbersome. However, with the outbreak of covid-19, court hearings could no longer be held with a large number of persons gathering behind closed doors. The submission of documents in hard copy, often filling up several cardboard boxes, also turned to be a burden for the parties (in terms of physical delivery and cost) as well as for the judges reviewing them. A bill to amend the Code of Civil Procedure, submitted to the Diet on 8 March 2022, aims to resolve some of these issues by introducing the following revisions:

- Complaints may be filed electronically over the Internet, and hard copies are no longer required. However, this privilege is only reserved for attorneys; litigants who are not represented can continue submitting documents in hard copy.
- The scope of hearings that may be held via online meetings is expanded. Hence, attorneys have more flexibility to attend hearings electronically and save on travel time, facilitating the process of scheduling court hearings.
- Judgments can be delivered electronically, eliminating the need to mail these documents via the post or retrieve them in person.

However, documents containing personal information and companies' trade secrets should be handled with the utmost care and all possible security measures undertaken to avoid the leakage of confidential information. The implementation of such security measures within the court systems may take some time, and the actual operation thereof is still a few years in the future.

# Liechtenstein

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## LITIGATION

### Court system

#### 1 | 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 and the Enforcement Act. Non-contentious proceedings are governed by the Special Non-Contentious Civil Proceedings Act. The organisation of the ordinary courts is governed by the Court Organisation Act (GOG).

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 15 judges of the LG functions as single judge in civil law matters, 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.

### Judges and juries

#### 2 | 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. However, the taking of documents and the hearing of witnesses is not permitted if both parties object to taking 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 claim documents on the defendant, setting the dates for the examination of witnesses and experts, and generally the production of evidence).

The duty of instruction requires the judge to provide instruction if the pleadings of the parties are unclear, incomplete or lack precision. In such a case, the judge must work towards improvement of the pleadings by the parties. Furthermore, the judge is obliged to discuss the factual and legal pleadings with the parties and may not base his or her decision on any legal ground that one of the parties obviously was not aware of, unless he or she discussed it with the parties (section 182(a) ZPO).

These principles apply to all contentious civil proceedings. However, the proceedings in non-contentious matters (eg, proceedings about parental custody and probate proceedings) are governed by slightly different principles. In those proceedings, the judge in general has a more active role (ie, more duties and more powers).

Overall, in Liechtenstein civil proceedings, the judge has more of an inquisitorial role than a passive role.

In Liechtenstein, juries are never involved in civil actions.

Judges are selected by the Judges Selection Committee, which is presided over by the Prince of Liechtenstein, and candidates proposed by the committee must be appointed by the Liechtenstein parliament. Generally, candidates must have passed the bar exam and must meet further criteria.

### Limitation issues

#### 3 | 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 because of ingratitude of the donee).

Claims for damages lapse within three years of the damaged party obtaining 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 is always 30 years.

The lapse of time is not to be considered *ex officio* without objection by 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.

### Pre-action behaviour

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

Pursuant to sections 227 to 231 ZPO, a party may apply for a conciliation attempt and the summons of the opponent for this purpose. However, this is entirely voluntary and only possible if the opponent resides in Liechtenstein. The non-appearance of the opponent has no consequences.

Since 1 July 2015, it is no longer necessary to conduct compulsory conciliation proceedings before filing an action.

### Starting proceedings

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

Civil proceedings are initiated by filing a legal action or statement of claim with the LG. In the legal action, the plaintiff must set out the facts on which he or she bases the 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 claim documents is regularly effected via letters rogatory to the competent court where the defendant resides.

The Liechtenstein courts have proven to be highly efficient and able to handle their caseload for decades.

### Timetable

#### 6 | 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) 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 security for costs, the defendant is invited by the court to submit a reply to the statement of claim, if such 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 is 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 court may, however, refuse to accept the pleadings or to take further evidence if it concludes that the new pleadings or evidence have not been brought forward earlier because of gross negligence and if their admission would considerably extend the proceedings (section 179(1) ZPO).

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.

### Case management

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

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, experts and the production of evidence. The parties may, however, in cases of excessive delay by the judge, file a disciplinary complaint (article 48 GOG) or an application to set a deadline (article 49a GOG) to the supervisory judge.

### Evidence – documents

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

During proceedings, 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 the 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 not, for example, refuse to submit a document if it is obliged by law to release it or if the document was mutually produced.

However, even in relation to documents the production of which has been ordered by the court, a party cannot be effectively forced 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.

### Evidence – privilege

#### 9 | 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 or an order to produce documents (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 in the same way as Liechtenstein lawyers, and therefore the same level of legal privilege applies to such lawyers.

## Evidence – pretrial

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

The 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. However, in specific and narrowly defined circumstances, the taking of evidence as a form of precautionary measure prior to trial is possible.

## Evidence – trial

### 11 | 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, meaning that only what has been brought forward in an oral hearing may form the basis of adjudication. Therefore, both witnesses and experts must testify orally and will be questioned by the court. The parties have the right to ask for explanations or submit additional questions.

Records of witness statements made in other court proceedings or a written expert report from other court proceedings are only admissible as evidence if all parties agree or if all parties were involved in the other court proceedings and the evidence is no longer available (section 281(a) ZPO).

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. To avoid delays, the revised ZPO that entered into force on 1 January 2019 provides for the opportunity of hearing a witness in a video conference instead of hearing the witness abroad via letters rogatory (section 283(4) ZPO).

## Interim remedies

### 12 | 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 Enforcement Act (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 enforcements 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 (except if there are already proceedings pending abroad and the judgment of the foreign court is recognisable in Liechtenstein; this can only be the case with respect to Austrian or Swiss courts). 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 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 must reimburse any pecuniary loss suffered by the defendant if, for example, the applicant loses the main proceedings.

Search orders are available only in the context of criminal proceedings.

## Remedies

### 13 | What substantive remedies are available?

Punitive damages are not available in Liechtenstein. However, 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 (if both parties are businesses, the interest rate is higher).

## Enforcement

### 14 | What means of enforcement are available?

The EO provides for enforcement measures in all kinds of assets of the obligor in the case of money judgments. In particular, it is possible to enforce money judgments in immovable property (by asking for a forced administration of the property, for a forced creation of a lien or for a foreclosure), in movable assets, in claims and other property rights of the obligor.

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, that 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 12 months in total. 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.

## Public access

### 15 | 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. Important judgments are available online for everyone in anonymised form.

## Costs

### 16 | 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 the 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 (GGG). On 1 January 2018, a new GGG entered into force. The new GGG provides for flat-rate fees depending on the value in dispute. This means that, irrespective of the amount and



the duration of the hearings in the specific case, the court fees are the same. The person who files the brief that commences the proceedings must pay the court fees within four weeks after filing the brief. If the court fees are not paid within this time limit, the court will deem the brief to be withdrawn. If the party who paid the court's fees wins the case, the opponent must reimburse the court's fees.

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 security for the costs of the proceedings. Likewise, legal entities that do not have sufficient property on which execution can be levied may also be required to furnish security for the costs of the proceedings. However, natural persons who are not able to bear the costs of litigation without detriment to their 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 or any natural person potentially significantly benefiting from the outcome of the lawsuit. Furthermore, legal persons will only be granted legal aid if the public interest requires that the rights of the legal person are exercised. Legal aid is granted only if the litigation is not considered vexatious or futile (section 63 ZPO). If legal aid is granted, the party may be relieved from the payment of court fees and from the provision of security for costs (section 64 ZPO). A lawyer to represent the party in the proceedings will be appointed only in cases of a difficult factual or legal situation.

### Funding arrangements

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

As 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. However, it is possible to agree, in addition to the basic fee, on an appropriate additional fee that 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 to reduce their risk. Those 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).

### Insurance

18 | 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. However, insurance policies generally contain cover restrictions (eg, the insured sum is normally capped per legal case) that might be applicable in the individual case.

### Class action

19 | 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, sections 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 and factual grounds or if they assert similar claims that are based on similar legal and factual grounds and that are all matters within the competence of Liechtenstein courts. Furthermore, the Liechtenstein Consumer Protection Act (KSChG) enables certain consumer protection organisations to claim on behalf of several individuals; for example, against the 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.

### Appeal

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

Each judgment passed by the LG may be appealed to the OG within four weeks. In appellate proceedings, the OG 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. According to the revised ZPO, the OG in general does not conduct an oral hearing on the appeal. An oral hearing only takes place upon specific request by one of the parties or if the OG considers it necessary because of specific circumstances. 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). However, the court may refuse to accept new pleadings or take further evidence if it concludes that the new pleadings or evidence has negligently not been brought forward in first instance proceedings (section 452(3) ZPO). Moreover, the parties may also contest procedural errors or the LG's factual and legal findings. Procedural orders regarding the form of procedural measures, however, may only be contested if they have already been contested in first instance right after the violation happened (section 196 ZPO).

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. There are, however, some exceptions (ie, some orders that cannot be appealed at all and some orders that are only appealable together with following decisions).

Decisions by the OG may be appealed to the OGH in general 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. Pursuant to the revised ZPO, there are, however, certain exceptions from this general rule with respect to orders concerning the sequence of the proceedings that can, in any event, only be appealed to the OG and not to the OGH (also in cases in which the OG does not confirm the decision of the LG, but overturns it). Judgments of the OG may generally be appealed to the OGH within four weeks. An appeal to the OGH is, however, not possible and the judgment of the OG is final in the following two cases: small-claim proceedings (values in dispute up to 5,000 Swiss francs; section 471(1) ZPO in connection with section 535(1) ZPO); and with some exceptions,

in cases with values in dispute up to 50,000 Swiss francs in which the OG has confirmed the decision of the LG. 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 raise points of law only on material or procedural issues, and 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 must 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.

**Foreign judgments**

**21 | 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 to recognise a judgment:

- a recognition of the judgment must not be contrary to the 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 was passed; and
- in the 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 of 20 May 1980 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 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 the Council Regulation (EC) No. 44/2001 of 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation).

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 the account of the *Rechtsöffnung*, a 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 that 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 must be retried on the merits before the Liechtenstein courts.

**Foreign proceedings**

**22 | 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 Jurisdiction Act provide assistance to foreign courts. Pursuant to section 27 of the Jurisdiction Act, the LG must grant legal assistance unless the requested act does not fall within the competence of the LG, 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 must 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 must provide legal assistance in accordance with the Liechtenstein procedural laws pursuant to section 28(1) of the Jurisdiction Act.

**ARBITRATION**

**UNCITRAL Model Law**

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

The Liechtenstein arbitration legislation generally follows the Austrian model, which is based upon the Model Law on International Arbitration (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);
- 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 (eg, removal of trustees in cases of gross breach of duty or incapacity).

In general, all claims arising from rights involving an economic interest that are usually decided by domestic courts are arbitrable. All other claims are arbitrable if the parties are capable of reaching a settlement on the subject matter of the dispute.

### Arbitration agreements

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

The arbitration agreement must be in writing and must be contained either in a written document signed by both parties or in letters, tele-faxes and emails or other means of transmitting messages between the parties that 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.

### Choice of arbitrator

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

Unless otherwise provided in the arbitration agreement, the number of arbitrators shall be three [section 603(2) Civil Procedure Act (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 [section 604(2)(4) ZPO].

The appointment of an arbitrator can 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 the qualifications agreed upon by the parties [section 605(2) ZPO].

### Arbitrator options

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

With the exception that full-time judges of the Liechtenstein courts may not become arbitrators during their tenure of office [section 605(3) ZPO], 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 they must appoint a further person as chair [section 603(1) ZPO].

A person who is 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 are in conflict with the agreement of the parties. After being appointed and throughout the arbitral proceedings, an arbitrator must disclose any such circumstances to the parties without delay, unless they have already been informed of them and consented to the continuation of his or her mandate as arbitrator [section 605(1) ZPO].

When choosing an arbitrator, the parties should select a candidate with the requisite legal and professional expertise that mirrors the nature of the specific dispute and who also has 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 to be eligible as arbitrator. A large number of Liechtenstein lawyers are members of the Liechtenstein Arbitration Association, which provides a large pool of candidates who are able to meet the needs of complex arbitration.

### Arbitral procedure

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

The arbitral tribunal adjudicates the dispute pursuant to the statutory provisions or 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 [section 620(1) ZPO]. 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 [section 620(2) ZPO].

Subject to the mandatory provisions of section 611 et seq ZPO, the parties are free to agree on the rules of procedure. Section 611 paragraph 2, which provides that the parties are to be treated fairly and that each party shall be granted the right to be heard, is mandatory, for example.

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 [section 611(1) ZPO].

### Court intervention

28 | 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. This provides, inter alia, that the court is competent to decide if one of the parties:

- files a request for interim measures [section 602 ZPO];
- files a request for appointment, recusal or early dismissal of an arbitrator [section 604 et seq ZPO];
- files a request to enforce provisional measures ordered by the arbitral tribunal [section 610 ZPO]; or
- files a suit to set the arbitration award aside [section 628 ZPO].

These powers of the court cannot be overridden by agreement.

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. However, 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 [section 601(1) ZPO].

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 the jurisdiction of the arbitral tribunal was raised with the arbitral tribunal, at the latest when entering into argument on the substance of the dispute, and a decision of the arbitral tribunal thereon cannot be obtained within a reasonable period of time [section 601(3) ZPO].

## Interim relief

### 29 | 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 measures, the arbitral tribunal may request any party to provide appropriate security in connection with such measures (section 610(1) ZPO).

Interim relief granted by arbitrators can only be enforced by the Princely Court of Justice (section 610(3) ZPO).

## Award

### 30 | 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 must 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 that the reason for any omitted signature is stated on the arbitral award. If the parties have not agreed otherwise, the award must 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 must 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 must discuss possible safekeeping of the award and the documentation of its service with the parties. Upon request of a party, the chair (or, in case of his or her inability, another arbitrator) is obliged to confirm the res judicata effect and the enforceability of the award (section 623 ZPO).

## Appeal

### 31 | 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 must be brought to the Princely Court of Appeals within four weeks. The time period begins on the day on which the claimant receives the award.

For actions for setting aside arbitral awards, the Princely Court of Appeals has jurisdiction as first and last instance, notwithstanding the possibility of an extraordinary appeal to the Constitutional Court 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 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 the Liechtenstein legal system (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; and
- the arbitral award conflicts with the fundamental values of the Liechtenstein legal system (public policy).

## Enforcement

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

As Liechtenstein has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (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.

## Costs

### 33 | 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. If the parties agree on the termination of the proceedings and communicate this to the arbitral tribunal, a decision on costs is made only where a party applies for that 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 (section 626 ZPO).

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The most important alternative dispute resolution paths are arbitration (governed by the Civil Procedure Act) and mediation proceedings (governed by the Law regarding Mediation in Civil Law Matters). However, while arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation, mediation proceedings have less practical importance.

Furthermore, Liechtenstein implemented the EU Directive on Consumer ADR (Directive 2013/11/EU) in the law regarding Alternative Dispute Resolution in Consumer Matters (AStG). According to that, participation in such proceedings is voluntary. Companies domiciled in Liechtenstein are, however, obliged to inform consumers about the opportunity of ADR proceedings if they cannot reach an agreement in the case of a dispute. One of the ADR entities provided for by the AStG is

the Conciliation Board for conflicts with 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.

### Requirements for ADR

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

Participation in ADR before or during proceedings is voluntary. Hence, neither court nor tribunal can compel the parties to participate in an ADR process (except in disputes about parental custody).

### MISCELLANEOUS

#### Interesting features

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

Not applicable.

### UPDATE AND TRENDS

#### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

In 2019, two key legislative projects in the area of dispute resolution entered into force. One of these key projects was the revised Civil Procedure Act, which aimed to facilitate and accelerate proceedings by restricting the appealability of court decisions and new pleading and evidence and by facilitating the taking of evidence. The other key project was the revised Enforcement Act, which aimed to modernise enforcement proceedings and to strengthen the principle of ex officio activity by the court officers. Further revisions of the Enforcement Act are planned.

To further improve the protection of victims and witnesses in connection with the ratification of the Istanbul Convention on the Prevention of Violence against Women and Domestic Violence, the separate examination of minors by experts as well as the secrecy of residential addresses of victims and witnesses and accompaniment in civil proceedings were introduced by amendments to the Civil Procedure Code and the Non-Contentious Proceedings Act, with effect from 1 October 2021. As a result, protective mechanisms already in place for the criminal proceedings apply in related civil proceedings.

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# Luxembourg

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## LITIGATION

### Court system

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

The hierarchy of the civil courts is as follows:

- justices de paix (lower instance courts);
- district courts;
- the Court of Appeal; and
- the Supreme Court.

#### Justices de paix

This is the first level of the judicial hierarchy. The three justices de paix have their seats in Luxembourg, Esch-sur-Alzette and Diekirch. They deal with low-value claims (less than €10,000), in both civil and commercial matters.

Justices de paix have specific jurisdiction for specific claims as laid down in the New Code of Civil Procedure (NCPC). They include a labour court section as well as a police court section.

#### District courts

The Grand Duchy of Luxembourg is divided into two judicial districts, Luxembourg City and Diekirch, each of which has its own district court.

The district court is competent to hear civil and commercial matters as well as matters for which competence is not attributed to another court based on the nature or the amount of the claim. The district court also has exclusive competence for matters expressly provided for by law, such as:

- exequatur of judgments issued by foreign courts;
- claims related to filiation;
- claims in relation with the change of surnames of children not issued from marriage;
- claims for declaration of absence;
- claims for declaration of abandon and adoption;
- claims related to parental authority;
- claims related to a civil forgery incident;
- insolvency claims and disputes related to a bankrupt company;
- action for liquidation of a company;
- action for voidance or contestation of the ownership of a patent;
- actions related to EU trademarks subject to Regulation (EC) 207/2009 on the European trademark; and
- actions related to the Luxembourg trade and companies' register, etc.

Unlike other jurisdictions, there is no special court for commercial matters in Luxembourg. The district court sits either in civil matters or in commercial matters, depending on the nature of the claim and under which procedural rules it has been introduced.

The district court hears cases under a composition of three judges. For urgent and summary proceedings, a sole magistrate hears the cases.

The district court comprises a youth and guardianship section as well as a family section.

In criminal matters, the district courts are organised in the form of chambers (the Criminal Chamber). The allocation of a case to one of the chambers depends on the severity of the criminal offence.

#### Court of Appeal

The Court of Appeal hears appeals against decisions made in a justice de paix or in the district courts. Cases are heard at the Court of Appeal of Luxembourg. There are usually three judges at the hearing.

#### Supreme Court (Court of Cassation)

The Court of Cassation is the apex of the judicial pyramid. Its main function is to review decisions of the Court of Appeal and certain other decisions that are not subject to any further appeal. Review by the Court of Cassation is restricted to questions of law. In the case of reversal, the court must remand the case for further proceedings.

Cases are normally heard by five magistrates, although this number may vary.

#### Judges and juries

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

The Luxembourg civil court system has no jury. Judges have the power to request the personal appearance of the parties, make a request for information and production of documents, ask for original documents, hear the testimonies, appoint an expert with a specific mission or inspect a specific place or item.

#### Limitation issues

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

Depending on the nature of the claim, the time limits may range from six months to one year, two years, three years, five years, 10 years and 20 to 30 years.

#### Pre-action behaviour

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

There is no mandatory pre-action to be made before issuing proceedings. Actions for recovery of a debt sometimes require a notice letter to be sent prior to issuing proceedings.



## Starting proceedings

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

In principle, civil proceedings are commenced when the claimant serves a writ of summons on the defendant. The writ of summons is served by a bailiff and sets out the basis of the claim. As from the date of service, various steps must be taken within the timescales provided for in the NCPC.

Once served, the defendant's legal counsel notifies the claimant's counsel of her or his deed of constitution within the legal time frame.

Then, the counsel to the claimant will lodge the docket with the court's clerk.

Once the docket has been filed with the court, the matter enters the case management phase, where the court will distribute the case to the appropriate chamber. The chamber shall issue a bulletin where a timetable is set out for the claimant and the defendant to communicate their written memoranda and documentary evidence.

Luxembourg courts are keen to ensure that the case is managed smoothly and efficiently until the date of the hearing is determined. Once the case is heard, the court will issue the judgment within a relatively short time frame depending on the nature of the claim.

## Timetable

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

The time between the commencement of a claim and the hearing is very much dependent on how the case is managed by the procedural judge and whether the parties comply with the deadlines set out in the timetable.

It can take approximately a year-and-a-half from commencement for a case in the District Court to be ready for hearing. The timeline below provides a breakdown of the timing by reference to the different stages of a standard civil case.

## Issue proceedings

Service of the writ of summons by the claimant through a bailiff.

Notification of the constitution of a lawyer at the court (15 days or extended timeline for a defendant residing outside Luxembourg) by the counsel to the defendant. The claimant files the docket with the court.

## Case management stage

The case is distributed to a chamber two to three weeks after filing of the docket. The chamber issues a bulletin with the timescale.

Hearings held for case management (two to three months after issuance of the bulletin).

Parties exchange written memoranda and exhibits.

## Pleadings

In most cases, the court will order a hearing to ensure that the timetable has been followed and the parties have exhausted their written arguments.

The date of the final hearing is set within two to three months.

## Judgment

Judgment is given at a later date once the judges have had time to consider the arguments raised by the parties and the evidence brought by each party.

## Case management

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

This depends on several aspects, but mainly, the claimant has control over the procedure in the sense that he or she can ask the court to issue injunctions to the defendant if the defendant does not respect the time-lines granted by the court.

Both the claimant and the defendant may ask for an extension of the deadlines set out in the timetable if need be.

## Evidence – documents

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

Under Luxembourg procedural rules, the burden of proof is upon the claimant. The defendant must bring evidence of the document or information disputed.

The claimant is also obliged to preserve any relevant documents that are able to support the claim. Each party has discretion regarding choosing the documents it wants to provide. Usually, only documents helpful to the case are shared.

During the proceedings, each party provides copies of its exhibits to the other party and the exhibits disclosed to the other party must be filed with the court. The concept of 'exhibit' is very broad and covers all types of information, including electronic information and written witness statements. Written witness statements set out the evidence of the witnesses who have knowledge of the facts of the matter.

If there are issues that require technical evidence or opinion, the court may appoint an expert. Experts have a duty to issue independent opinion to the court.

## Evidence – privilege

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

Correspondence between counsel registered with the Luxembourg Bar that is marked as confidential cannot be produced. Advice from a local in-house lawyer is, in principle, not covered by privilege.

## Evidence – pretrial

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

There is no pretrial within the meaning of common law rules on civil procedure. Luxembourg civil procedure rules do, however, foresee an examination of the case by a procedural judge. During the examination phase, parties are allowed to produce written evidence from witnesses. The court-appointed expert opinion is communicated to the court once the expertise operations have taken place in the presence of the parties or their counsels.

## Evidence – trial

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

Under Luxembourg procedural rules, the burden of proof is upon the claimant. The defendant must bring evidence of the document or information disputed.

The claimant is also obliged to preserve any relevant documents that are able to support the claim. Each party has discretion regarding choosing the documents it wants to provide. Usually, only documents helpful to the case are shared.

During the proceedings, each party provides copies of its exhibits to the other party, and the exhibits disclosed to the other party must be filed with the court. The concept of 'exhibit' is very broad and covers all types of information, including electronic information and written witness statements. Written witness statements set out the evidence of the witnesses who have knowledge of the facts of the matter.

If there are issues that require technical evidence or opinion, the court may appoint an expert. Experts have a duty to issue independent opinion to the court.

## Interim remedies

### 12 | What interim remedies are available?

Luxembourg courts are empowered to grant interim remedies (such as injunctions, suspension of resolutions, appointment of provisional administrator or custodian and appointment of an expert, and forced production of certain exhibits) upon the application of a party.

A claimant may also obtain a freezing order if there is a risk that the defendant will dissipate assets that the claimant would like to recover. In addition to freezing orders, there are other forms of interim remedies that are available to the parties.

## Remedies

### 13 | What substantive remedies are available?

Luxembourg courts are empowered to award a wide variety of legal remedies. Damages, injunctions, specific performance, penalty payments and interest accrued on principal amount are the main substantive remedies.

## Enforcement

### 14 | What means of enforcement are available?

If the court order sentences a party to pay a certain amount to the other party, the seizure of goods, attachment of earnings, attachment of third party debts, charging orders or orders for sale of land or realisation of pledge over assets are all available methods of enforcement.

The appropriate procedure will depend on the nature and location of the debtor's assets. Where the debtor has assets outside Luxembourg, the judgment can be enforced abroad depending on the existing arrangement in place between Luxembourg and the jurisdiction in which enforcement is sought.

## Public access

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

Court hearings are, in principle, held in public. There are some exceptions however, in particular, where the hearings are held in the council chamber.

Court documents are not available to the public.

## Costs

### 16 | Does the court have power to order costs?

The court has the power to order costs. Costs are usually awarded to the winning party; they may be shared between the claimant and the defendant where each of them has succeeded in a demand. The costs are calculated on the basis of a specific regulation and exclude the portion of fees that may be awarded by the court to the losing party (procedural allowance). The procedural allowance covers in general only a portion of the winning party's own costs from its opponent.

Under articles 257 and 258 of the NCPC, a security for costs may, upon the request of the defendant, be granted by the court that has discretion to determine the amount. Claimants who have their domicile in a member state of the European Union, a member state of the Council of Europe or any other state with which Luxembourg has entered into an international agreement providing for an exemption to request a security for costs, are excluded from the scope of application of these provisions.

## Funding arrangements

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

Fee arrangements between lawyers and their clients that are based on the outcome of the dispute (*pactes de quota litis*) are prohibited.

There is no specific prohibition on a party having its litigation financed by a third party. However, the third party cannot be a party in the litigation proceedings without having the quality, capacity and a proper legitimate interest to bring proceedings. Furthermore, as part of the lawyers' obligations, lawyers must ensure that the financing of a dispute does not contravene any of the applicable anti-money laundering provisions. The lawyer must, in principle, take instructions from the client, and the third-party funder is not allowed to influence the litigation strategy set out between the lawyer and the client, in particular where the interests of the party to the litigation proceedings are not protected.

## Insurance

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

It is possible for an individual to subscribe an insurance to cover the defence of specific claims, such as in proceedings brought to uphold directors' liability. Insurance cover in general includes the insured individual's costs and those of the winning party.

## Class action

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

Class actions are not specifically recognised under Luxembourg procedural rules. In principle, each claimant may bring his or her own claim, unless there has been an assignment of similar claims by litigants to one of the claimants. The assignment of claims is permissible under Luxembourg law, except for claims upholding personal rights.

The Luxembourg consumers law provides for the ability for non-profit entities that have the purpose to protect the collective interests of consumers to launch representative actions on behalf of consumers and seek redress.

## Appeal

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

An unsuccessful party can appeal a judgment (or part of it). A decision may be appealed only on the basis that it was either wrong due to disqualification of facts, lack of grounds or other irregularity in the proceedings. The general rule is that notice of an appeal must be filed within 40 days of the service of the judgment on the unsuccessful party

by the winning party. An appeal to the Court of Appeal will on average take 18 months to be listed for hearing.

The Court of Cassation is the Supreme Court and hears appeals on arguable points of law only.

### Foreign judgments

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

There are four different methods of enforcement of foreign judgments and awards in Luxembourg:

- the enforcement of judgments rendered by a court of a state that has no international agreement with Luxembourg;
- the enforcement of judgments rendered by a court of a state that has an agreement with Luxembourg and under which a recognition process is required to go through;
- the enforcement of judgments rendered by a court of a state that has an agreement with Luxembourg and under which the judgments are recognised; and
- the enforcement of arbitral awards.

The process for recognition and enforcement, hence, depends on the reciprocal arrangements entered into with other countries, or the domestic rules as laid down in the code of civil procedure.

Luxembourg has reciprocal arrangements for enforcement of judgments under the Brussels Convention, the Lugano Convention and the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations. Luxembourg is also bound by the Hague Convention of Choice of Court Agreements as a result of the approval of the European Union.

Luxembourg is party to the Convention of 29 July 1971 with Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters.

Luxembourg is also party to the New York Convention of 10 June 1958 on the recognition and enforcement of arbitral awards.

Enforcement of a foreign judgment or award is mainly of use if the defendant has assets located in Luxembourg.

### Foreign proceedings

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

Under article 350 of the NCP, if there is a legitimate reason to preserve or establish before any trial the proof of facts on which the solution of a dispute could depend, the court may order any legally admissible investigative measures upon request of any interested party. The provisions set out conditions under which the investigative measures can be ordered by the judge. It is not specifically mentioned that the action for which evidence must be preserved or established is to be brought in Luxembourg.

## ARBITRATION

### UNCITRAL Model Law

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

The Luxembourg law provisions on arbitration are included in Book III, Title 1 of the Luxembourg New Code of Civil Procedure (NCP) (articles 1224 to 1251 NCP). Although these provisions are not expressly based on the UNCITRAL Model Law, they are to a large extent inspired by the UNCITRAL Model Law.

A new draft law number 7671 for amending the arbitration procedure was deposited on 15 September 2020 and is currently under

discussion in the Chamber of Deputies. The draft law mainly reconstitutes the international arbitration regime rules under French law that served as a reference model for the proposed text. The draft law is based on existing rules, namely French law and UNCITRAL rules on international commercial arbitration.

### Arbitration agreements

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

To be valid under Luxembourg law the arbitration agreement must:

- as to form: be in writing and documented either through minutes recorded before the arbitrators chosen, or through a notarial deed, or under a private seal agreement (article 1226 NCP); and
- as to substance: state the reasons upon which it is based and contain the names and domiciles of the arbitrators, the names and domiciles of the parties and the object of the dispute.

### Choice of arbitrator

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

In the absence of contractual provisions regarding the appointment of the arbitrator or arbitrators, and in the absence of an amicable agreement between the parties on this point, the procedure is as follows.

The case will be heard by three arbitrators.

Each party shall designate its arbitrator and make his or her name known to the other party. If one party fails to designate its arbitrator and make known the name to the other party, it will be summoned to do so within eight days of receipt of the registered letter that will be sent to it for these purposes.

If no appointment is made within the time limit, the appointment will be made through a court order of the president of the district court, issued upon request of one of the parties to the dispute. This court order is not subject to appeal.

A copy of the application and the subsequent court order will be served on the defaulting party and on the arbitrators within eight days, with an injunction to carry out their duties.

The arbitrators will agree on the designation of the third arbitrator. Failure to do so will result in this appointment being made by the president of the district court at the request of the most diligent party. If there are more than two parties with distinct interests in the dispute, they will have to agree on the names of the three arbitrators. If they fail to reach an agreement, these appointments will be made by the president of the district court at the request of the most diligent party, the other parties present or duly called.

### Arbitrator options

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

In general, the parties choose the most suitable arbitrators who are familiar with the relevant sector and industry given the economic sector or industry setting in which the dispute takes place. The experience and reputation of the arbitrators are also taken into consideration by parties to an arbitration.

## Arbitral procedure

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

The modalities of an arbitration procedure are subject to contractual freedom and can, therefore, be multiple and varied or borrowed from model statutes set up by national or international organisations. In principle, therefore, there is no room for the application of domestic procedural rules except where the arbitration agreement makes them applicable. However, the procedural rules shall apply when it comes to enforcing the award.

## Court intervention

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

The inclusion of an arbitration clause in a contract or the conclusion of an arbitration agreement affects the jurisdiction of national courts in the sense that such agreements exclude the dispute from the knowledge and ruling of these courts, thus leading to their incompetence, which they must automatically raise.

The courts may, however, intervene in certain specific circumstances.

## Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators have powers to grant interim relief. However, the awards providing for interim relief as well as final awards may be enforced only after they have been declared enforceable by the president of the district court, except where the award is declared provisionally enforceable by the arbitral tribunal (articles 1242 and 1249 NCPC).

The new article 1227(4) of the draft law also gives the court jurisdiction to grant interim measures of protection or measures of inquiry when it appears that the arbitral tribunal would not be able to effectively grant the measure sought.

## Award

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

The award is delivered once each of the parties has been able to produce its arguments, defences and exhibits. The award shall be delivered in writing and signed by each of the arbitrators. If there are more than two arbitrators, and provided some arbitrators refuse to sign it, the other arbitrators shall mention it, and the judgment shall have the same effect as if it had been signed by each of the arbitrators.

## Appeal

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

If the arbitral tribunal has failed to rule on one or more points of the dispute that may be dissociated from the points on which it has ruled, this tribunal may, at the request of one of the parties, complete its award, even if the time limit set for the arbitrators has expired, unless the other party disputes that points were omitted or that the omitted points can be dissociated from the points on which it was decided. In this case, the dispute is brought by the most diligent party before the district court. If the latter decides that the omitted points can be dissociated from the points on which the award has ruled, he or she refers the parties to the arbitral tribunal to have the award completed (article 1248 NCPC).

The award can only be appealed to the district court by way of annulment. The nullity of the award may only be pronounced in the following cases:

- the award is contrary to the public policy;
- the dispute could not be settled by way of arbitration;
- there was no valid arbitration agreement between parties;
- the arbitral tribunal has exceeded its competence or powers;
- the arbitral tribunal has failed to rule on one or more points of the dispute and if the points omitted cannot be dissociated from points on which it has been decided;
- the award was rendered by an arbitral tribunal irregularly formed;
- there has been a violation of the rights of the defence;
- the award is not grounded unless the parties have expressly dispensed the arbitrators from justifying the grounds therein;
- the award contains contradictory provisions;
- the award was obtained by fraud;
- the award is based on evidence declared false by an irrevocable court decision or on evidence recognised as false; and
- if, since the award was rendered, a document or other evidence has been discovered that would have had a decisive influence on said award and that had been retained by the opponent.

The application for annulment of the award is only admissible if the award can no longer be challenged before the arbitrators.

## Enforcement

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

Articles 1250 and 1251 NCPC govern the recognition and enforcement of arbitral awards.

Luxembourg is party to several treaties facilitating recognition and enforcement of arbitral awards, namely the New York Convention of 10 June 1958, the European Convention on International Commercial Arbitration of 21 April 1961 and the ICSID Convention of 18 March 1965.

The enforcement of a foreign award is granted by the president of the district court, upon request of the applicant.

The request is brought before the president of the district court in whose jurisdiction the party against whom enforcement is requested has domicile or residence. If the defendant has no domicile or residence in Luxembourg, the request is brought before the president of the district court of the place where the sentence is to be executed.

The applicant must elect domicile in the district of the court with which the application is filed.

In addition, the rules applicable to the enforcement of foreign judgments rendered in accordance with an international convention on the recognition and enforcement of such judgments must be observed.

## Costs

33 | Can a successful party recover its costs?

Yes, a successful party can recover its costs, mainly its fees and its portion of the arbitration costs.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

Mediation and conciliation in the sense of an ADR process do not seem to show any major differences. In both cases, it is a question of ensuring the intervention of a third person who is not responsible for settling the dispute between the parties to stimulate the debate and reflection and to get the parties themselves to seek a solution to their problem.

From our experience, the most popular ADR process is mediation. Conciliation is an ADR process that is commonly used for specific types of disputes.

### Requirements for ADR

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

There is no specific requirement for the parties to litigation or arbitration to consider ADR before the proceedings. However, there are certain circumstances under which ADR may play a role, such as:

- when a judge is in charge of a dispute that is the subject of a mediation clause, he or she must suspend the examination of the dispute when one of the parties requests it (article 1251-5, section 2 NCPC);
- when the parties jointly request mediation from the judge (or one of them requests it and the other accepts it), the procedural time frames in the proceedings are suspended (article 1251-12, section 6 NCPC);
- written documents communicated through a mediation process and declarations gathered or established during said process cannot be used as evidence in subsequent legal proceedings (article 1251-6 NCPC);
- the judge may, at any stage of the proceedings, propose or order the parties to resort to mediation, except in cassation proceedings (before the Supreme Court for points of law) and summary proceedings (article 1251-12 NCPC); and
- the agreement concluded between the parties following a mediation process can be approved, and therefore become enforceable, by decision of the president of the district court, upon application (articles 1251-11, 1251-21 and 1251-22 NCPC).

## MISCELLANEOUS

### Interesting features

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

A new law amending the rules on civil procedure entered into force on 16 September 2021. The new provisions have shortened the length of certain proceedings and have increased the value of certain claims up to which the courts will have final jurisdiction.

Further, written proceedings may be introduced under a simplified procedure for claims that do not exceed €100,000.

For non-simplified procedures, the written proceedings will now require parties to submit to the court final written briefs that must summarise all the arguments made in the precedent written briefs. Failing to do so, the court will take into consideration only the arguments laid down in the last filed written briefs.

## UPDATE AND TRENDS

### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

A new draft law (7650) introducing collective redress into Luxembourg consumer law is currently being discussed within the Luxembourg parliament. The bill shall, among other things, implement the provisions of EU Directive No. 2020/1828 of the European Parliament and

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of the Council of 25 November 2020 on representative actions for the protection of the collective interests.

The new draft law (7671) for amending the arbitration procedure identifies a corpus of the most appropriate rules with an aim to constitute the best possible draft text based on fundamental choices relating to the content.

# Malaysia

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SKRINE

## LITIGATION

### Court system

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

The civil courts in Malaysia are divided into the superior courts (governed by the Courts of Judicature Act 1964) and the subordinate courts (governed by the Subordinate Courts Act 1948). The superior courts comprise three courts with different jurisdictions: the Federal Court, the Court of Appeal and the high courts. The subordinate courts consist of the sessions courts and the magistrates courts.

As of 24 April 2020, the Federal Court bench comprises 11 judges, namely the chief justice of the Federal Court, the president of the Court of Appeal, two chief judges of the high courts and seven Federal Court judges. The court of appeal bench has 24 judges, namely the president of the Court of Appeal and 23 Court of Appeal judges, and the high court bench has 95 judges, namely the chief judges of the high courts, 66 high court judges and 27 judicial commissioners.

The Federal Court is the apex court in the land and exercises both original and appellate jurisdiction. The Federal Court has original jurisdiction under article 128(1) and (2) of the Constitution to determine any constitutional law issue. The Federal Court may, subject to leave being obtained first, hear appeals from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the high court in the exercise of its original jurisdiction. The Federal Court also has advisory jurisdiction in that the Yang di-Pertuan Agong (the head of state) may refer to the Federal Court for its opinion or advice as to the effect of any provision of the Constitution that has arisen or appears to him or her likely to arise, and the Federal Court shall pronounce its opinion in open court of any question so referred to it. All proceedings at the Federal Court are generally heard and disposed of by three or five judges.

The Court of Appeal exercises appellate jurisdiction and has the jurisdiction to hear and determine appeals from any judgment or order of any high court in any civil matter, whether it was made in the exercise of its original or its appellate jurisdiction (section 67 of the Courts of Judicature Act 1964). Unless leave is granted, the Court of Appeal will only hear appeals where the amount or value of the subject matter of the claim (exclusive of interest) is 250,000 ringgit or above (section 68 of the Courts of Judicature Act 1964). All proceedings at the Court of Appeal are generally heard and disposed of by three judges.

The high court in Malaya and the high court in Sabah and Sarawak are high courts of coordinate jurisdiction (article 121 of the Constitution) and hear cases at first instance as well as appeals against decisions from the subordinate courts. The high court also hears appeals from a decision of a subordinate court in any civil matter where the amount in dispute or the value of the subject matter is above 10,000 ringgit, except where the matter involves a question of law (section 28 of the Courts of

Judicature Act 1964). All proceedings at a high court are generally heard and disposed of before a single judge.

Within the high courts, various specialised courts have been set up, including the Intellectual Property Court, the Construction Court, the Family Court, the Admiralty Court, the Cyber Court and the Islamic banking (Muamalat) Court.

The Sessions Court judge has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant and distress, all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed 1 million ringgit, and all civil actions and suits for the specific performance or rescission of contracts, or for cancellation or rectification of instruments (section 65 of the Subordinate Courts Act 1984). The Sessions Court may grant an injunction and make a declaration, regardless of whether any other relief, redress or remedy is or could be claimed.

For civil matters, a first-class magistrate has the jurisdiction to try all actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed 100,000 ringgit (section 90 of the Subordinate Courts Act 1984), whereas a second-class magistrate only has the jurisdiction to try original actions or suits of a civil nature where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, not exceeding 10,000 ringgit (section 92 of the Subordinate Courts Act 1984).

### Judges and juries

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

The Malaysian judicial system is adversarial in nature, where the parties or their counsel present evidence and arguments that advance their case. Judges generally adopt a passive role in proceedings and decide questions of fact and law based on the evidence and arguments advanced by the parties or their counsel. On 1 January 1995, Malaysia effectively abolished its jury system.

The chief justice of the Federal Court (the head of the Malaysian judiciary system) is appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers (article 122B of the Federal Constitution). The process of appointment for the president of the Court of Appeal (the deputy head of the Malaysian judiciary system) and the chief judges of the high courts (the head of the high court in Malaya and the high court in Sabah and Sarawak, respectively) and all the other judges is the same, with the additional procedure of the Prime Minister consulting the chief justice of the Federal Court. Judicial commissioners may also be appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the chief justice of the Federal Court.

To be qualified for appointment under article 122B as a judge of any of the superior courts, the candidate must be a citizen and an advocate of any of those courts, or a member of the judicial and legal service



of the federation or of the legal service of a state, for at least 10 years preceding his or her appointment. A judge holds office until he or she attains the age of 66 years and no later than six months after he or she attains that age, as the Yang di-Pertuan Agong may approve.

A Sessions Court judge is appointed by the Yang di-Pertuan Agong on the recommendation of the chief judge (section 59(3) of the Subordinate Courts Act 1948). A Sessions Court judge must be a member of the Judicial and Legal Service of the Federation (section 60 of the Subordinate Courts Act 1948).

A first-class magistrate is appointed by the Yang di-Pertuan Agong, on the recommendation of the chief judge whereas in all other states, they are appointed by the respective state authorities on the recommendation of the chief judge (section 78 of the Subordinate Courts Act 1948).

Similarly, a second-class magistrate is appointed by the Yang di-Pertuan Agong and respective state authorities without needing recommendation of the chief judge (section 79 of the Subordinate Courts Act 1948).

The Judicial Appointments Committee (JAC) was established with the effect of the Judicial Appointments Commission Act 2009, gazetted on 8 February 2009. The purpose of the JAC is to ensure that the process for the nomination, appointment and promotion of superior court judges is more transparent and comprehensive. The establishment of the JAC is a step towards improving the judiciary and strengthening and enhancing the integrity of the institution.

To promote diversity on the bench, candidates are chosen from differing backgrounds, ranging from academia to private practice and the public sector. The year 2019 was one of milestone achievements for female judges in Malaysia's apex court. Federal Court judge Tan Sri Tengku Maimun Tuan Mat, who was appointed as the 16th chief justice of the Federal Court on 2 May 2019, is the first woman to head the Malaysian judiciary. Dato' Rohana Yusof, who was elevated to the position of the president of the Court of Appeal on 25 November 2019, is the first woman to hold the position since the inception of the Court of Appeal in 1994. Further, on 26 November 2018, Datuk Nallini Pathmanathan became the first Malaysian Indian woman to sit in the Federal Court. For the first time, there are also eight women judges in the Federal Court.

## Limitation issues

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

Limitation periods for bringing civil claims are generally set out in the Limitation Act 1953. Pursuant to section 6(1)(a) of the Limitation Act 1953, an action founded on a contract or on tort cannot be brought after the expiration of six years from the date on which the cause of action accrued. This time limit applies similarly to actions to enforce a recognisance, actions to enforce an award, and actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. Similarly, actions to recover rent have a limitation period of six years.

Limitation periods may be extended by fraud of the defendant or his or her agent concealing the right of action, or by a mistake. In those cases, the limitation period may not run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it (section 29 of the Limitation Act 1953).

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. The limitation period for actions to recover land and recover principal secured by a charge or enforce a charge is also 12 years from the date on which the right of action accrued. Actions in respect of a fraudulent breach of

trust or by a beneficiary under a trust to recover trust property from the trustee have no limitation period.

In respect of actions founded on tort where the time limit is six years, by virtue of the Limitation (Amendment) Act 2018, which came into effect on 1 September 2019, there has been an extension of three years from the date of knowledge of the person having the cause of action for negligence not involving personal injury and where the damage was not discoverable prior to the expiry of the statutory limitation period (section 6A of the Limitation Act 1953). Nevertheless, an action cannot be instituted 15 years after the cause of action accrued. There is also a special limitation period for individuals with a disability for cases under section 6A of the Limitation Act 1953, which is three years from the date the person ceased to be under a disability or died (section 24A of the Limitation Act 1953). Similarly, an action cannot be instituted 15 years after the cause of action accrued.

In the case of *Insun Development Sdn Bhd v Azali Bin Bakar* [1996] 2 MLJ 188, the Federal Court held that parties to a contract are free to regulate or modify their rights in the case of a breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages. This would mean that parties are free to agree to suspend time limits.

## Pre-action behaviour

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

Generally, there are no steps that a party must take before commencing proceedings. Unlike the Civil Procedure Rules in the United Kingdom, the Malaysian Rules of Court 2012 do not impose any pre-action protocols on parties. Nevertheless, the parties may have agreed to certain pre-dispute negotiations or procedures in their contracts or agreements, which they will be contractually bound to observe and comply.

A party can apply for a pre-action discovery order under Order 24, Rule 7A(1) of the Rules of Court 2012 before the commencement of proceedings, for the purpose of or with a view to identifying possible parties to any proceedings. In a pre-action discovery application, the applicant must:

- specify or describe the documents in question;
- show that the documents are relevant to an issue arising or likely to be made in the proceedings or the identity of the likely parties to the proceedings or both by, where practicable, reference to any pleading served or intended to be served in the proceedings; and
- show that the person against whom the order is sought is likely to have or have had them in his or her possession, custody or power.

A plaintiff may also apply for a disclosure order against a third-party bank, pursuant to Order 24, Rule 7A of the Rules of Court 2012. This application is also known as a Bankers Trust application and is used to ascertain information of bank accounts of fraudsters and other recipients of fraud monies. The overriding test in a Bankers Trust application is that there must be a viable case against the wrongdoers and the plaintiff requires discovery to facilitate his or her action.

## Starting proceedings

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

In Malaysia, civil proceedings are commenced either by way of a writ of summons (writ) or an originating summons.

Where there is a substantial dispute of fact or where the plaintiff intends to seek summary judgment, a writ should begin the proceeding.

Where there are no or few disputes of fact and the main issues are questions of law, or involve the construction of any document where such questions are suitable for determination without the full trial of the action, the proceeding may be begun by originating summons.

All new cases commenced at the high court may now be filed electronically. In some subordinate courts in certain states where electronic filing is not yet available, filing must be done manually at the court registry.

Parties are notified of the commencement of proceedings upon being served with a sealed copy of the writ or originating summons, as the case may be. Where the defendant is a corporation, service is effected by leaving or sending by registered post a copy of either the writ or originating summons at the registered address of the company. Alternatively, service is effected by handing a copy of the writ or originating summons to the secretary or to any director or officer of the corporation. Where the defendant is an individual, service is effected by leaving a copy of the writ or originating summons with the defendant or by sending the same through prepaid advice of receipt registered post addressed to the defendant's last known address. These modes of service would not be applicable where parties are suing based on a contract that specifically stipulates a different mode of service. In those circumstances, service must be effected by the method stipulated in the contract.

Where personal service is impracticable or cannot be effected, leave may be obtained from the court for the cause papers to be served by way of substituted service. The party applying for leave must prove that all reasonable efforts had been taken to attempt personal service. Generally, a substituted service order will require a notice to be published in one or two newspapers with national circulation, posted in the court premises or at the defendant's last known address.

For defendants outside Malaysia, an application must be made to the court for leave to serve out of the jurisdiction. For leave to be granted, the plaintiff must show, among other things, that he or she has a good arguable case for the relief claimed, that the defendant is in the particular jurisdiction outside Malaysia, and that Malaysia is the most appropriate forum to determine the dispute.

**Timetable**

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

In Malaysia, a civil claim can be commenced either by way of a writ or an originating summons, which are valid for six months beginning from the date of its issue.

On 31 January 2020, the chief judge of Malaya issued Practice Direction No. 1 of 2020 relating to case management of civil matters. Essentially, in a civil claim commenced by way of a writ, the typical procedure and timetable for the proceedings are as follows:

- Assuming an endorsed copy of the writ and statement of claim are duly served on the defendant, he or she has 14 days to enter appearance to defend the claim, and to file a statement of defence (and counterclaim, if any) within 14 days from the time limited for appearing or after the statement of claim is served on him or her, whichever is the later. Thereafter, the plaintiff has 14 days to file and serve a reply or reply and defence to counterclaim (if applicable).
- Pleadings are deemed to be closed at the expiration of 14 days after service of the reply or defence to the counterclaim (if no reply is served) or service of the defence (if no reply nor a defence to the counterclaim is served).
- Generally, the first case management will be fixed within 30 days from the filing of the writ. The second case management will take place within 14 days from the close of pleading. At the second case management, pretrial directions will be given, including, among others, directions relating to the filing of bundle of pleadings,

bundle of documents, all interlocutory applications (if any) and other pretrial filings.

- The third case management will be fixed before the learned judge. Trial dates may be fixed, typically within six months of the date of filing of the writ, subject to the court's discretion to fix the trial dates on a later date.
- Practice Direction No. 1 of 2020 does not stipulate when a decision must be delivered. It is usual for parties to be given a month or two after the close of trial proceedings to file and exchange written submissions. A hearing date for oral submissions may be fixed, after which the court may deliver the judgment within one to three months.

In the case of a civil claim commenced by way of originating summons, a defendant has 21 days from the date of receipt of the sealed originating summons and the affidavit in support to respond by filing an affidavit in reply. Thereafter, the plaintiff will have another 14 days to respond to the defendant's affidavit in reply. Directions would usually be given by the courts during case management on timelines for further affidavits to be exchanged. The general rule is that the plaintiff would have the last say. According to Practice Direction No. 1 of 2020, the first case management date will be endorsed on the sealed originating summons, usually within 14 days of the date of filing the originating summons. Interlocutory applications, if any, must be filed within 14 days of the first case management. A hearing date will be fixed within 30 days after all affidavits are exhausted.

**Case management**

**7 | 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 2012 and fixed by the courts. However, parties may propose appropriate procedures and suitable timelines for the court's consideration during case management. The court has wide discretion and may make any order and directions for just, expeditious and economical disposal of proceeding.

**Evidence – documents**

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

Generally, parties have an obligation to preserve documents and other evidence pending trial. Pursuant to Order 24, Rule 3 of the Rules Court 2012, the court may at any time in the proceedings order any party to give discovery by making and serving on any other party a list of the documents that are or have been in his or her possession, custody or power and may at the same time or subsequently also order him or her to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. The list of documents is generally verified by way of an affidavit, which is filed and served on the other party.

The documents that parties may be ordered to discover are:

- documents on which the party relies or will rely on; and
- documents that could adversely affect his or her own case, adversely affect another party's case or support another party's case.

The provisions in Order 24 of the Rules of Court 2012 are subject to any written law or any rule of law that authorises or requires the withholding of any document on the grounds that the disclosure of it would be injurious to the public interest. Privileged documents that are not subject to discovery include public interest privilege, affairs of state privilege and legal professional privilege.

The duty to provide discovery under any order continues throughout the proceedings until the proceedings in which the order was made are concluded (Order 24, Rule 8A of the Rules of Court 2012).

### Evidence – privilege

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

There are generally three broad categories of legal privilege recognised in Malaysia: legal advice privilege, litigation privilege and without-prejudice privilege.

Legal advice privilege arises out of the relationship between a client and his or her lawyer. Legal advice privilege is codified in section 126 of the Evidence Act 1950, which provides that no advocate is permitted to disclose any communication made by the client to the advocate. This privilege is absolute and can only be waived by the privilege holder, namely the client (*Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 [FC]). The exception is where the communication is made in furtherance of any illegal purpose, crime or fraud. The Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v Bar Malaysia* [2021] MLJU 2176 recently affirmed the principles set out in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 [FC]. The Court of Appeal further observed that an advocate's and solicitor's legal brief can be multifaceted and wide-ranging, and as such, it is necessary for the classes of information protected under section 126 to be wide.

A breach of section 126 is tantamount to a breach of a principle of fundamental justice that would entitle an aggrieved party to commence an action for an order to 'safeguard the confidentiality of the client-solicitor communication' (*Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669 [FC]).

The high court in the case of *Toralf Mueller v Alcim Holding Sdn Bhd* [2015] MLJU 779 (HC) held that section 126 does not apply to communications between in-house counsel and his or her employer.

Litigation privilege applies to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with pending or contemplated litigation. For litigation privilege to be established, a two-fold test must be satisfied: whether litigation was pending or apprehended when the information or document was obtained; and whether litigation was the dominant purpose for the preparation of the document (*Wang Han Lin v HSBC Bank Malaysia Bhd* [2017] 10 CLJ 111 [CA]).

Without-prejudice privilege applies to communications, whether oral or written, that were made in the course of settlement negotiations. When used correctly, without-prejudice communications can render a statement or admission made by one party inadmissible as evidence in court proceedings. That is, the communications by that party cannot be used against them in a manner that would cause prejudice to that party's case.

In the recent case of *Malaysia Debt Ventures Berhad v Platinum TechSolve Sdn Bhd & Ors* [2020] MLJU 1421, the Court of Appeal held that a draft agreement that was being prepared by the appellant's solicitors would qualify as legal advice and, therefore, ought to be protected from disclosure on the ground of legal professional privilege.

### Evidence – pretrial

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

During a pretrial case management, the court may give pretrial directions to parties pursuant to Order 34, Rule 2 of the Rules of Court 2012 directing parties to exchange their evidence-in-chief in the form of written statements of factual witnesses and documents that will be

relied on or referred to in the course of the trial by any party, including documents referred to in the witness statements. The court would also likely direct expert evidence to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him or her testifying that the report exhibited is his or hers and that he or she accepts full responsibility for the report (Order 40A of the Rules of Court 2012). A party may also apply for leave of the court to put to an expert instructed by another party written questions about his or her report.

### Evidence – trial

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

The evidence-in-chief of each witness that has been exchanged before trial can only be admitted as evidence if the witness attends the trial for oral cross-examination. Order 38, Rule 1 of the Rules of Court 2012 provides that, as a general rule, witnesses in a writ action are to give evidence orally for examination. In this regard, witnesses are first examined-in-chief, then cross-examined and, finally, re-examined.

Expert witnesses also generally must give oral evidence on issues on which the expert witnesses of the respective parties are unable to agree. Where the experts reach agreement on an issue during the course of their discussions, the parties may agree to be bound by the agreement, and hence, remove the issue from contention and from the areas on which the experts may be cross-examined (Order 40A, Rule 5 of the Rules of Court 2012).

### Interim remedies

12 | What interim remedies are available?

The court has wide powers to grant a wide range of interim remedies, including:

- interim injunctions: orders directing a defendant to do or refrain from doing something pending the trial where there is a serious question to be tried, damages are not adequate remedy, and the balance of convenience lies in favour of granting an injunction;
- *Anton Piller* orders or search orders: mandatory injunctions requiring a defendant to provide access to its premises to allow documents and materials to be removed and preserved pending trial, to preserve the subject matter of a cause of action and of related documents;
- *Mareva* injunction or freezing orders: orders preventing the defendant from dissipating assets so as not to frustrate any judgment that the plaintiff may eventually obtain against the defendant;
- interim payments: orders requiring a party 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;
- *quia timet* injunction: injunctions to prevent an injury from occurring, which will only be granted if the plaintiff can show a strong probability that unless restrained, the defendant will do something that will cause the plaintiff irreparable harm;
- appointment of provisional liquidator: orders appointing provisional liquidators 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
- appointment of receivers and managers: orders appointing receivers and managers when it appears just and appropriate to do so to receive, manage or preserve property, or to restrain other parties from taking that property pending the trial.

## Remedies

### 13 | What substantive remedies are available?

Common substantive remedies available to a plaintiff include:

- damages, which are generally compensatory in nature, to compensate the loss suffered by the plaintiff as a result of the defendant's actions. Exemplary or punitive damages are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he or she has acted with a 'contumelious disregard' for the rights of the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (*Sambaga Valli K R Ponnusamy v Datuk Bandar Kuala Lumpur & Ors & Another Appeal* [2018] 1 MLJ 784 [CA]);
- declarations, which may be made under the discretionary power of the courts;
- injunctions, which may be granted to compel or restrain conduct on the part of a defendant pending the completion of a trial;
- specific performance: to require the defendant to perform the terms of the contract that were breached and are often awarded where damages would not be an adequate remedy; and
- account: to recover profits taken as a result of a breach of duty.

Interests are incurred on judgment debts at the applicable rate provided for in the Rules of Court 2012. Pursuant to Practice Direction No. 1 of 2012, the present prescribed rate of interest is 5 per cent per annum.

## Enforcement

### 14 | What means of enforcement are available?

There are various means of enforcement under the Rules of Court 2012 to ensure that parties comply with judgments or orders.

For the enforcement or execution of judgment or order for the payment of money, the following means may be adopted:

- writ of execution, which includes a writ of seizure and sale (for judgment sum), a writ of possession (for judgment for possession of immovable property) and a writ of delivery (for judgment or delivery of movable property);
- the appointment of a receiver or a receiver and manager;
- examination of the judgment debtor where the judgment debtor will be ordered to attend court for oral examination as to his or her assets and means under section 4(1) of the Debtors Act 1957;
- garnishee order, which compels a third party who owes money to the judgment debtor to pay the said sum directly to the judgment creditor;
- charging order in respect of shares held by the judgment debtor; and
- bankruptcy and winding-up proceedings.

For failure to comply with judgments and orders to do or abstain from doing an act, the court may make an order for committal under Order 45, Rule 5 of the Rules of Court 2012.

## Public access

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

Generally, the public is allowed to attend court hearings in Malaysia, which are conducted in open court. These include trials, appellate court hearings, hearings of judicial review applications and hearings

of winding-up petitions. On the other hand, hearings of originating summons and notices of application are heard in chambers. Proceedings may also be held in camera, that is, without the presence of the public or the press, where it is expedient in the interests of justice, owing to public safety or propriety, or for other sufficient reasons.

Court documents, such as pleadings and other cause papers, are generally available to the public. A member of the public may have access to cause lists and court documents by conducting an online file search if he or she has the relevant case number. However, there may be certain cases where the court files are sealed owing to reasons of confidentiality or secrecy. In these circumstances, the court files will not be available to the public for easy access.

## Costs

### 16 | Does the court have power to order costs?

The court has full discretion to order costs and has full power to determine by whom and to what extent the costs are to be paid.

The general position is that costs are to be paid by the losing party to the winning party. In assessing the costs to be paid, the court will consider all relevant circumstances and, in particular, the factors set out in Order 59, Rule 16(1) of the Rules of Court 2012, which include the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved; the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel; the number and importance of the documents, however brief, prepared and used; and, where money or property is involved, its amount or value.

A plaintiff may be ordered to provide security for costs in civil proceedings if, among others things, he or she is ordinarily resident out of the jurisdiction or is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he or she will be unable to pay the costs of the defendant if ordered to do so (Order 23, Rule 1 of the Rules of Court 2012).

Previously, section 351 of the Companies Act 1965 (now repealed) allowed for security for costs to be ordered against a company if it appears by credible testimony that there is reason to believe that the company cannot pay the costs of the defendant. Section 351 of the Companies Act 1965 is now reflected in section 580A of the Companies Act 2016.

## Funding arrangements

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

Section 112 of the Legal Profession Act 1976 expressly prohibits any advocate and solicitor from entering into an arrangement or agreement where the advocates' and solicitors' entitlement to fees is conditional on the success of the suit, action or proceeding. An advocate or solicitor is also prohibited from purchasing (or agreeing to purchase) directly or indirectly any interest that is the subject matter of the suit, action or proceeding. Those engagements or appointments are illegal and against public policy and, therefore, are void under section 24 of the Contracts Act 1950 (*Industrial Concrete Products Berhad v Huang Khairun Kumar & Associates* [2014] 7 CLJ 52 [CA]). Rule 27 of the Legal Profession (Practice and Etiquette) Rules 1978 also prohibits an advocate or solicitor from appearing in any matter in which he or she is directly financially involved.

While section 112 of the Legal Profession Act 1976 applies only to advocates and solicitors in West Malaysia, it must be pointed out that

the common law doctrine of maintenance and champerty has not been abolished in Malaysia, and as such, litigation funding arrangements are unenforceable as a matter of public policy (*Quill Construction Sdn Bhd v Tan Hor Teng & Anor* [2006] 2 CLJ 358 (HC)).

Although there are no express statutory provisions prohibiting those arrangements (eg, there is no provision in the Sarawak Advocate Ordinance), the common law doctrine against maintenance and champerty is applicable to declare an agreement void on the ground of public policy (*Mastika Jaya Timber Sdn Bhd v Shankar Ram Pohumall (No 2)* [2010] 10 CLJ 312 (HC)).

Sections 112 and 116 of the Legal Profession Act 1976 permit an advocate and solicitor to enter into a written agreement for costing contentious business. Rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978 sets out the factors to be taken into consideration.

Third-party funding arrangements are not allowed in Malaysia. The Third-Party Funding Bill 2018 was proposed to allow third-party funding for international arbitrations seated in Malaysia or international arbitration-related court proceedings. However, this bill was not ultimately tabled in parliament.

Litigation may be funded if a party is financially eligible for legal aid rendered by the government's Legal Aid Department. Legal aid services provided include legal aid in civil court proceedings relating to married women, children, probate, letters of administration, tenancy and consumer claims, legal advice on all matters, mediation services and legal companion services. The Bar Council Legal Aid Centre also provides legal services and advice for those who cannot afford legal services through its various programmes, such as the Walk-in Clinic, and joint programmes with other non-government organisations such as the All Women's Action Society Malaysia, the Women's Aid Organisation and the United Nation High Commissioner for Refugees, Tenaganita.

## Insurance

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

Legal expenses insurance and legal protection insurance are not commonplace in Malaysia. However, liability insurance, also known as business and commercial insurance, is available to protect the insured if sued for claims that come within the coverage of the liability insurance policy.

There are many types of liability insurance, including public liability insurance, product liability insurance, professional indemnity insurance, directors' and officers' liability insurance, and employers' liability insurance.

Under section 289 of the Companies Act 2016, a company is now permitted, with the prior approval of its board, to effect insurance to cover an officer or auditor of the company against any civil liability for any act or omission in his or her capacity as a director or officer or auditor; and for any costs incurred by that officer or auditor in defending or settling any claim or proceeding relating to any such liability. However, that insurance may not be effected by the company in respect of civil or criminal liability arising from a director's breach of duty under section 213 of the Companies Act 2016.

Professional indemnity insurance is typically mandatory for professionals who are regulated by their respective professional bodies, such as the profession of lawyers, accountants, architects, doctors, engineers and surveyors. The extent of coverage will depend on the policies taken out.

## Class action

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

Malaysia does not have a broad process for class action. Class action in Malaysia is generally known as representative action. The formal rules that apply to a representative action in Malaysia is Order 15, Rule 12 of the Rules of Court 2012, which provides that proceedings may be filed by or against one or more persons as representing numerous persons who have the same interest in the proceedings.

The sole test to apply is that of 'the same interest' in one cause or matter. The Court of Appeal in *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 (CA) laid down the prerequisites for invoking Order 15, Rule 12 of the Rules of Court 2012, which are:

- there must be numerous persons with the same common interest arising out of the same contract or the same grant or claim pertaining to the same subject matter;
- the reliefs sought by these numerous persons must not be personal but beneficial to the class as a whole; and
- the plaintiffs and those represented in it must be members of a class having a common interest and a common grievance and the reliefs sought are beneficial to all of them.

## Appeal

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

Parties may appeal against findings of both fact and law, or against the court's exercise of its discretion. Appellate courts are generally reluctant to reverse findings of fact, particularly where those findings depended on the judge's view of the credibility of the witnesses who gave oral evidence before the court of first instance.

An appeal from a decision of a subordinate court in a civil action shall only lie to the high court where the amount in dispute or the value of the subject matter exceeds 10,000 ringgit, except where the appeal involves a question of law or where it relates to the maintenance of wives or children.

A party aggrieved with any judgment or order of the high court may appeal as of right to the Court of Appeal, subject to certain exceptions: for instance, where leave of the Court of Appeal is required if the amount or value of the subject matter of the claim (exclusive of interest) is less than 250,000 ringgit.

The Federal Court may hear appeals from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the high court in the exercise of its original jurisdiction. However, leave of the Federal Court must first be obtained. Leave will only be granted if the matter involves a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage (section 96 of the Courts of Judicature Act 1964). The Federal Court may also hear appeals from any decision as to the effect of any provision of the Constitution, including the validity of any written law relating to any such provision.

## Foreign judgments

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

A foreign judgment may be recognised and enforced under the Reciprocal Enforcement of Judgements Act 1958 (REJA) or under common law by commencing an action on the judgment itself. 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 Malaysian courts only after it has been registered.

REJA applies only to judgments made by superior courts from the reciprocating countries as listed in the First Schedule of the Act, namely the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India (excluding certain states) and Brunei.

An application to register foreign judgments must be filed within six years of the date of the judgment or any appeal decision thereof.

**Foreign proceedings**

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

The procedure for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions is governed by Order 66, Rule 1 of the Rules of Court 2012. An application may be made to the high court for an order for the examination of witnesses and for attendance and production of documents, for use in foreign proceedings. The application will be made ex parte by a person duly authorised to make the application on behalf of the foreign court or tribunal and must be supported by an affidavit exhibiting the letter of request, certificate or other document evidencing the desire of the foreign court or tribunal to obtain for the purpose of foreign proceedings the evidence of that witness. The deposition of that witness shall be sent to the registrar who will send the deposition, together with a certificate with the seal of the high court to the minister or any appropriate person, for transmission to the foreign court or tribunal.

**ARBITRATION**

**UNCITRAL Model Law**

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

The Malaysian Arbitration Act 2005 is largely modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985.

**Arbitration agreements**

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

The formal requirements for an enforceable arbitration agreement are set out in section 9 of the Arbitration Act 2005. An arbitration agreement is defined as ‘an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’.

An arbitration must be in writing. Following the amendments to section 9 of the Arbitration Act 2005 by virtue of the Arbitration (Amendment) (No. 2) Act 2018, an arbitration agreement is regarded to be in writing if:

- its content is recorded in any form, regardless of whether the agreement or contract has been concluded orally, by conduct or by other means; or
- it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

An electronic communication that the parties make by means of data message is also regarded as an arbitration agreement in writing if the information contained therein is accessible so as to be usable for subsequent reference. ‘Data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.

An arbitration agreement should contain information such as the scope of the disputes to be referred to arbitration, the number of arbitrators and procedure for the appointment of arbitrators, whether the arbitration is to be administered by an arbitral institution or otherwise, the seat and language of the arbitration and the governing law of the arbitration agreement.

**Choice of arbitrator**

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

Generally, parties are free to determine the number of arbitrators and the procedure for appointing the arbitrators.

If the arbitration agreement is silent on the matter and the parties fail to determine the number of arbitrators, under section 12 of the Arbitration Act 2005, the arbitral tribunal shall:

- in the case of an international arbitration, consist of three arbitrators; and
- in the case of domestic arbitration, consist of a single arbitrator.

Pursuant to section 13 of the Arbitration Act 2005, where the parties fail to agree on the procedure for appointing arbitrators, in the case of a panel of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator. At any point in time, if arbitrators are not appointed within the stipulated time period, either party may apply to the director of the Asian International Arbitration Centre (Malaysia) for such appointment. The procedure is the same in an arbitration with a single arbitrator.

**Arbitrator options**

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

Parties are free to choose and are subject to pre-agreed criteria or qualifications in their arbitration agreements, the parties’ available pool of candidates is not confined to arbitrators in Malaysia.

Parties may also select arbitrators from various panels of arbitrators maintained by arbitral institutions around the world, including the Asian International Arbitration Centre (AIAC), which provides a diverse list of arbitrators available locally and abroad (together with their qualifications and experiences) to meet the needs of complex arbitrations.

**Arbitral procedure**

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

Section 21 of the Arbitration Act 2005 provides that the parties are free to agree on the procedure to be followed in conducting arbitral proceedings, failing such an agreement the tribunal may, subject to the provisions of the Act, conduct the arbitration in a manner it considers appropriate. This provision in the Act is in line with the principle of party autonomy and the ability of parties to design the procedural rules according to their needs.

The procedure or procedural rules agreed upon by parties must be consistent with the public policy of Malaysia, otherwise, the eventual arbitral award may be liable to be set aside, or may be enforcement refused (section 37 of the Arbitration Act 2005).



## Court intervention

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

Section 8 of the Arbitration Act 2005 provides that no court may intervene in matters governed by the Act, except where so provided in the Act. The need to respect party autonomy in the arbitral process with minimal court intervention is a fundamental concept under Malaysian law. The court may intervene in limited circumstances expressly provided in the Act, including the:

- appointment of arbitrators, where the director of the AIAC fails to do so within 30 days from the request;
- determination on any challenge made by a party to the appointment of an arbitrator;
- determination of the jurisdiction of the arbitral tribunal upon an appeal by a party;
- power to issue interim measures in relation to arbitration proceedings, including to maintain or restore the status quo pending the determination of the dispute, to preserve assets, to preserve evidence or to provide security for the costs of the dispute;
- power to order the attendance of a witness to give evidence or, where applicable, produce documents;
- determination of any preliminary question of law arising in the course of the arbitration; and
- extension of time for commencing arbitration proceedings.

In the high court case of *WRP Asia Pacific Sdn Bhd & Anor v TAEI Tijari Partners Ltd & Ors* [2019] MLJU 1244 (HC), it was held that the court has the powers to vary or set aside the interim measures if there is a change of circumstances justifying the making of such an order. The fact that the interim measures, in this case, prohibitory injunction orders, were made after an inter partes hearing does not mean that the court cannot vary or discharge the same if there is suppression of material facts or an intentional act to mislead the court.

## Interim relief

### 29 | Do arbitrators have powers to grant interim relief?

Pursuant to section 19 of the Arbitration Act 2005, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures. The arbitral tribunal may grant an interim measure, whether in the form of an award or in another form, at any time prior to the issuance of the final award, to order a party to:

- maintain or restore the status quo, pending the 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 to preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute; or
- provide security for costs of the dispute.

## Award

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

Pursuant to section 33 of the Arbitration Act 2005, an award shall be made in writing and signed by the sole arbitrator or, where there is more than one arbitrator, by a majority of the members of the arbitral tribunal.

An arbitral award must state the reasons for the award unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms, and must state its date and the seat of the

arbitration. After an award has been made, a copy of the signed award shall be delivered to each party.

The Arbitration Act 2005 does not prescribe a time limit within which an award should be rendered. However, if the arbitration is administered under the AIAC Arbitration Rules 2021, Rule 34 requires the arbitral tribunal to submit its draft of the final award to the Director of AIAC within 90 days of the close of proceedings for a technical review. Where the AIAC Fast Track Arbitration Rules 2021 is adopted, the arbitral tribunal must publish its award within 90 days of the date when the proceedings were declared closed.

If the time for making an award is limited by the arbitration agreement, the high court may, unless otherwise agreed by the parties, extend the time. An application may be made by the arbitral tribunal with notice to the parties or by any party to the proceedings with notice to the arbitral tribunal and the other parties (section 46 of the Arbitration Act 2005).

## Appeal

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

There are no provisions in the Arbitration Act 2005 allowing for appeal of an arbitral award. Parties may apply to set aside the award on the grounds set out in section 37 of the Arbitration Act 2005 or apply to resist the recognition or enforcement of the award under section 39 of the Arbitration Act 2005.

## Enforcement

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

Malaysia is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which came into force on 3 February 1986 in Malaysia.

The provisions on recognition and enforcement of arbitral awards are contained in sections 38 and 39 of the Arbitration 2005 Act read with Order 69, Rule 8 of the Rules of Court 2012, which provide for a two-stage process (*CTI Group Inc v International Bulk Carriers SPA* [2017] 9 CLJ 499 (FC)):

- the first stage, an *ex parte* proceeding: an originating summons must be filed with an affidavit exhibiting the duly authenticated original or duly certified copy of the award, and the original or duly certified copy of the arbitration agreement. An *ex parte* order giving permission to enforce an arbitral award is made at this stage; and
- the second stage, an *inter partes* proceeding: an application to set aside the *ex parte* order must be made within 14 days after service of the *ex parte* order on the party against whom the order is made.

The two-stage process does not permit a party seeking to set aside the *ex parte* order to set it aside under section 38 – it must be applied for under section 39 of the Arbitration Act 2005, which sets out limited grounds on which recognition or enforcement may be refused by the court (*CTI Group Inc v International Bulk Carriers SPA* [2017] 9 CLJ 499 (FC)).

Malaysia is also a signatory to the Convention on the Settlement of Investment Disputes (the ICSID Convention) and the ASEAN Comprehensive Investment Agreement between members of the Association of Southeast Asia Nations.

## Costs

### 33 | Can a successful party recover its costs?

Parties are entitled to recover the costs and expenses of an arbitration. Parties are free to agree on how costs are to be paid, failing which, section 44 of the Arbitration Act 2005 gives the arbitral tribunal the

discretion to determine whether costs should follow the outcome of the arbitration, or for each party to bear its own costs.

Article 40(2) of the UNCITRAL Arbitration Rules, read with Rule 40 of the AIAC Arbitration Rules 2021, provide that the term 'costs' includes only:

- the fees of the arbitral tribunal;
- the reasonable travel and other expenses incurred by the arbitrators;
- the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- the reasonable travel and other expenses of witnesses to the extent those expenses are approved by the arbitral tribunal;
- the legal and other costs incurred by parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; or
- any fees and expenses of the appointed authority, and include the expenses reasonably incurred by the AIAC in connection with the arbitration, the administrative fees of the AIAC and the costs of the facilities made available by the AIAC.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

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

The ADR processes that are commonly used in Malaysia are mediation and adjudication.

#### Mediation

Mediation is a voluntary process governed by the Mediation Act 2012, in which an impartial third party, for example the mediator, facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute. In mediation, the parties themselves retain control over the solution to their dispute. The mediator acts independently and impartially and does not impose a resolution or make a decision that is binding on the parties. All mediation proceedings are private and confidential. Any disclosure, admission, concession or communication made during the mediation process shall be strictly 'without prejudice' and may only be disclosed with the consent of the parties.

The types of cases that are appropriate for settlement by mediation include claims for personal injuries and other tortious acts, claims for defamation, matrimonial disputes, commercial disputes, contractual disputes, and intellectual property cases. Matters relating to constitutional law, public law and criminal law are not suitable for mediation.

There are two avenues that parties can consider when attempting mediation: judge-led mediation; and ad hoc mediation, where the dispute will be referred to a private mediator.

The court-annexed mediation programme is a free service where judges act as mediators to aid in resolving disputes between litigation parties. This initiative is supported by Practice Direction No. 4 of 2016 issued by the chief justice of Malaysia, which took effect on 15 July 2016, directing that all judges and registrars may, at pretrial case management stage, give directions to parties to facilitate the settlement of the matter before the court by way of mediation to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal.

Parties may also opt for ad hoc mediation. There are various organisations that offer private mediation services in Malaysia, such as the Asian International Arbitration Centre (AIAC); the Malaysian Mediation Centre (MMC), which is overseen by the Malaysian Bar; and

the Securities Industries Dispute Resolution Centre (SIDREC), which focuses mainly on securities disputes.

On 7 August 2019, the United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) was signed in Singapore by 46 UN members – on the day it opened for signatures. Malaysia was among the first signatories to the Singapore Convention on Mediation. As at 4 April 2022, there were 55 signatories to the Singapore Convention on Mediation. The Convention will enable and facilitate the enforcement of mediated settlement agreements among the signatory states, in a manner similar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for arbitral awards. The Convention entered into force on 12 September 2020.

#### Adjudication

Adjudication is a statutory dispute resolution mechanism under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication and to provide remedies for the recovery of payment in the construction industry. The CIPAA applies to every construction contract made in writing relating to construction work carried out wholly or partly within Malaysia, including a construction contract entered into by the government. However, the CIPAA does not apply to construction work in respect of a building that is less than four storeys high and that is wholly intended for occupation.

The adjudication process is meant to be quick and speedy, and the statutory timelines set out in the CIPAA must be strictly adhered to. An adjudication decision is binding unless it is set aside by the high court; the subject matter of the adjudication decision is settled by written agreement between the parties; or the dispute is finally settled by arbitration or the court.

On 16 October 2019, the Federal Court in two landmark cases, *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal)* [2019] 7 AMR 348 and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd and two other appeals* [2019] 7 AMR 309, held that CIPAA applies prospectively to contracts entered into after the CIPAA came into force on 15 April 2014. It is therefore clear that CIPAA does not apply to construction contracts made before the CIPAA came into operation and that parties to such contracts are not entitled to resort to statutory adjudication proceedings to resolve payment disputes.

#### Requirements for ADR

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

For court litigation, Practice Direction No. 4 of 2016 states that all judges of the high court and its deputy registrars and all judges of the Sessions Court and Magistrates and their assistant registrars may, at pretrial case management stage, give directions to parties to facilitate the settlement of the matter before the court by way of mediation. While judges may encourage parties to settle their disputes at any stage of the proceedings, there is no mandatory requirement for parties to do so, and the court would unlikely compel the parties to participate in an ADR process.

As for arbitration, unless expressly provided in the arbitration clause that mediation or other ADR processes must be pursued or attempted as a condition precedent to the referral of any dispute to arbitration, the parties are not required to consider ADR before or during proceedings.

## MISCELLANEOUS

### Interesting features

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

The e-Review System, which was first implemented at the Federal Court and the Court of Appeal in October 2018 and subsequently extended to some of the high courts in stages, has been expanded to all high courts and subordinate courts in Peninsular Malaysia that operate the case management system (CMS) with effect from 2 January 2020. The e-Review System is an online forum within the e-Court System that enables judicial officers and legal representatives in a case to conduct case management via exchange of written messages without having to attend court. The objectives of this system are to reduce in-person court appearances for case management before the registrars at the courts and to save the time and expense of having to attend court in person to deal with preliminary matters. This system has revolutionised the manner in which case managements are conducted and have moved away from conventional case management. With the e-Review System, court registrars are able to conduct more case managements in a single day compared to conventional case management.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Selected key developments of the past year are set out below.

#### Arbitration

- *Danieli & C Officine Meccaniche SPA v Southern HRC Sdn Bhd* [2021] 10 MLJ 48. In this case, the high court held that the courts' powers in respect of arbitral awards were limited to their recognition and enforcement under section 38 of the Arbitration Act 2005. The Malaysian courts cannot grant relief or orders in respect of an award unless the award is recognised in Malaysia pursuant to section 38. Section 8 of the Arbitration Act 2005 ('[n]o court shall intervene in matters governed by this Act, except where so provided in this Act') was applied strictly.
- *MISC Bhd v Cockett Marine Oil (Asia) Pte Ltd* [2021] MLJU 563. In this case, the high court granted an anti-arbitration injunction to restrain a London-seated arbitration on the basis that it was subjected to the exclusive jurisdiction of the Malaysian Courts. The high court applied the usual American Cynamid test to discover whether there are serious issues to be tried, whether damages would be an adequate remedy and whether the balance of convenience lies in favour of granting the injunction. To date, the Malaysian courts have not adopted a uniform test when considering anti-arbitration injunctions concerning foreign arbitration proceedings. The high court did not follow the approach taken in its earlier case of *Government of Malaysia v Nurhima Kiram Fornan & Ors* [2020] MLJU 425, where the high court suggested that a higher threshold applied in the grant of an anti-arbitration injunction.
- *Jana DCS Sdn Bhd v TAR PH Family Entertainment and other cases* [2021] MLJU 1275. In this case, the high court confirmed its jurisdiction pursuant to section 11 of the Arbitration Act 2005 to grant *Mareva* injunctive relief pending the disposal of arbitral proceedings. In doing so, the high court took a wide interpretation of its powers under section 11 of the Arbitration Act 2005 and held that the high courts' power to grant interim relief in respect of arbitral

proceedings is not limited to the arrest of ships as security under its admiralty jurisdiction set out in section 11(1)(c) of the Arbitration Act 2005. This is consistent with the high court's discretion to grant other interim measures pursuant to its civil jurisdiction under the Courts of Judicature Act 1967. The high court held that although arbitral tribunal is also empowered to grant an interim relief as a means to preserve assets pursuant to section 19(2) of the Arbitration Act 2005, that does not replace the court's power pursuant to section 11 of the Arbitration Act 2005.

- *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 6 MLJ 255. In this case, the Federal Court re-affirmed the settled principles of arbitration law, namely that the seat of an arbitration determines the court with the exclusive jurisdiction to exercise supervisory or regulatory powers. In this case, the Federal Court held that given that the seat of arbitration was Kuala Lumpur, the High Court of Malaya at Kuala Lumpur was the appropriate supervisory court. The respondent, who was based in Sabah, was therefore wrong in filing the setting aside application in the High Court of Sabah and Sarawak at Kota Kinabalu.

#### New corporate rescue mechanisms in Malaysia

The Companies Act 2016 brought changes to the corporate insolvency regime in Malaysia through the introduction of corporate voluntary arrangement and judicial management (JM), in addition to the existing scheme of arrangement mechanism.

- *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] 4 CLJ 1 (CA). This was the first appellate decision on the JM mechanism. The Court of Appeal set aside the stay of the order refusing judicial management and held that the respondent company (whose JM application had been dismissed) is not allowed to have a second bite at the cherry for statutory moratorium protection under section 410 of the Companies Act 2016. The Court of Appeal was of the view that this would, in jurisprudential terms, be an abuse of process.
- *Re Scomi Group Bhd* [2022] 7 MLJ 620. In this case, the high court held that, for the first time, a public listed company is precluded from applying for a judicial management order by reason of section 403(b) of the Companies Act 2016, which provides that all the provisions on judicial management cannot apply to a company that is subject to the Capital Markets and Services Act 2007. This decision is currently pending appeal before the Court of Appeal.
- *Demeter O&G Supplies Sdn Bhd v Datuk Stephen Duar Tuan Kiat (as judicial manager of Scomi Oiltools Sdn Bhd and Scomi KMC Sdn Bhd)* [2021] MLJU 2769. In this case, the high court held that, in the first decision of the Malaysian courts, leave from court is required to commence legal proceedings against a judicial manager.
- *Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723. In this case, the high court put to rest the long-drawn debate over whether unsecured creditors can intervene and be heard in judicial management proceedings. The court held in the affirmative and stated that the court can consider the views of unsecured creditors in an application to oppose the making of a judicial management order.
- *Mansion Properties Sdn Bhd v Sham Chin Yen & Ors* [2021] 1 MLJ 527. In this case, the Federal Court followed the approach adopted by the high court in the case of *Barakah Offshore Petroleum Berhad & Anor v Mersing Construction & Engineering Sdn Bhd & Ors* [2019] MLJU 338. The Federal Court held that the statutory requirements provided for under section 368(2) of the Companies Act 2016 were mandatory, and any non-compliance may render a restraining order liable to be set aside for irregularity.
- *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942. In this landmark decision on the first airline debt restructuring scheme

in Malaysia owing to covid-19, the high court held that a scheme of arrangement under section 366 of the Malaysian Companies Act 2016 is an 'insolvency-related event' for the purposes of the Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. The high court held that AirAsia X bore the duty of absolute transparency and to unreservedly disclose all material information to assist the court in determining the classification and composition of the creditors, how the creditors' meeting was to be concluded, and to address any allegation of an abuse of process or if the application was not made bona fide. The high court further held that it must always be mindful of the possibility of class manipulation. It is incumbent on a company to propose a scheme fairly and not to manipulate the constitution of classes to ensure apparent satisfaction of the statutory requirements.

- *Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors* [2021] 12 MLJ 690. In this case, the high court held that section 368(6)(b) of the Companies Act 2016 does not prohibit the court from granting a restraining order that extends to the corporate guarantors of a company undergoing a scheme of arrangement. In this case, the high court was of the view that it was valid for the restraining order to extend to the corporate guarantor as the corporate guarantor was an integral component of the scheme to the extent that the proposed scheme would not be workable without it. If the restraining order was not extended to the corporate guarantor, the various proceedings or actions by the creditors against it would have been detrimental or even fatal to the proposed scheme.
- *Re Top Builders Capital Berhad and others (No. 2)* [2022] MLJU 1. In this case, the high court explained that for the purposes of counting creditors' votes under a scheme of arrangement pursuant to section 366 of the Companies Act 2016, there is no general rule that votes belonging to related inter-company creditors must be discounted and that the court has the discretion to decide on whether such votes should be discounted. In exercising its discretion, the court ought to take into account various considerations including, but not limited to, whether the related inter-company creditors are driven by any special or ulterior interests adverse to the other creditors' interests and whether the adjudicated debts of the related inter-company creditors are genuine, among other things.

### Conflict of interest

In *Dato' Azizan bin Abdul Rahman & Ors v Pinerains Sdn Bhd* [2021] MLJU 1414, the Court of Appeal held that for a former client to succeed in an application to disqualify an advocate and solicitor from acting, (1) there must first be established a former solicitor-client or some fiduciary relationship between the former client and the advocate and solicitor; (2) the former client must prove that the advocate and solicitor is in possession of the confidential information that is relevant to the present proceedings; and (3) a strong case must be made out by the former client to disqualify the advocate and solicitor from acting for the existing client.

### Company law – indemnity provision under a company's constitution

In *Perdana Petroleum Berhad v Tengku Dato' Ibrahim Petra and others* [2021] 6 MLJ 663, the Court of Appeal held that the indemnity provision provided for in the constitution of a company does not extend to its directors, because the constitution constitutes a contract between members of a company (in their capacity as members) and the company. However, the Court of Appeal also held that there is no reason why, in principle, provisions in a constitution, where relevant, may not be incorporated into a contract between a company and a third party, be it its director or otherwise, by agreement, expressed or implied.

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### Company law – suspension of directors

In *Dato' Shun Leong Kwong & Anor v Menang Corporation (M) Bhd & Ors* [2021] MLJU 870, the high court held that a company cannot suspend its directors.

### Company law – minority oppression under section 346 of the Companies Act 2016

In *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 3 MLJ 549, the Federal Court emphasised that section 346 of the Companies Act 2016 (oppression provision) is to be given a 'liberal and broad interpretation' to the extent that it applies to directors and third parties. In determining whether liability should be extended to a director or third party in a particular case, the court has to ask itself (among other questions) whether the director or third party was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him or her for such conduct.

### Malaysian courts embracing the use of technology

During the covid-19 pandemic, courts, tribunals and dispute resolution bodies around the world adopted various options to mitigate the adverse consequences of covid-19 to ensure that there was no or minimal disruption to the dispute resolution process for all stakeholders of the legal system. Arbitral institutions, including the AIAC, promptly responded to facilitate parties, counsel and arbitral tribunals, to ensure fair and efficient arbitration in these uncertain times.

As Malaysia begins its transition into the endemic phase, to ensure access to justice at all times, the Malaysian courts continue to keep up with the march of technology, whenever required. Case managements of cases generally continue to be by way of electronic review, and trials and hearings are conducted online where the circumstances require. The courts have also moved seamlessly into paperless hearings with the aid of technology.

Further, the experience gained in using technology has also affected how disputes are being handled and decided. In *SS Precast Sdn Bhd v Serba Dinamik Group Bhd* [2020] 1 LNS 316, the high court exercised its discretion to dispose of three applications by way of videoconferencing, despite being objected to by the plaintiff. The high court was of the view, per obiter, that the court has discretion to proceed by way of videoconferencing even if the plaintiff had objected to the use of

such facilities prior to or during the conduct of the hearing, as access to justice is a fundamental right of the defendants that is guaranteed under article 5(1) of the Federal Constitution. *Liziz Plantation v Liew Ah Yong* [2020] 10 CLJ 94 dismissed an application to transfer a case from a high court in one state to a high court in another state, holding inter alia that the increasing acceptance of remote communication technology has made the issue of having to physically travel to any court very much less important when considering the transfer of a case.

In February 2020, the Malaysian judiciary made history as the first court in Asia to use artificial intelligence for data sentencing for certain common offences. This initiative has been extended and implemented in the Sessions and Magistrates Courts in Peninsular Malaysia since 23 July 2021.

### **Cyber fraud**

The Malaysian High Court recently granted a *Mareva* injunction (freezing order) and proprietary injunction against 'Persons Unknown' for the very first time in the case of *Zschimmer & Schwarz GmbH & Co Kg Chemische Fabriken v Persons Unknown & Anor* [2021] 7 MLJ 178. Through this case, it is now clear that claims can be brought against anonymous defendants, provided they can be described in a way that makes it possible in principle to locate and communicate with them. This will be particularly useful in cases where fraud is involved.

# Malta

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## LITIGATION

### Court system

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

The Maltese Civil Court system is subdivided into inferior and superior courts. The inferior courts are divided into the Court of Magistrates (Malta) and Court of Magistrates (Gozo), each dealing with claims under €15,000 arising within their territory (the islands of Malta and Gozo respectively). The superior courts are the First Hall Civil Court, which deals with claims over €15,000 and other civil claims that are not value-connected (eg, claims related to rights over immovables). The Court of Magistrates (Gozo) also sits in its superior jurisdiction equivalent to the jurisdiction of the First Hall Civil Court in Malta. The other superior courts are the Court of Appeal (Inferior Jurisdiction), composed of one judge for appeals from judgments of the Courts of Magistrates and from decisions by certain administrative tribunals, and the Court of Appeal (Superior Jurisdiction), composed of three judges, hearing appeals from the First Hall Civil Court and the Court of Magistrates (Gozo) in its superior jurisdiction sitting. In addition, the First Hall Civil Court (Family Section) deals with family law matters, the First Hall Civil Court (Commercial Section) deals with matters regulated by the Companies Act (Chapter 386 of the Laws of Malta) as from 9 April 2018 and the Court of Voluntary Jurisdiction deals with specific non-contentious matters. The First Hall of the Civil Court can also sit in a 'constitutional jurisdiction' to hear and decide issues relating to constitutional matters that mostly concern fundamental human rights. An appeal lies from decisions of the First Hall (in its Constitutional jurisdiction) to the Constitutional Court, composed of three judges. The law also envisages several tribunals and boards, such as the Rent Regulation Board (which is competent to decide on rent issues) and the Small Claims Tribunal (competent to hear monetary claims of a value of up to €5,000).

Legislative amendments, namely those introduced through Act No. 1 of 2018, have established a commercial section of the Civil Court and provided for the creation of additional chambers of the Court of Appeal. More notably, however, the said act has also abolished the Court of Magistrates (Gozo) sitting in its superior jurisdiction, whereas it has conversely extended the jurisdiction of the Civil Court, First Hall, the Civil Court (Family Section) and the Civil Court (Voluntary Jurisdiction) to the Islands of Gozo and Comino. While it is envisaged that most of the provisions introduced by virtue of Act No. 1 of 2018 will come into force in the near future, amendments to the law that concern the establishment of a commercial section of the Civil Court were brought into force as of 1 June 2018 through Legal Notice 164 of 2018.

### Judges and juries

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

The Maltese civil court system is composed of adjudicators in the small claims tribunal, magistrates in the inferior courts and judges in the superior courts. No juries are present during civil proceedings. The selection process of judges is regulated by the Constitution of Malta. From 2020, the procedure for the choice of magistrates and judges has changed. They are now appointed by the President of Malta exclusively from a list of three candidates proposed by a Judicial Appointments Committee set up in terms of section 96A of the Constitution. A person is qualified to be a magistrate if he or she practises as an advocate in Malta for a period amounting to at least seven years and, for a judge, for at least 12 years. While the law does not promote diversity through, say, gender quotas, in recent years there has been a very visible policy to appoint female members to the judiciary. Other policies have also been introduced, allowing, for instance, eligible practising lawyers to formally apply for the post of judge or magistrate. The selection process itself, however, ultimately remains as specified in the Constitution.

### Limitation issues

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

There is no single uniform time limit applicable to all civil claims. To determine the relevant time limit, the nature and facts of each individual case and the requests made in the claim are all taken into consideration. Some examples of different time limits include the following:

- five years: in cases concerning non-performance of contractual obligations from when the obligation was due and not met;
- two years: in the case of tortious claims from the day the tort occurred; or
- two months: in cases where one has been despoiled of their possession or of the detention of any movable or immovable thing clandestinely or by violence, which starts running from the day of spoliation.

Time limits can be suspended or interrupted, except when they are of a peremptory nature (such as the time limit applicable for spoliation mentioned previously). 'Suspension' merely suspends the applicable time limit, while interruption allows for the applicable time limit to start running afresh. A time limit can be suspended in the case of conditional rights, where the applicable time limit would be suspended until the condition is fulfilled. Interruption can take place when, for example, a judicial act is filed, subject that such act is duly served on the other party and that such act clearly shows that the person claiming such rights is preserving his or her rights.

Agreements whereby a time limit is suspended will only have any effect if they satisfy any of the instances mentioned at law whereby a time limit can be suspended. Otherwise, such time limits cannot be



suspended by any other agreement, because the law prohibits renunciation of such time limits before they expire. It is also prohibited for parties to an agreement to establish longer time limits than those specified in the law.

### Pre-action behaviour

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

The law does not provide for any procedure whereby a party can request the disclosure or exchange of documents prior to instituting court proceedings. Nevertheless, the parties are not prohibited from communicating with each other and trying to settle the disputed matters amicably or even possibly obtaining any documentation or information required from the other party if they consent to such disclosure. It is the practice to precede formal civil actions by a legal or judicial letter or by a judicial protest setting out the claim and calling upon the respondent to meet their obligations. While this is not strictly speaking necessary [except when the plaintiff intends to file 'precautionary warrants' in security of the claim], it is good practice and could impact on whether the defendant is eventually ordered to pay judicial expenses.

### Starting proceedings

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

Civil proceedings are commenced by filing a court application that, in certain instances depending on the nature of the claim, must be confirmed by the claimant on oath. The format of the court application will vary depending on which court it is filed before. For instance, sworn applications filed before the First Hall of the Civil Court must include a summary of the relevant facts, a list of witnesses, a list of documents together with a copy of such documents attached to the application, and the remedy or relief being sought by the plaintiff.

Once the court application is filed, the case is assigned to a particular adjudicator, who sets the date of the first hearing of the case. The court application is then notified to the counterparty by a court officer. Upon successful notification, the defendant must reply within the applicable time period, which varies according to the nature of the case and before which court the court application was filed. For example, in cases being heard before the First Hall of the Civil Court, a reply must be filed within 20 days from the date of service of the relevant facts.

Maltese courts are still experiencing a backlog in actively dealing with the considerable number of active cases at any given time. However, with a continued increase in the number of judges and magistrates and the introduction of court attorneys, the backlog is being tackled concretely and each year there is a tangible and significant improvement in this regard. The government of Malta has also introduced new boards or tribunals, such as the Arbiter for Financial Services, to better handle the backlog and provide adjudicators with more specialised knowledge in certain fields. The government of Malta is undergoing a reform of the judicial system in Malta to improve efficiency and create easier access for people to seek an appropriate remedy. Part of this reform refers to the procedure before the Superior Court of Appeal that has been amended in the past year such that, except in certain circumstances, submissions are made solely through written pleadings, removing the need for one or more sittings for oral submissions.

### Timetable

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

Consequent to filing a civil claim in the superior courts, and unless the defendant intends to admit the claim, the defendant is to file a reply within 20 days from notification. In the inferior courts, a reply generally needs to be filed until the day of the first hearing or by leave of the court after this time. The documents in support of the demand or reply as applicable must be produced with the demand or reply. The court may decree that within a particular term either party should present additional documents substantiating the demand or reply. Generally, unless stipulated otherwise, all causes should be appointed within two months and sittings are to be heard at least on a bimonthly basis. At the first sitting, the court will ascertain whether all parties involved were notified of the acts and determine the course of the proceedings. Where the plaintiff is seeking payment of a debt that is certain, liquidated and due, or where there is a demand for eviction of a person from immovable property, the law envisages 'summary proceedings'. In such situations, defendants are to appear before the competent court at the date set for the hearing and seek to convince the court that they have an adequate defence to bring forward. If the court upholds the plaintiff's request for summary proceedings, the court proceeds to give judgment in favour of the claimant on the same date. If not, the defendant would be allowed leave to file a defence and the case would follow normal timelines.

The procedure related to appeal proceedings has been amended substantially through Act XXXII of 2021, which came into force on the 18 June 2021. Appeals filed before these amendments came into force or that had been adjourned sine die remain governed by the law in force prior to these amendments.

In terms of these recent amendments, the time limit to file an appeal has been increased from 20 days from the date of the judgment to 30 days from the date of the judgment. The time limit for the parties against whom an appeal has been filed to file their reply has been increased from 20 days to 30 days. In the case of a cross-appeal, the time limit for the party against whom the cross appeal has been directed to file their reply has also been increased from 20 days to 30 days. Under the new system, an appellant should file a guarantee covering the costs of appeal within three months of being notified with the apposite notice issued by the Registrar of Courts. All proceedings shall be conducted in writing, unless the court sets a sitting for hearing oral pleadings or evidence from the parties. Where no oral hearing took place at first instance, the Court of Appeal will appoint an oral hearing. Otherwise, all pleadings will be made in writing. The appellant is granted 30 days to file a rejoinder to address those points that were raised for the first time in the reply to the appeal application, such as pleadings based on alleged nullity of the appeal application. Once the submissions procedure is concluded and provided that appellants have deposited the guarantee for costs, the case can then be left for judgment at a date that shall be notified to the parties.

### Case management

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

Once the adjudicator sets the first hearing, from the first hearing onwards the parties to a case can agree with the adjudicator when and at what time subsequent sittings are to take place. The parties to a civil case will not be notified by the court of every subsequent court sitting after the first hearing. The parties and the adjudicator may agree that the case should proceed in a certain manner and, subject to the agreed manner being in line with the law, the case will proceed accordingly. Where time is of the essence, the courts may appoint judicial assistants to collect evidence or prepare a prejudgment report. Where the matter has a technical aspect, technical experts may be appointed.

## Evidence – documents

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

In principle, each party in court proceedings is free to exhibit documents to substantiate their respective claims or arguments. However, in terms of article 558 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), evidence in general must be relevant to the matter in issue. Maltese courts tend to abide by the principle that a party should present the best proof available under the 'best evidence' rule. There are specific procedures available for the expunging of documents under specific rules. The parties are not obliged to share any documents not exhibited in court. This means that the documents already exhibited by any party during court proceedings may be used by the other party to substantiate any argument they may put forward. The Code of Organisation and Civil Procedure also caters for a special procedure termed *actio ad exhibendum* for one of the parties in court proceedings to demand the other party produce documents in their possession in specific instances set down in the law; for instance, where the document belongs in common between the parties involved. Furthermore, there is no specific obligation on the parties to preserve evidence that is in their possession.

## Evidence – privilege

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

In terms of article 588 of the Code of Organisation and Civil Procedure, no advocate or legal procurator without the consent of the client, and no member of the clergy without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the member of the clergy under the seal of confession. Similar rules apply to accountants, medical practitioners, social workers, psychologists and marriage counsellors, except that in these cases the rule is less strict and such professionals may be ordered by the court to give evidence. Unless otherwise specifically indicated in the law, there is no document that is privileged and cannot be produced during civil court proceedings. A particular bone of contention refers to correspondence sent on a 'without prejudice' basis. Within the Maltese legal profession, it is deemed unacceptable to exhibit such correspondence, but this is not backed by any specific legal provision and, on rare occasions, the courts have taken into consideration documents even if marked 'without prejudice'.

Reference should also be made to article 637(3) of the Code of Organisation and Civil Procedure, which lists specific documents that are privileged and cannot be forced to be exhibited by any party during court proceedings. For instance, a document that if disclosed would damage the security, defence or international relations of Malta or would divulge information or matters communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the government would be considered a privileged document. Specific documents related to the cabinet's government are also termed 'privileged documents'. Other examples of privileged documents are those that would endanger the life or physical safety of a person or would prejudice the fair trial or impartial adjudication of a person undergoing proceedings. Other examples are documents that would substantially affect the ability of the government of Malta to manage the Maltese economy. Article 637(3) of the Code of Organisation and Civil Procedure also stipulates that documents of

which the disclosure is prohibited by any other law are also privileged documents.

## Evidence – pretrial

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

Evidence from witnesses and experts may be exchanged prior to the trial at the discretion of the relevant party, but there is no legal obligation on the parties to exchange any written evidence prior to the instituting of the court proceedings.

## Evidence – trial

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

Once court proceedings are instituted and prior to the hearing of any oral evidence, the adjudicator may order the parties to the case to exhibit all documentary and other written evidence they may have within a time period decided by the adjudicator. If the adjudicator does not make such a request, then documents and written evidence are exhibited during the witnesses' testimony. Evidence may be given either orally or by means of an affidavit. If an affidavit is presented by one party, the other party has the right to cross-examine the witnesses or experts *ex parte* who presented their testimony by means of an affidavit; this cross-examination will usually be done orally. In the case of experts or referees appointed by the adjudicator, unless the parties wish to further question the experts or referees, a sworn written report of their findings is presented in court and this report is to be read out in court, unless the adjudicator declares otherwise. The referees may be examined and cross-examined by the parties to the case.

## Interim remedies

### 12 | What interim remedies are available?

There are various interim remedies, termed 'precautionary warrants', under Maltese law, depending on the remedy being sought. These are the following:

- warrant of description: this warrant deals with enforcing rights over movable property, whereby an order is given that the movable be preserved in its current location and condition;
- warrant of seizure: this warrant deals with enforcing rights over movables by depositing the said movable with a 'consignee' authorised by the courts. This warrant can also be issued on a commercial going concern;
- garnishee order: this is the most popular interim remedy available for value-based claims. In such cases, debtors of the defendant, including banks holding moneys of the defendant, will be ordered to lodge in court the moneys of the debtor against whom the garnishee was placed;
- warrants of arrest of sea vessel: this warrant can only be exercised on sea vessels of length exceeding 10 metres where the sea vessel is seised and placed under the control of the Authority for Transport in Malta;
- warrant of arrest of an aircraft: this warrant can be issued both on the aircraft itself and on the engine of the aircraft; and
- the warrant of injunction: this warrant prevents the defendant from carrying out a specified act that is deemed to be prejudicial to the person suing out the warrant, provided that the person suing out the warrant proves that they have the right that they are seeking to protect. This warrant also applies in instances of separation or divorce and to prevent a minor from being taken outside Malta.

An application for the issuance of a precautionary warrant should be submitted to the competent court through an application which, on pain of nullity, should be confirmed on oath. Precautionary warrants, once issued, should be followed by the filing of court proceedings on the merits within 20 days. Foreign proceedings may meet this requirement of the law, provided that the claim for which the warrant has been issued as security is reflected in the ongoing foreign proceedings. Moreover, the European Account Preservation Order in terms of EU Regulation No. 655/2014 has been applicable for cross-border disputes since January 2017.

Precautionary warrants may be revoked at the request of the respondent in specific instances set down in law.

## Remedies

### 13 | What substantive remedies are available?

Substantive remedies under Maltese law are determinable upon the demands of the plaintiff. If the demands of the claimant are procedurally correct and in terms of the applicable principles, including the necessary proof of the claim, the court will uphold the demands of the claimant and grant the remedies sought. Punitive damages are available in terms of the principles of *restitutio in integrum*, where a person should be reintegrated into the situation before suffering the damages in question. One may also demand interest on a sum of money as damages at a maximum of 8 per cent per year. In terms of damages, the courts award effective damages, which are those suffered as a consequence of the actions of the other party, and also loss of future profits for persons who suffer permanent disabilities. Moral damages are not legislatively available except in constitutional and consumer claims, but on occasion (relatively low) moral damages have been awarded in cases of personal injury.

## Enforcement

### 14 | What means of enforcement are available?

Consequent to obtaining an executive title, including a final judgment, plaintiffs may enforce a claim in terms of the law. In exceptional cases a person may enforce a non-definitive judgment provisionally if the court is satisfied that delay in execution would cause prejudice to the party demanding enforcement. The means of enforcement are chiefly through executive warrants, which are very similar to precautionary warrants except for the fact that they are issued pursuant to an executive title:

- warrant of seizure: akin to the precautionary warrant of seizure enforcing rights over movables. However, the executive warrant of seizure can also be placed on immovables, which can then be sold by judicial auction. Likewise, this warrant may also be applied to a commercial going concern;
- executive garnishee order: also akin to the precautionary garnishee order and the same procedures apply;
- warrant of eviction from immovable property: this warrant is enforced against occupants of immovable property;
- warrant of arrest of sea vessels and aircraft: these warrants are enforced on sea vessels and aircraft, which are then sold by judicial auction or through a court-approved sale;
- warrant in factum: this warrant is issued rarely and in extraordinary circumstances where no other means of execution are available. It envisages the imprisonment of the defendant until that party abides by the orders of the court; and
- warrant in procinctu: this exceptional warrant is used to demand the court issue such orders to the Registrar of the Courts to proceed as necessary for the judgment to be executed.

Failure to obey a court order can also lead to the institution of proceedings for contempt of court.

## Public access

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

Court hearings are usually held in open court. However, depending on the nature of the case or of the evidence to be tendered, there may be cases where the general public are excluded from attending. Judgments are also generally delivered publicly in open court, and in civil cases the whole judgment is not usually read out; instead, only the operative part of the judgment is read. In view of the covid pandemic, procedure has changed to allow for videoconferencing in court hearings, which was previously considered an exceptional procedure that was generally resorted to only in specific circumstances.

Court documents are generally available to the public, except for those documents that the court at its discretion may restrict owing to their content or nature, such as personal banking documents or sensitive medical records. In practice, judgments are generally uploaded to the court's online portal.

## Costs

### 16 | Does the court have power to order costs?

Judges will include a decision as to who is to bear the costs of the case. Normally it is the party cast who will be ordered to pay all the costs of the proceedings, including those of the winning party. The adjudicator may also order that costs be shared if there is a good cause; for instance, if both parties were at fault or if the case dealt with a very difficult or novel point of law. The costs are determined according to statutory tariffs and, irrespective of whether the party was represented by one advocate or more, the winning party is not entitled to claim the fee of more than one lawyer.

Defendants may request the adjudicator to order plaintiffs to provide security for their costs, particularly in cases where precautionary warrants have been issued by the claimant against the respondent. Furthermore, when an appeal is filed from a judgment or decree given in a cause initiated by a sworn application, the appellant must deposit security for costs not later than two days before the first hearing of the appeal.

## Funding arrangements

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

Advocates and clients can enter into different fee arrangements but cannot enter into any agreements or stipulations *quotae litis* (including no win, no fee agreements).

The parties to a case may obtain funding from third parties to defend their case, such as from insurers. However, the courts will not order such third parties to be paid a share of the winnings if they are not the rightful party in the claim for which funding was obtained. The third party will also not bear any of the risks involved in the case if they are not an actual party to the case or are not subrogated in the rights and responsibilities of one of the parties to the claim.

## Insurance

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

Insurance companies can cover certain legal costs depending on the terms and conditions of the insurance policy.

## Class action

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

In terms of article 161(3) of the Code of Organisation and Civil Procedure, two or more persons may bring an action together if their actions are connected in respect of the subject matter or if the decision of one action might affect the decision of another action and the evidence in support of one action is generally the same. Connected actions are also governed by the Collective Proceedings Act (Chapter 520 of the Laws of Malta), which deals with connected actions in issues of competition law, consumer law and product safety law. Specific procedural rules apply in relation to connected actions filed under the Collective Proceedings Act.

## Appeal

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

In civil claims, an appeal is available from decisions of the first court, both on points of law and on points of fact. There is, however, a general principle that the Court of Appeal will not reverse the first court's rulings on points of fact unless there are grave reasons justifying this. Generally, the term for appealing is 30 days from the judgment of the first court, and the party against whom a reply is lodged has another 30 days from notification to file a reply to that appeal. In certain circumstances, such as appeals from tribunal decisions or arbitration decisions, an appeal is only available on points of law. A third-party appeal may also be lodged by a party not involved in the original proceedings, provided that such third party proves juridical interest in the claim in question. There is no further appeal from a judgment of the court of appeal, although there is the possibility of a retrial in exceptional circumstances.

## Foreign judgments

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

Brussels I Regulations (EC) 44/2001 and Brussels I Recast Regulations (EC) 1215/2012 apply for the recognition and enforcement of judgments in civil and commercial matters obtained from a court of an EU member state, including Denmark. In the case of judgments obtained from other countries that did not adopt the Brussels Regulations, a court application will need to be presented before the courts for the judgment to be recognised and eventually enforced in Malta. If such judgment does not satisfy the relevant criteria set out in the Code of Organisation and Civil Procedure (eg, if it is in breach of Maltese public policy), then this judgment will not be recognised and enforced. There are also specific provisions regulating the enforcement of money judgments obtained from a court in the United Kingdom (British Judgments (Reciprocal Enforcement) Act – Chapter 52 of the Laws of Malta) and certain Commonwealth countries.

## Foreign proceedings

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

In cases where evidence needs to be obtained from other jurisdictions, one can apply the letters of request (letters rogatory) procedure. In the case of jurisdictions within the EU, Regulation (EC) 1206/2001 on the cooperation between the courts of the member states in the taking of evidence in civil or commercial matters may be applied. These procedures are applied reciprocally.

## ARBITRATION

### UNCITRAL Model Law

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

Yes. Domestic arbitration law has adopted the default rules of the UNCITRAL Model Law on International Commercial Arbitration since the inception of the 1996 Arbitration Act (Chapter 387 of the Laws of Malta) (the Act) and provided for the establishment of the Malta Arbitration Centre. The UNCITRAL Model Law is considered to form part of the laws of Malta and is accordingly deemed enforceable as such. Moreover, should the parties to an arbitration agreement relating to any international commercial disputes expressly agree in writing, whether in the agreement itself or in any other document, that any such controversy that has arisen or may arise between them is not to be settled in accordance with the UNCITRAL Model Law, and such parties fail to provide for the applicability of alternative arbitration rules therein, the relevant rules on international commercial arbitration as detailed in the Act shall apply.

### Arbitration agreements

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

Even insofar as the formal requirements of an arbitration agreement are concerned, Maltese arbitration law follows the UNCITRAL Model Law, which is reproduced in the First Schedule forming part of the Act. An arbitration agreement may be drawn up in the form of an arbitration clause in a contract or in the form of a separate agreement. Domestic law requires that an arbitration agreement be made in writing as provided under article 7(2) of the UNCITRAL Model Law. However, for the purposes of Maltese law, an agreement is considered to have been made in writing solely in the following circumstances:

- if it is contained in a document that is transferred from one party to the other party or by a third party to both parties, provided no objection was raised within 30 days from receipt thereof;
- if reference is made in a written contract to a document containing an arbitration clause, insofar as that reference operates to make such clause part of the contract; or
- through the issuance of a bill of lading, provided the latter contains an express reference to an arbitration clause in a charter party, in which case the bill of lading is – in and of itself – deemed to constitute a written arbitration agreement.

### Choice of arbitrator

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

As per the UNCITRAL Model Law, domestic law concedes the parties to an arbitration agreement the faculty of determining any matters relating

to the choice, as well as the number, of arbitrators. Unless otherwise specified by the parties, the default number of arbitrators that is to be appointed to take cognisance of the dispute is three.

The parties may determine the procedure through which arbitrators shall be appointed. Under domestic arbitration rules, if only one arbitrator is to be appointed, each party may propose the name of a viable candidate to the other. Should the parties fail to reach an agreement within 30 days of receipt of such a proposal by either party, the chair of the board of governors of the Malta Arbitration Centre shall appoint the sole arbitrator. In arbitrations where three arbitrators must be appointed, each party shall elect an arbitrator of his or her choice. The remaining arbitrator, who shall be the presiding arbitrator, shall subsequently be chosen by such two arbitrators jointly. The chair intervenes where the arbitrators are not appointed within statutory terms. The UNCITRAL Model Law sets out a similar mechanism for the appointment of arbitrators in the case of international arbitrations.

An arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts in relation to an arbitrator's impartiality or independence. However, a party may only challenge an arbitrator appointed by him or her for reasons that he or she becomes aware of after the appointment had been made. While the UNCITRAL Model Law adopts a similar approach, in the context of international arbitration a party may also challenge the appointment of an arbitrator if he or she does not possess the qualities previously agreed to between the parties.

### Arbitrator options

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

The parties are effectively free to choose any person of their liking to act as arbitrator; however, the Malta Arbitration Centre has set up various specialised panels for domestic, as well as international, arbitration from which accredited arbitrators may be appointed.

These panels include, inter alia, the Maritime Panel, the General/Civil Commercial Panel, the Banking, Finance, Accounting and Taxation Panel, the Building Construction Panel and the Medical Panel, to name a few. This has enabled the Malta Arbitration Centre to respond to the growing need to provide focused arbitral expertise in various distinctive sectors to deal with potentially complex arbitrations.

### Arbitral procedure

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

Both the Act, as well as the domestic Arbitration Rules, set out standard procedural rules in relation to various forms of arbitral proceedings. However, the manner in which arbitral proceedings are to be conducted by the Arbitral Tribunal is left entirely at the parties' discretion, provided there is consensus among them. In the absence of such agreement between the parties, the procedure to be followed shall be determined by the Arbitral Tribunal, and in such cases the latter is free to establish the procedural parameters with respect to the admissibility, relevance, materiality and weight of any evidence.

### Court intervention

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

As a general rule, domestic courts may not intervene or have jurisdiction during the arbitral proceedings themselves, without prejudice to the provisions of the Constitution of Malta and of the European Convention Act, and provided they are requested to do so by either of the parties. However, precautionary warrants may be issued before the ordinary

courts as security for claims being made in arbitration proceedings. Similarly, arbitration decisions would be enforceable through the courts. Appeals to the court are also available in specific circumstances, which will be addressed later on.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Yes. Upon a request made by either party, the Arbitral Tribunal may order that an interim measure of protection be taken if it considers such measure necessary owing to the nature of the dispute in question.

Additionally, the Arbitral Tribunal may also require any party to provide adequate security in connection with such measures.

As already indicated, the Act also provides that, in the absence of an agreement between the parties stipulating the contrary, any party may request the court to issue precautionary warrants.

### Award

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

Awards made by the Arbitral Tribunal may take various forms, namely:

- financial awards, such as an order for a party to pay damages or compensation;
- declaratory awards;
- awards that order the execution or prohibition of acts by a party; or
- awards ordering that provisional measures are undertaken by a party.

Depending on the circumstances of the dispute brought before it, the Arbitral Tribunal may deliver certain awards at any stage of proceedings. By way of example, while financial awards are generally delivered at the end of arbitration proceedings, awards ordering the execution of provisional measures may, in cases of urgency (such as when these are ordered for the purpose of preserving an asset), be granted prior to the Arbitral Tribunal's final decision.

### Appeal

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

In the case of domestic arbitration proceedings, an appeal from an arbitral award may only be entered on a point of law arising out of a final award and unless:

- the parties have expressly excluded such a right to appeal in the arbitration agreement or otherwise in writing; or
- notwithstanding anything stated in the arbitration agreement, the parties have expressly agreed that no reasons are to be given in the award in accordance with article 44(3) of the Act.

Nevertheless, there are exceptions in respect of appeals made pursuant to constitutional matters or appeals regarding potential lack of jurisdiction of the Arbitral Tribunal.

An appeal must be filed within 15 days from the date of service of the award upon the applicant. Once the appeal is filed, the appellant must notify the Malta Arbitration Centre, as well as the arbitrators, with a copy of the application as soon as practicable but not later than 15 days after the application is filed.

The Act provides that the court shall only consider an appeal if it is satisfied that:

- the determination of the point of law will substantially affect the rights of one or more of the parties;
- the point of law is one that the tribunal was asked to determine or was otherwise relied on in the award;

- on the basis of the findings of fact in the award, the decision of the Arbitral Tribunal on the point of law is prima facie open to serious doubt; and
- based on a review of the application, any response and the award, the appeal does not appear dilatory and vexatious.

With respect to arbitral awards resulting from international commercial arbitration proceedings, domestic arbitration rules grant the parties thereto the right to enter an appeal to the Court of Appeal on a point of law, insofar as the parties to the arbitration agreement have expressly agreed that such right of appeal shall be available to them, over and above any rights of recourse contemplated in article 34 of the UNCITRAL Model Law.

**Enforcement**

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

Malta is a signatory to the 1958 New York Convention.

Awards given in connection with domestic arbitrations are deemed to constitute an executive title under Maltese Law, but the successful party must first proceed to register the award with the Malta Arbitration Centre.

An award that has been recognised by the Malta Arbitration Centre, and has been rendered an executive title as a result, may subsequently be enforced by the successful party through executive warrants.

Foreign awards are enforceable in the same manner as domestic awards and should also be registered with the Malta Arbitration Centre prior to being enforceable as an executive title. This, however, operates to the exclusion of awards delivered in terms of the 1965 Washington Convention, which are treated as final judgments under Maltese law and are enforced by the courts accordingly. In the latter case, registration with the Malta Arbitration Centre is therefore not necessary.

Current enforcement procedures do not appear to have been influenced by changes to the local political landscape.

**Costs**

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

A party to arbitration proceedings who has successfully obtained a favourable award can generally expect to recover the costs it has incurred in the course of such proceedings. The Arbitral Tribunal, however, retains full discretion in determining who the respective costs are to be borne by and in what proportion. The recoverable costs generally include fees due to arbitrators, legal counsel and expenses and fees due to the Malta Arbitration Centre.

**ALTERNATIVE DISPUTE RESOLUTION**

**Types of ADR**

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

The Mediation Act (Chapter 474 of the Laws of Malta) establishes the Malta Mediation Centre and makes provisions regulating the conduct of the mediation process in Malta. The principal function of the Centre is to provide a forum where mediation parties refer or can be referred to resolve their dispute through a mediator. Under Maltese law, generally mediation proceedings are resorted either voluntarily, by order of an adjudicating authority including a court or else by law. Any parties to any proceedings may request together the court or adjudicating authority to stay proceedings and proceed with mediation. Such authority on its own initiative or under such request may direct the stay proceedings to order the dispute to continue through mediation. Mediation agreements between the parties involved may constitute executive titles enforceable

# MAMO TCV



A D V O C A T E S

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by law in cases where the parties explicitly demand so under specific applicable rules.

**Requirements for ADR**

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

Amendments introduced in 2017 to the Code of Organisation and Civil Procedure provide that on the day appointed for the first hearing, the courts of Malta must examine prima facie whether there are grounds to refer the issue in question to mediation in terms of the Mediation Act. There are instances where mediation is obligatory; for instance, in cases dealing with personal separation, divorce, access to children, care and custody of children and maintenance for children or spouses. Although the main body under Maltese law dealing with mediation is the Malta Mediation Centre, there are other entities that deal with mediation, such as the Office for Consumer Affairs in disputes between consumers and traders.

**MISCELLANEOUS**

**Interesting features**

**36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?**

Not applicable.

**UPDATE AND TRENDS**

**Recent developments**

**37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?**

In the past two years, amendments to procedure have been introduced in the light of the covid-19 pandemic. There have also been significant changes to procedure before the Court of Appeal in its superior jurisdiction, with written pleadings now considered the default procedure. Ultimately, the aim of these amendments is to make the courts more efficient and reduce the current backlog. As these changes are relatively recent, it is too early to predict the impact they will have in practice.



# Pakistan

Yousaf Khosa, Omer Soomro, Mayhar Mustafa Kazi and Shahbakht Pirzada

RIAA Barker Gillette

## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

Civil courts in Pakistan are established under the Civil Courts Ordinance 1962, which has been adopted, subject to certain modifications, in each of the four provinces and the Islamabad Capital Territory, and comprises the following hierarchy of courts, in descending order:

- the court of the district judge;
- the court of the additional district judge; and
- the court of the civil judge.

Each civil court is presided over by a single judge who hears and decides all cases in the court. Generally, the courts of the civil judges serve as the courts of first instance. Civil judges are divided into classes, with each class having a different pecuniary jurisdiction. Courts of district judges generally exercise appellate jurisdiction. However, they also serve as courts of first instance for certain types of cases, such as defamation. The courts of the additional district judge discharge such functions of the district judge as the district judge may assign, and in the discharge of those functions that court exercises the same powers as the court of the district judge. One important exception to the aforesaid is in the district of Karachi, where the original jurisdiction to hear civil claims valued at more than 65 million Pakistani rupees is with the High Court of Sindh.

An appeal against a judgment of a civil judge may be made to the court of the district judge or the High Court, depending on the value of the suit. A decision of the court of the district judge in appeal may be challenged in appeal before the High Court. Where no appeal lies against an order or decree passed by the district judge in an appeal, that order or decree may be challenged by filing a revision before the High Court. Ordinarily, appeals from the High Court lie before the Supreme Court.

In addition to the ordinary civil courts, Pakistan has set up various specialised courts and tribunals that exercise jurisdiction over certain types of civil disputes, such as banking courts, rent courts, consumer courts and intellectual property tribunals. Further, there may also be an administrative division of cases among the various benches of a court.

All the courts mentioned above, including all ordinary and specialised courts, fall within the supervisory jurisdiction of one of the five High Courts in Pakistan. While the High Courts generally exercise appellate jurisdiction, they are conferred with original civil jurisdiction in certain matters, including company and banking cases, by way of statute.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

In Pakistan, judges are the exclusive arbiters of law and fact. There is no jury system in Pakistan. As in most common law jurisdictions, the

Pakistani legal system is adversarial, and the judges in Pakistan adopt a passive role when hearing cases.

A judge exercising civil jurisdiction is bound to conduct every case in accordance with the procedural requirements of the Code of Civil Procedure 1908, including determination of preliminary issues of jurisdiction, limitation, maintainability, compliance with procedural formalities (payment of court fees, process fees, etc), disposal of applications, framing of issues, appointment commissions for the recording of evidence, supervising recording and deposition of evidence and cross-examination, and passing orders, judgments or decrees.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

The time limits for filing of all nature of civil claims in the concerned civil courts in all provinces of Pakistan and Islamabad Capital Territory are governed by the Limitation Act 1908 (the Limitation Act), which provides for various time limits for bringing different kinds of claims, ranging up to 12 years, with most civil claims having a limitation period of three to six years.

Statutorily prescribed time limits cannot be suspended or waived by mutual consent of the parties to a dispute and, subject to certain exceptions provided in the Limitation Act, every suit instituted after expiry of the period of limitation prescribed is required to be dismissed by the court.

In addition to the Limitation Act, some statutes also provide for special limitation periods to be applied in certain cases.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

No action is generally required to be taken before the filing of a suit of a civil nature in the courts. Some statutes, such as the Defamation Ordinance 2002, require a notice to be sent to the defendant prior to commencement of suit. Other statutes require notices to be sent to certain government bodies before a suit is instituted against them.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced with the presentation of a claim (plaint) in the relevant court of first instance in accordance with the procedural requirements of the Code of Civil Procedure 1908 and payment of the requisite court fees. Upon perusal of the plaint by the judge, or in some cases, a judicial officer, summons along with the claim

documents are issued to be served on the defendants or respondents through prescribed modes of service for filing of a reply in response to the claim by a fixed date. Summons are ordinarily served by registered post and personal service; however, if service is unsuccessful, the court can order service by several means, including service by publication in a newspaper. To avoid delays occasioned by unsuccessful service, the aforesaid provisions of the Code of Civil Procedure 1908 have recently been amended in Punjab, the country's most populous province, Khyber Pakhtunkhwa and the Islamabad Capital Territory, to require summons to be served, in the first instance, simultaneously by registered post with acknowledgement, courier and by other methods that were previously available only for substituted service.

Many courts in Pakistan are currently facing a lack of capacity owing to an overwhelming number of pending cases, inadequate number of judges and leniency in granting adjournments. Civil courts are not equipped with the requisite digital technology and are dependent on labour-intensive manual methods of record-keeping, etc. There is vast room for improvement in the current setup for improving the capacity of civil courts to handle caseloads. The judiciary continues to grapple with the problem of a high number of pending cases.

Recent amendments in the Code of Civil Procedure 1908 in Punjab, Khyber Pakhtunkhwa and Islamabad Capital Territory have sought to impose strict timelines with the aim of reducing delays. Such amendments also include provisions to require courts to maintain electronic records of proceedings in suits.

## Timetable

### 6 | What is the typical procedure and timetable for a civil claim?

All civil claims begin by the filing of a claim in the relevant court, following which the court will issue summons to the counterparty for filing of a reply (written statement) by a fixed date, not ordinarily exceeding 30 days.

If the claim is accompanied by an interlocutory application, that application is fixed before the court for order. At this stage, the court decides whether a notice of the application is to be issued to the opposing party and the court may pass a preliminary order on that application, such as an ad interim injunction. Thereafter, that application is fixed before the court for hearing. The notice of the application invites the opposing party to file a reply to such application by the hearing date. If a reply is filed, the claimant is ordinarily allowed an opportunity to file a rejoinder. Once the court is satisfied that it must proceed with the hearing of the application, it invites arguments from both sides and passes an order on the pending interlocutory applications.

Once a reply has been filed to the claim or the opposing party has been barred from filing a reply, the matter is fixed in court for settlement of issues. At that stage, the court settles issues in the case that are decided on the basis of the pleadings filed by the parties. Those issues are the various questions of law and fact that are required to be answered in the proceedings. Following the settlement of issues, the case is fixed for the recording of evidence. After the conclusion of evidence, the matter is fixed in court for arguments and both parties are invited to make oral submissions in court before the court gives judgment and decree on the matter.

Recent amendments to the Code of Civil Procedure 1908 in Punjab, Khyber Pakhtunkhwa and Islamabad Capital Territory seek to address delays that were encountered in suits where interlocutory applications had been filed; such suits would not proceed to evidence and subsequent stages until interlocutory applications were decided. The amendments require such cases to proceed before two different courts simultaneously, with one court hearing interlocutory applications and the other, the main suit, including evidence and final arguments.

Although the court and the procedural rules governing the matter will provide time periods for the various phases of the matter and fixed dates for filing of documents, it is uncommon for those procedural timelines to be strictly enforced. It is more common for parties to seek and be granted adjournments, as a result of which claims can take five or more years to conclude.

## Case management

### 7 | Can the parties control the procedure and the timetable?

Ultimately, the timetable of a case is in the hands of the judge responsible for enforcing any requirements, including timelines mandated by law. However, the parties are able to make representations to the judge to shorten or extend timelines and judges are generally lenient when it comes to requests for adjournments.

Recent amendments to the Code of Civil Procedure 1908 in Punjab, Khyber Pakhtunkhwa and Islamabad Capital Territory have made provision for the respective high courts to make rules applicable to civil courts subordinate to them in connection with case management and scheduling conferences.

## Evidence – documents

### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no general obligation to preserve documents or other evidence pending trial. Discovery and inspection of documents is governed by Order XI of the Code of Civil Procedure 1908 and rules thereunder. Pursuant to Rule 14, the court may order the production by any party of documents in his or her possession or power relating to any matter in question in the proceedings. Every party to that proceeding is entitled to give notice to any other party to produce documents for the inspection of the party giving notice that are referred to in the party's pleadings or affidavits. An application to inspect documents other than those referred to in a party's pleading or affidavits or that are in its possession or power may be allowed by the court only if it is of the opinion that the document is necessary for disposing fairly of the suit or for saving costs. The Code of Civil Procedure 1908 provides for focused document production rather than US-style discovery.

## Evidence – privilege

### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Under articles 9 and 12 of the Qanun-e-Shahadat Order 1984 (being the relevant law governing evidence in Pakistan), an advocate's advice to a client and communications between an advocate and a client are privileged and their production in evidence cannot be compelled by a court. A person who is a full-time salaried employee cannot practice as an advocate; this privilege, therefore, will not apply to RIAA communications with in-house lawyers.

## Evidence – pretrial

### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Any documentary evidence that a party seeks to rely on must be submitted prior to trial along with the pleadings. However, parties are not required to exchange affidavits of witnesses and experts prior to the trial.

**Evidence – trial**

**11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?**

The law of evidence in Pakistan is codified in the Qanun-e-Shahadat Order 1984. Before trial, each party is required to file a list of witnesses and documents that they intend to present during the trial. The claimant has the right to begin the evidence, followed by the defendant.

The evidence of the witness of fact or an expert is given orally in the presence of the judge or a commission appointed by the court. The evidence of the witnesses is taken down in writing in a narrative form by or under the directions of the judge or commission. In the recent amendments to the Code of Civil Procedure 1908 in Punjab, Khyber Pakhtunkhwa and Islamabad Capital Territory, provision has been made for evidence and the proceedings thereof to also be recorded by audio and video.

A witness is first examined-in-chief by the counsel of the party calling the witness. In some instances, evidence-in-chief is conducted by the witness reaffirming the contents of his or her affidavit in evidence in the presence of the court or the commission. In the recent amendments to the Code of Civil Procedure 1908 in Punjab, Khyber Pakhtunkhwa and Islamabad Capital Territory, provision has been made for the affidavit in evidence to be construed as the examination-in-chief. The witness is also asked to present documents filed in support of the affidavit in evidence. Following the examination-in-chief, the opposing counsel is invited to cross-examine the witness orally. Thereafter, the counsel of the party calling the witness may re-examine the witness.

Any documents sought to be relied on are presented by the relevant witness during the examination-in-chief and documents with which a presumption of truth is attached can be produced in evidence under a statement of the counsel of the party who wants to produce such documents as evidence.

**Interim remedies**

**12 | What interim remedies are available?**

Civil courts in Pakistan may grant a number of interim remedies, including:

- arrest;
- attachment before judgment;
- injunction;
- appointment of receiver; and
- inspections by court officer.

Remedies in the nature of *Mareva* injunctions and *Anton Piller* orders are rarely sought in Pakistani courts and may be granted in appropriate circumstances.

These interim remedies may also be granted in a suit seeking to enforce a foreign judgment.

**Remedies**

**13 | What substantive remedies are available?**

The civil courts in Pakistan are empowered to grant a host of substantive remedies, which are primarily set out in the Specific Relief Act 1877 and include:

- damages including interest but not including punitive damages;
- possession of movable or immovable property;
- specific performance of a contract;
- rectification of an instrument;
- rescission of a contract;
- cancellation of an instrument;
- declaration;

- prohibitory injunction;
- mandatory injunction; and
- recovery of money, including interest.

**Enforcement**

**14 | What means of enforcement are available?**

The means of enforcement of a courts order may be broadly divided into the formal means for executing an order and means by way of which a person can be punished for violating a court order.

The process of execution of orders essentially entails pursuing execution proceedings against the relevant part to seek orders forcing compliance with the court order. In execution proceedings, the court may order:

- delivery of any property;
- attachment and sale or by sale without attachment of any property;
- arrest and detention in prison;
- appointment of a receiver; or
- other directions that the nature of the relief granted may require.

If a person violates a court order, there are various provisions of law that empower the court to take steps to punish such violation and indirectly force compliance with the order.

If a person fails to comply with an interim injunction granted by a court, such court may order the property of such person to be attached and may order such person to be detained in prison for a term not exceeding six months. Further, the party that disobeys the order can be subjected to contempt proceedings before the relevant high court, where a finding of contempt can be punished with imprisonment, which may extend to six months, or with a fine, which may extend to 100,000 Pakistani rupees or with both.

In recent amendments to the Code of Civil Procedure 1908 in Punjab, on passing of an executable decree, proceedings in the suit are automatically converted to execution proceedings, without the party to whom relief has been granted having to file separate proceedings for this purpose.

**Public access**

**15 | Are court hearings held in public? Are court documents available to the public?**

Yes, ordinarily all court hearings are held in public.

Court documents are available to the public for inspection and copies may be obtained for a nominal fee.

**Costs**

**16 | Does the court have power to order costs?**

The court has the power to grant costs calculated on the basis of actual costs incurred, subject to limits, which may vary between 25,000 and 100,000 Pakistani rupees. Unlike many other jurisdictions, claimants are not required to provide security for the opposing party’s costs. The court has the power to require the claimant to provide security for the costs of the defendant in limited circumstances, including where the plaintiff resides outside Pakistan and does not possess sufficient immovable property in Pakistan.

Ordinarily, when awarded, costs are limited to amounts paid by way of court fees.

## Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency or conditional fee arrangements are not permissible in Pakistan. There are no express rules in relation to using third-party funding and the practice is uncommon. In the absence of rules, the parties are free to make contractual commitments in respect of the funding of litigation and the distribution of any proceeds.

## Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance policies for legal costs are not available in Pakistan. However, legal costs may be covered by other policies such as third-party liability, which are available.

## Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants may bring a suit jointly if their right to sue arises out of the same transaction or series of acts or transactions, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. Further, parties may with the permission of the court sue on behalf of or for the benefit of all persons interested. In those cases, notice is required to be given to all persons of that action. While the bringing of a representative action is allowed, it is uncommon in practice. It is more common for litigants to invoke the constitutional jurisdiction of the High Court or Supreme Court to seek writ remedies or directions for enforcement of fundamental rights against the state or any instrumentality thereof. Those actions usually take the form of public interest litigation.

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Under the procedural laws of Pakistan, there are multiple appellate remedies that can be availed by an aggrieved litigant, including appeal, reference, review and revision. The remedy of appeal is not restricted to any particular grounds and parties who are dissatisfied with a judgment and decree of a court of first instance have the right to file an appeal before the relevant appellate forum.

In most cases, the parties are entitled to make a further appeal and may have remedies against that further appellate order. Even in cases where the parties do not have a further right of appeal, they can still challenge appellate decisions, on certain limited grounds, by invoking the constitutional jurisdiction of the high courts.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Decrees passed by the superior courts in certain reciprocating territories notified by the government of Pakistan may be executed in Pakistan as if they had been passed by a district court. Reciprocating territories include the United Kingdom, Fiji, Singapore, Australia, New Zealand,

Kuwait, Turkey and the United Arab Emirates. A certified copy of the decree is required to be filed with the execution application in the district court where the decree is required to be enforced.

If a foreign decree sought to be enforced is not passed by a superior court of one of the above-mentioned jurisdictions, the decree holder will have to initiate a fresh suit in Pakistan on the basis of the foreign decree.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

This requires that a certificate, signed by the consular officer of the foreign country of the highest rank in Pakistan, is sent to the high court in whose appellate territorial jurisdiction the witness resides through the federal government; a letter of request issued by the foreign court be sent to the high court through the federal government; or a letter of request issued by the foreign court be produced before the said high court by a party to the proceeding. The high court shall issue a commission for examination of the witness if satisfied from above said certificate or letter of request that:

- the foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it;
- the proceedings are of civil nature; and
- the witness is residing within the limits of the high court's appellate jurisdiction.

When the commission has duly executed its duty, its report shall be returned together with the evidence taken to the high court, which shall forward it to the federal government along with the letter of request for transmission to the foreign court.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

There are two major statutory instruments that govern arbitration in Pakistan: the Arbitration Act 1940 (the 1940 Act), which applies to local arbitrations, and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (the 2011 Act), which applies to foreign arbitrations. Neither of these are based on the UNCITRAL Model Law.

The 1940 Act is applicable to all local arbitration and provides for three approaches to arbitration: without the intervention of the court; with the intervention of the court; and with the intervention of the court but where a suit is pending between the parties and they agree for the resolution of their disputes through arbitration, keeping the suit pending, and that the fate thereof (suit) be decided on the basis of the decision rendered by the arbitrator.

The 2011 Act has been enacted to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Convention, which Pakistan has ratified.

While the 1940 Act comprehensively deals with various aspects of local arbitration, including the appointment of arbitrators, the conduct of the arbitration and the powers of the court to interfere with the arbitration, the 2011 Act only seeks to enforce the New York Convention and does not address matters beyond the scope of the convention. As such, unless it is expressly provided otherwise, the answers given below have been given in relation to local arbitrations, whereas the law on such matters should be considered to be silent in respect of foreign arbitrations.

## Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

With respect to local arbitrations, a valid arbitration agreement must be an agreement in writing, reflecting the intention of parties to refer the dispute to arbitration, with or without a named arbitrator.

As for foreign arbitration agreements, the 2011 Act refers to the definition in the New York Convention. Article II of the Convention defines 'arbitration agreement' as an agreement in writing under which the parties undertake to submit to arbitration all of any differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Article II(3) further states that the term 'agreement in writing' must include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

## Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Ordinarily, parties have a right to agree on the arbitrator or arbitrators of their choice and the manner in which the arbitrator or arbitrators will be appointed. However, if the arbitration agreement is silent on the number of arbitrators to be appointed, the reference shall be presumed to have been intended to be made to a sole arbitrator to be appointed by the consent of both parties.

Either party may serve notice to the other party for appointment of an arbitrator. In the case of non-appointment within 15 days of the service of that notice to concur in appointment, the party can file an application to the court to appoint an arbitrator after hearing both the parties. The court then has exclusive jurisdiction to make such appointment if approached by either party.

Where an arbitrator is appointed in contradiction with the arbitration agreement and the parties participate in the said proceedings without objection, subsequent objection to the arbitrators' jurisdiction is disallowed ostensibly on the principle of waiver. However, the Supreme Court has held that this principle is not applicable when the appointment of the arbitrator is in contravention with the provisions of law.

## Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

No restrictions have been imposed on the parties with regard to the choice of arbitrators in Pakistani law. The parties are free to agree upon arbitrators of their choice. The Supreme Court has held that the parties may even agree to name an authority or person from among their own officers or officials, and this would not render that arbitration agreement illegal or against public policy.

## Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Act 1940 does not provide for any specific procedure to be followed in the course of arbitration proceedings. The parties are relatively free to agree upon any procedure or choose to adopt that of a particular arbitral institution.

The only procedure that the Arbitration Act 1940 provides for is when approaching the courts (for referral to arbitration, appointment of arbitrator, obtaining interim relief, enforcement of awards, etc). In that case, section 41 of the Arbitration Act 1940 clearly states that the provisions of the Code of Civil Procedure 1908 will apply.

## Court intervention

28 | On what grounds can the court intervene during an arbitration?

The court has extensive powers to intervene in local arbitrations. Where the parties fail to consent to the appointment of an arbitrator as required, the arbitrator fails or is incapable of acting, or where arbitrators fail to appoint an umpire, the court has the power to appoint arbitrators or umpires. The court also has the authority to remove arbitrators or umpires where they fail to act reasonably in proceeding with the arbitration or misconduct themselves. The court also enjoys discretionary powers to revoke the authority of an arbitrator in cases where it sees fit to do so. Following the award, the court, in certain circumstances, has the power to modify or set aside the award or supersede the arbitration.

## Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless otherwise restricted by the arbitration agreement, arbitrators have the power to grant interim relief. However, in practice, owing to the difficulty of enforcing interim relief granted by arbitrators, parties prefer to approach the courts for grant of interim relief.

## Award

30 | When and in what form must the award be delivered?

The award must be delivered by the time frame as provided in the arbitration agreement. If no time frame is provided, then by law it is an implied term of the arbitration that the arbitrators are required to make their award within four months of entering on the reference or of having been called upon to act by notice in writing from any party to the arbitration agreement, or within such extended time as the court may allow. Unless otherwise provided in the arbitration agreement, the award is not required to be in any particular form except that it is required to be signed by the arbitrator or arbitrators.

## Appeal

31 | On what grounds can an award be appealed to the court?

The award can be wholly or partially set aside by the court on the grounds that:

- there has been misconduct involving the arbitrator or umpire or the proceedings;
- the award has been made after an order of the court superseding the arbitration or declaring it invalid; or
- the award has been improperly procured or is otherwise invalid

The order of the court in this regard may be further appealed.

## Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

In the case of a foreign award, the 2011 Act provides that the person seeking enforcement must file an application for recognition and enforcement before the relevant high court. That application may only be refused on the grounds stated in article V of the New York Convention. The

2011 Act does not prescribe any procedure for such application. There have been few instances of such enforcement proceedings in Pakistan and therefore, the courts have had limited opportunities to deliberate on this procedure. The practice that has been informally adopted is to file an application before the high court seeking recognition of the award and for the court to issue a decree in terms of the award. That decree may then be executed as any other decree of the court.

In the case of a domestic award, the arbitral tribunal must give notice to the parties when the award is made. If requested by the parties or directed by the court, the arbitral tribunal must file the award in court. After the award is filed in court, if an application to set aside the award is not filed in the required time or the application is filed and refused, the court pronounces judgment in terms of the award, after which a decree is passed.

### Costs

#### 33 | Can a successful party recover its costs?

Unless otherwise provided in the arbitration agreement, it is an implied term of every domestic arbitration agreement that the arbitrator has the discretion to award costs of the reference to arbitration, including legal fees.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

#### 34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Arbitration is the only formal ADR process to be commonly used in Pakistan. Recently, laws have been introduced across Pakistan to encourage other alternate methods of dispute resolution including mediation and conciliation. There are various informal adjudicatory practices derived from custom that are used in some rural areas in Pakistan.

### Requirements for ADR

#### 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Recently there have been many legislative changes in Pakistan encouraging the resolution of dispute by way of alternate dispute resolution (ADR) including arbitration, mediation and conciliation.

Sindh enacted the Code of Civil Procedure (Sindh Amendment) Act 2018, whereby it introduced certain amendment in the Code of Civil Procedure 1908 (CPC) as applicable in Sindh. Pursuant to such changes, the courts in Sindh have been given the power to mandatorily refer parties to any form of ADR.

Punjab enacted the Punjab Alternate Dispute Resolution Act 2019, and the Lahore High Court made certain amendments to the First Schedule of the CPC as applicable in Punjab. Under the Act, the courts are required to refer to ADR the disputes listed in Schedule 1 of the Act, whereas the courts have been empowered to refer to ADR disputes listed in Schedule 2. The Act contemplates a resumption in litigation if ADR fails. Pursuant to the changes in the CPC, courts hearing civil suits are required to refer the dispute for mediation except where the court is satisfied that the case involves an intricate question of law or fact or that there is no possibility of successful mediation. When referring a case for mediation, the court may specify the material issues for determination through mediation. When a case is so referred, its proceedings in

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court are stayed for a period not exceeding 30 days, and the parties are directed to the Mediation Centre established by the Lahore High Court.

The Alternate Dispute Resolution Act 2017 was enacted in Islamabad along with changes in the CPC. Under this Act, where the court is satisfied that a scheduled dispute can be resolved by ADR and it does not involve an intricate question of law, the court may refer the dispute to ADR. In this case, the court requires the consent of the parties to refer the matter to ADR.

Khyber Pakhtunkhwa enacted the Khyber Pakhtunkhwa Alternate Dispute Resolution Act 2020. This Act applies in the same manner as the Alternate Dispute Resolution Act 2017, discussed above.

Balochistan is yet to introduce any legislation empowering courts to refer matters to ADR.

This legislative reform is fairly recent and it remains to be seen whether it will be implemented in practice.

## MISCELLANEOUS

### Interesting features

#### 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Judges in Pakistan often act in multiple capacities. Although separate legal systems may have a specific set of categories of proceedings, various kinds of proceedings will often be brought before the same judge. The most prominent example of this is that ordinary civil courts also



exercise criminal jurisdiction, with civil judges also holding the charge of magistrates and district judges and additional district judges also holding the charge of sessions judges and additional sessions judges.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Currently, there are no significant proposals for dispute resolution reform.

# Panama

**Khatiya Asvat and Joaquín De Obarrio**

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

At the first level are the municipal courts, with jurisdiction on matters not exceeding US\$5,000 and certain case-specific matters (eg, eviction proceedings). The municipal courts have jurisdiction over a municipality. Appeals against decisions of the municipal courts are heard by the circuit courts, where three circuit judges act as the appellate court, one of them serving as the main appellate judge.

Next are the circuit courts, with jurisdiction on matters exceeding US\$5,001 and certain case-specific matters (eg, oral proceedings related to challenges against resolutions of corporations and claims involving land). The circuit courts have jurisdiction over a province, except for the province of Panama, where three groups of circuit courts hold jurisdiction over a series of municipalities.

The provinces are distributed in what is known as judicial districts. For civil matters, the Republic of Panama has four judicial districts headed by a Superior Court: the First Judicial District, formed by the provinces of Panama, Colon, Darien, San Blas and Panama Oeste; the Second Judicial District, formed by the provinces of Coclé and Veraguas; the Third Judicial District, formed by the provinces of Chiriquí and Bocas del Toro; and the Fourth Judicial District, formed by the provinces of Los Santos and Herrera. Appeals against decisions of the circuit courts are heard by the Superior Courts or courts of appeal of the relevant province's judicial district.

The Superior Courts or courts of appeal generally serve as appellate courts for appeals against decisions of the circuit courts, as well as first instance courts for constitutional challenges against actions of public officials with jurisdiction over a province, and other matters. The Superior Court is composed of five magistrates for the First Judicial District and three magistrates for the other judicial districts. The magistrates act as an appellate court consisting of three magistrates, each alternating as the main magistrate on different cases, pursuant to case distribution rules.

Challenges against decisions of the Superior Courts are heard before the Civil Chamber of the Supreme Court of Justice, in particular, the writ of cassation. Three Supreme Court justices form the Civil Chamber.

Matters related to constitutional challenges are heard by the Plenary Assembly of the Supreme Court of Justice. The Supreme Court comprises nine justices overseeing four chambers, each chamber composed of three justices, namely the First Civil Chamber, the Second Chamber for criminal matters, the Third Chamber for administrative matters and labour litigation, and the Fourth Chamber for general matters.

Other special courts exist, such as the courts of commerce, composed of three (two active) circuit-level commercial courts of the

first judicial circuit of Panama, and a Superior Commercial Court, part of the First Judicial District. In addition, special insolvency courts are to be incorporated into the civil court system, to eventually operate at the circuit court level, overseen by a Superior Insolvency Court, part of the First Judicial District. There are also two maritime courts with nationwide jurisdiction and a maritime court of appeals.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

In civil matters, the burden of proof is borne by the plaintiff. Therefore, the judge's role consists of verifying and analysing the evidence produced by the parties in the proceedings, and forming their own concept, based on personal knowledge and experience, the applicable law and principles, and the rules for admission of evidence. This process is known as critical analysis. When conducting this critical analysis, the judge can request the production of evidence, including the assistance of experts; however, this analysis cannot make up for or supplement deficiencies of the parties, in particular as it relates to the plaintiff's burden of proof duties. Juries are not involved in civil proceedings. Civil proceedings are mostly of a written nature.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

Different time limits apply depending on the nature of the claim.

The general time limit provided by the Civil Code for the filing of a personal claim for actions that do not have a particular time limit is seven years.

The general time limit for the filing of a claim for tortious damages is one year.

Real estate claims have a 15-year time limit.

The time limit for claims to seek payment of overdue leases is five years.

Claims to seek payment of civil services rendered by lawyers, notaries, experts, custodians, interpreters, arbitrators and services provided by pharmacists, medical doctors, engineers, chemists, teachers and professors, as well as lodging and food, and the sale of provisions to non-merchants or those merchants practising in another activity, are limited to two years.

It is not permitted for the parties to agree to suspend time limits; however, individuals with the capacity to dispose of assets can waive the acquired time limit.

The above are Civil Code-governed claims.

Note that civil proceedings also include claims governed by the Code of Commerce, where the default time limitation is five years.

Claims governed by the Code of Commerce subject to civil procedure include: claims for retail sales, claims for agents' wages, claims

for transportation contracts, broker’s liability claims and insurance claims where the time limitation is one year.

Claims related to corporations and the resulting relations and liabilities between shareholders or partners, as well as with regard to the company; liability of liquidators or managers of corporations; interest due on leases when charged yearly or for lesser periods; collection of negotiable instruments; wholesale activity; and financial leasing and banking facilities have a time limitation of three years.

**Pre-action behaviour**

**4 | Are there any pre-action considerations the parties should take into account?**

Considering the formal nature of civil proceedings, the plaintiff must verify that documents serving as evidence comply with the requirements of the governing law as well as for their admissibility (eg, signatures have been acknowledged before a notary, documents granted abroad have been legalised, documents have been signed by individuals with authority and certificates have been obtained within the legal timeline for their validity).

The plaintiff can try to secure or produce evidence that may otherwise not be available during the proceedings through prejudicial petitions that may include witness statements, inspections of places, objects or documents with the assistance of experts, special disclosure of accounting or financial records, and reports from private or public institutions. A security deposit (in the range of US\$100 to US\$1,000) for damages is generally required for the order to be effected.

A plaintiff can try to secure the claim through the prejudgment attachment of assets, such as cash in banks, movable assets, property recorded with the Public Registry, credits and inventories. A security bond for damages that may be caused, representing an estimated 25–40 per cent of the attachment amount or claim amount (the attachment amount cannot exceed the claim amount) is required in the form of cash deposited with the National Bank in the relevant court’s account, insurance or bank guarantees, mortgages or public debt instruments; the amount is set by the court at its discretion. The prejudgment attachment is an ex parte application; once the order has been effected, the plaintiff must file the complaint within the following six days and serve the defendant with proceedings within the following three months; otherwise, the complaint may be dismissed.

**Starting proceedings**

**5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?**

Proceedings commence through the filing of a complaint. Once the complaint is admitted, the court instructs service on the defendant. The defendant is personally served through the judiciary. If the defendant is a corporation, then its legal representative would have to take service. If the defendant or its representative is not within Panamanian jurisdiction, letters rogatory must be sent to the foreign jurisdiction through diplomatic channels. The defendant must be provided with a copy of the complaint and order of admission, and will be required to sign the order of admission. At such moment, the term for answering the complaint shall commence. If the defendant cannot be located, an absentee party defendant shall be appointed.

The Panamanian judiciary’s caseload is significant and the allocated budget is restricted, and as a result the progression of proceedings is slow.

**Timetable**

**6 | What is the typical procedure and timetable for a civil claim?**

The timeline for an ordinary civil claim is as follows:

- filing the complaint;
- answer to complaint: to be filed within 10 days of service of the order of admission of complaint;
- filing of evidence: takes place 15 days after the term for responding to the complaint, and must be filed within the following five days;
- counter-evidence: must be filed within three days of the filing of evidence term;
- objections to evidence: must be filed within three days of the filing of counter-evidence term;
- taking of evidence: the court may set a calendar of up to 30 days. The order for taking of evidence may take an estimated one to two years or more;
- closing statements: filed within five days of the conclusion of the taking of evidence stage;
- decision: one to three years or more;
- appeal: to be taken three days after service, filed within the five following days; one to two years; and
- cassation: two to three years or more.

**Case management**

**7 | Can the parties control the procedure and the timetable?**

The duty to maintain the pace and progress of the proceeding falls on the judge. However, there are mechanisms that allow the parties to control certain aspects of the procedure and its timetable: the parties can agree to stay the terms of proceedings for periods of up to three months, and they can also ask the judge to eliminate, modify or have as effected certain parts of the procedure.

**Evidence – documents**

**8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?**

Generally, no. Discovery is not available in civil proceedings.

**Evidence – privilege**

**9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?**

In principle, yes. The document would be protected by attorney–client privilege.

**Evidence – pretrial**

**10 | Do parties exchange written evidence from witnesses and experts prior to trial?**

No. A party can try to secure evidence prior to the commencement of proceedings.

The timeline for an ordinary civil claim is as follows:

- filing the complaint;
- answer to complaint: to be filed within 10 days of service of the order of admission of complaint;
- filing of evidence: takes place 15 days after the term for responding to the complaint, and must be filed within the following five days;
- counter-evidence: must be filed within three days of the filing of evidence term;
- objections to evidence: must be filed within three days of the filing of counter-evidence term;

- taking of evidence: the court may set a calendar of up to 30 days. The order for taking of evidence may take an estimated one to two years or more;
- closing statements: filed within five days of the conclusion of the taking of evidence stage;
- decision: one to three years or more;
- appeal: to be taken three days after service, filed within the five following days; one to two years; and
- cassation: two to three years or more.

### Evidence – trial

#### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Generally, evidence is submitted in the form of briefs together with evidentiary documents, either at the moment the complaint is filed or answered, or during the stage of filing of evidence, counter-evidence and objections (this applies to ordinary or standard civil proceedings), or when filing or answering a motion. The briefs must contain the list of fact witnesses, the appointment of expert witnesses and the questions to be addressed by the expert witnesses. Witnesses can be interrogated and counter-interrogated by the parties, and the judge may also interrogate; expert witnesses are also interrogated on their findings and conclusions in a similar manner. The judge may order witnesses to face each other if they give contradictory answers.

### Interim remedies

#### 12 | What interim remedies are available?

General injunctive remedies such as freezing injunctions are not available in civil proceedings.

Plaintiffs can seek prejudgment attachment of a defendant's assets.

Plaintiffs can also request the staying of negotiations or dealings whenever a real right (such as property) may be affected, subject to the consigning of security for damages with the court.

In connection with claims involving challenges against resolutions of a corporation, a staying order or freezing order is available provided the plaintiff files the complaint within 30 days of the document being recorded with the Public Registry or, if the document was not recorded, from the moment the plaintiff learned of its existence.

Interim remedies are available in connection with foreign proceedings when the relevant decision is presented for acknowledgment and enforcement before the Fourth Chamber of the Supreme Court of Justice.

### Remedies

#### 13 | What substantive remedies are available?

As a general rule, in addition to the proven claimed amount, the prevailing party is entitled to interest (at a default rate of 6 per cent per annum in civil matters and 10 per cent in commercial matters), litigation costs and expenses, as well as legal fees set in accordance to the Bar tariff, which considers the type of procedure and claim amount.

Moral damages (eg, emotional or reputational loss) are available in civil claims for damages.

Punitive damages are generally not available in civil proceedings. As exceptions, treble damages are available in consumer defence or action proceedings, as well as in the special procedure of international private law conflicts before the Panamanian courts, where the parties can request the application of foreign law indemnity rules.

### Enforcement

#### 14 | What means of enforcement are available?

If a defendant does not comply with the final order within six days of receiving service, the plaintiff can commence special enforcement proceedings and request the post-judgment attachment of the defendant's assets.

In certain cases, the plaintiff can request that the defendant or a third party who fails to comply with or breaches an order of the judge be held in contempt. This may result in arrest and fines.

### Public access

#### 15 | Are court hearings held in public? Are court documents available to the public?

Generally, yes. However, in oral proceedings, any of the parties may request that the hearing be held privately, for reasons of security, morality, decorum or public policy.

In addition to the parties, the case file documents are generally available to lawyers, paralegals and clerks, appointed experts and custodians, other court-appointed assistants, law students, and those individuals authorised by the judge for purposes of research or education, as well as other individuals specially authorised by the judge.

### Costs

#### 16 | Does the court have power to order costs?

Yes. As a general rule, the prevailing party is entitled to legal costs. Legal costs (or legal fees) are set by application of the Bar tariff, which generally considers the type of procedure and claim amount. In addition to legal costs, the prevailing party can seek payment of other expenses, such as expert fees, expenses for the reproduction of documents, certificates, fees charged by public institutions and other expenses related to the proceedings. The judge can adjust or eliminate the application of legal costs and only order payment of expenses if he or she considers that the losing party litigated in good faith. Good faith cannot be considered to exist, inter alia, when a defendant fails to appear before the court despite having been served with proceedings; enforcement proceedings are required to seek performance of the judgment; the defendant denies evident statements that should have been accepted as true; false documents or witnesses are submitted; no evidence is filed to substantiate the facts of the complaint or a motion; or a party abuses his or her litigation rights.

The plaintiff is not obligated to provide security for the defendant's costs.

### Funding arrangements

#### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

This is a matter of private agreement between counsel and client. The above arrangements, although not customary in our system, should in principle be available.

### Insurance

#### 18 | Is insurance available to cover all or part of a party's legal costs?

Not applicable.

## Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes. Class actions exist in connection with consumer protection claims. In addition, the Judicial Code has a special chapter on international private law conflict procedure, which allows the judge to group or consolidate actions whenever a great number of plaintiffs or defendants exist.

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeal is generally available against decisions or orders of the first instance judge. Generally, the appellant has three days after receiving service of the decision or judgment (two days if dealing with an order) to appeal against the adverse judgment. The brief of appeal must be filed before the first instance judge within five days, and the opposing party has the following five days to lodge its brief opposition. The first instance judge shall review the brief to confirm that appeal is available against the decision and that the appeal has been timely filed; in that case, the case file is sent to the Superior Court. The appellant can also request the taking of evidence in special circumstances, as part of the appeals procedure.

The extraordinary writ of cassation before the Civil Chamber of the Supreme Court of Justice is available, in special circumstances, against appellate court decisions. The writ of cassation deals with special and specific matters of procedure, application of the law and evaluation of evidence.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Generally, a final foreign judgment will be recognised and enforced in the courts of Panama without retrial of the originating action by instituting exequatur proceedings before the Fourth Chamber of the Supreme Court of Justice of Panama.

For a writ of exequatur to be obtained from the Fourth Chamber of the Supreme Court of Justice, the following are required:

- The existence of a treaty or, in its absence, reciprocity. The principle of reciprocity provides that the country that issued the judgment would, in similar circumstances, recognise a final and conclusive judgment of the courts of Panama. Reciprocity is presumed to exist; therefore, if the opposing party (and, exceptionally, the Prosecution Office of the Attorney General) considers reciprocity is lacking, then such party must provide evidence within the course of exequatur proceedings.
- A judgment issued because of an action in personam. Actions in personam are the opposite of 'real' actions (ie, real estate property situated in Panama).
- Demonstrating the judgment was rendered after personal service has been effected on the defendant. When analysing the exequatur petition, the Fourth Chamber of the Supreme Court of Justice will look for confirmation of proper personal service of process effected on the defendant. The purpose of this requirement is to verify that the defendant had the opportunity to submit a defence against the claim, and that, therefore, the principles of contradiction or bilateralism and due process were observed.
- That the cause of action upon which the judgment was based is lawful and does not contravene the public policy of Panama.

- Providing authentic copies of the documents evidencing the judgment, according to the law of the relevant foreign court and have been duly legalised by a Consul of Panama or pursuant to the 1961 Hague Convention on the legalisation of documents.
- Providing translations of the copy of the final judgment (and complementary evidence) by a licensed translator in Panama.
- The judgment must be final and definitive, meaning that no other remedies (ie, appeals or other challenges) are available against the judgment.

Once the writ of exequatur has been obtained from the Fourth Chamber of the Supreme Court of Justice, the plaintiff must commence special executory proceedings before the civil courts to seek collection of the owed amounts.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Foreign courts can request legal assistance from the Panamanian judiciary through letters rogatory, either through means of treaties or conventions, or following principles of international comity. The petitions are channelled through the Fourth Chamber of the Supreme Court of Justice, which will review the application and, if granted, shall instruct the competent courts to take or instruct the production of the required evidence.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Generally, yes, with influence from the ICC Arbitration Rules, as well as the arbitration laws of other jurisdictions (Spain, France, Mexico and others).

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing. An arbitration agreement shall be considered to meet this requirement whenever evidence of its contents can be produced by any means. This includes electronic communications that can be accessed for eventual confirmation. The existence of a written form can also result from the exchange of briefs of complaint and answer to the complaint, whenever a party affirms its existence and the opposing party does not object, or by reference to an arbitration clause existing in a document that would apply to the relevant contract.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Generally, the parties are free to appoint the number of arbitrators, provided the tribunal is composed of an odd number. If the parties cannot agree to the number of arbitrators, the dispute shall be decided by a sole arbitrator. If one of the parties is the state or a state entity, then the tribunal shall consist of three arbitrators.

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 of 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).

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties generally agree that each shall appoint one arbitrator. The chair may be appointed by the institution or the party-appointed arbitrators, depending of the arbitration agreement and applicable rules. The most active arbitral institutions have lists of arbitrators, for both domestic and international arbitration, from which the chair of the tribunal is appointed following the relevant institution's rules. The candidates are generally experienced practitioners in their fields and have served as arbitrators, and include national as well as internationally renowned specialists.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The law on arbitration contains substantive provisions regulating matters such as the definition of domestic or international arbitration, matters that can be submitted to arbitration, the effects of the arbitration agreement, the default rule that arbitration shall be at law when the parties do not state the nature of the arbitration, and requirements for application for the annulment or enforcement of the award.

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, court intervention during an arbitration is not admissible. The parties can agree to arbitrate a court dispute, provided the matter can be submitted to arbitration. The courts can intervene prior to the formation of the arbitral tribunal by providing interim relief or precautionary measures at the request of the plaintiff, or they can intervene at the request of the arbitral tribunal, for purposes of assisting the tribunal with interim relief or with the production of evidence.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes.

### Award

30 | When and in what form must the award be delivered?

In domestic arbitration, the general rule is that the award must be delivered within two months of the filing of closing statements, and may be extended for an additional two months depending on the degree of complexity. In international arbitration, the award must be delivered

within the term provided by the relevant rules, or as agreed by the parties or the arbitral tribunal.

Generally, the arbitration award must be in written form signed by the majority of the arbitrators. If there is no majority consent, then the chair can sign the award. The award must include the analysis and motivations (except as otherwise agreed by the parties) and the date and the seat of the arbitration. The award is served by the arbitral institution or the tribunal, as applicable, to the parties through delivery of a signed copy of the award. Generally, a single award is issued; however, multiple awards can also be issued, as may be agreed with the parties.

### Appeal

31 | On what grounds can an award be appealed to the court?

Appeal is not available against the arbitral award. The award can be challenged through an annulment application filed before the Fourth Chamber of the Supreme Court of Justice, on the following grounds:

- that one of the parties to the arbitration agreement was under some incapacity under the law applicable to it, or the agreement was not valid pursuant to the law to which the parties subjected it or, if no provision was made in this regard, pursuant to Panamanian law;
- that the party against was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable, for whatever reason, to present its defence;
- that the award deals with a dispute that was not contemplated by the arbitration agreement, or that did not fall within the terms of the submission to arbitration, or contains decisions that go beyond the scope of the arbitration clause or the submission to arbitration. However, if the provisions of the award that refer to the matters submitted to arbitration can be separated from those that have not been submitted to arbitration, the former may be recognised and enforced;
- that the formation of the arbitral tribunal or the arbitral proceedings did not conform to the parties' agreement – except when such agreement breaches the arbitration law – or, in absence of an agreement, it did not conform to the arbitration law;
- that the arbitration tribunal has ruled on a matter that could not be arbitrated; and
- that the international arbitral award breaches international public policy, or in the case of a domestic award, that such award breaches Panamanian public policy.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Foreign arbitral awards in Panama are recognised and enforced in accordance with:

- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958);
- the Inter-American Convention of International Commercial Arbitration (Panama, 1975); or
- any other treaty ratified by the Republic of Panama on the recognition and enforcement of arbitral awards. The petition for recognition is filed before the Fourth Chamber of the Supreme Court of Justice of Panama.

In the case of foreign awards where Panama served as the seat of arbitration, enforcement can be directly requested before the civil circuit courts through judgment enforcement proceedings.

Domestic awards are enforced through judgment enforcement proceedings before the civil circuit courts.



**Costs****33 | Can a successful party recover its costs?**

Generally, yes. When filing closing statements, the parties are generally requested to submit a report on incurred costs, including legal expenses, expert fees, and arbitrator and services fees of the institution, as well as general expenses incurred during the arbitration, for evaluation by the arbitral tribunal and inclusion in the award.

**ALTERNATIVE DISPUTE RESOLUTION****Types of ADR****34 | What types of ADR process are commonly used? Is a particular ADR process popular?**

The most commonly used ADR processes are mediation and conciliation. ADR has still to gather momentum; it is generally conceived as a pre-arbitration or pre-litigation stage.

**Requirements for ADR****35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?**

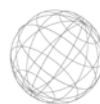
In certain cases, the parties contractually agree to mandatory ADR prior to commencing arbitration. The arbitral tribunal may stay the arbitration and request the parties to submit to ADR in cases where the arbitration has commenced without the observance of this stage.

**MISCELLANEOUS****Interesting features****36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?**

Not applicable.

**UPDATE AND TRENDS****Recent developments****37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?**

The judiciary has been implementing the use of electronic court files, which can be reviewed remotely by users. It was initially implemented in mid-2021, in the first, second and third civil circuit courts of the First Judicial Circuit of Panama, and in the late 2021, it was implemented in the fourth, fifth and sixth civil circuit courts of the First Judicial Circuit of Panama. In December 2021, it was further expanded to the maritime and admiralty courts of Panama, and in early 2022 it was implemented in the twelfth, thirteenth and fourteenth civil circuit courts of the First Judicial Circuit of Panama.



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# Philippines

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The Philippine judicial system comprises first-level courts (municipal, metropolitan and regional trial courts), the Court of Appeals and the Supreme Court. A single judge presides over first-level courts, while the Court of Appeals comprises 69 justices, who sit in divisions of three members. The Supreme Court comprises 15 justices, which sit en banc or in divisions of three, five or seven members.

The jurisdiction of first-level courts depends on the nature of the proceedings and the amounts involved. A metropolitan trial court has exclusive original jurisdiction over civil actions involving amounts at lower limits. Civil actions involving amounts beyond the threshold of metropolitan trial courts, as well as actions incapable of pecuniary estimation, are handled at the first instance by regional trial courts.

Metropolitan trial court decisions can be appealed to a regional trial court. In turn, regional trial court decisions can be appealed to the Court of Appeals and the Supreme Court.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The judge presiding over civil proceedings:

- determines the facts;
- ensures that the parties comply with the rules of procedure;
- interprets the applicable laws; and
- in penning the decision, applies the law.

In the performance of their functions, judges must be impartial. Nonetheless, during a trial, judges may adopt an inquisitorial role only for clarificatory purposes.

The Philippines has not adopted the jury system.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

The time limits for bringing civil claims are as follows:

- eight years from the time possession was lost for actions to recover movable property;
- 30 years for actions affecting title to or possession of real property;
- 10 years for actions involving mortgages, written contracts, obligations created by law and judgments;
- six years for actions involving oral contracts and quasi-contracts;
- four years for actions involving injury to the rights of the claimant and quasi-delicts;
- one year for actions involving forcible entry, detainers and defamation; and

- five years for all other actions.

Actions to demand a right of way or to bring an action to abate a public or private nuisance are not time-limited.

Time limits for bringing civil claims may not be suspended merely by agreement of the parties involved. However, such periods may be interrupted if:

- a relevant action is filed before the court;
- the creditors produce a written extrajudicial demand; or
- the debtor issues a written acknowledgement of the debt.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

Depositions may be commenced before a civil action has been instituted. However, a proper petition for this purpose must be filed with the court. The petition should indicate that the petitioner expects to be a party to an action but is presently unable to commence this action. The petition must also describe the expected action in which the deposition would be used and the facts to be established in and purpose of the deposition. If allowed, the deposition may be used in any action involving the same subject matter.

All other remedies may be availed of only after a civil action has been instituted.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A claimant institutes a civil action by filing a complaint and paying the proper fees therefor. The responding party will be notified by the court of the complaint through a summons and issued a copy of the complaint.

Owing to greater court accessibility and the relative ease of initiating civil actions, court dockets have become congested. In response, the Philippine judiciary has actively promoted amicable settlements to resolve civil actions. Thus, after they are instituted and before the trial, civil actions are diverted to mediation over which accredited mediators from the Philippine Mediation Centre preside. Where mediation fails, another chance to arrive at an amicable settlement is available during judicial dispute resolution, presided over by a judge. If mediation fails again and trial ensues until complete resolution of the civil action, a third attempt at mediation is available at the appellate level.

## Timetable

### 6 | What is the typical procedure and timetable for a civil claim?

After the institution of a civil action, the clerk of the court is required to issue summons to the responding party within five days of receipt of the complaint. In turn, the summons should require the responding party to answer the complaint within 30 days of a successful service in accordance with the rules of court. If the responding party is a foreign private juridical entity, the answer may be submitted within 60 days. Both periods are subject to a 30-day extension for meritorious reasons. The claimant may file a reply within 15 days of receiving an answer. After all pleadings have been submitted, the clerk of court will set the case for pretrial not later than 60 days from the submission of the last pleading. At least three days before the pretrial, the parties must ensure that the other receives their pretrial brief.

During pretrial, the parties identify:

- the possibility of an amicable settlement;
- the admitted facts;
- the legal issues to be resolved;
- their respective evidence and witnesses; and
- the trial dates.

The parties are then referred to court-annexed mediation, which should not exceed 30 days. Mediation may fail due to the expiration of the period. However, if amicable settlement is still possible, the court may refer the parties to judicial dispute resolution to be conducted by another court within 15 days from notice of failure of mediation.

If judicial dispute resolution is also unsuccessful, trial before the original court ensues. During the trial, the parties present their evidence and witnesses. Each party is allowed to present their witnesses and evidence within 90 days. After the trial terminates, the court may require the submission of memoranda. Thereafter, the civil action will be submitted for resolution. The decision must be served on the parties within 90 days therefrom.

The 1987 Constitution requires courts to resolve cases in three months in the first instance, 12 months on appeal (ie, before the Court of Appeals) and 24 months on final appeal (ie, before the Supreme Court). These periods commence after the case is submitted for resolution.

## Case management

### 7 | Can the parties control the procedure and the timetable?

In general, the parties cannot control the procedure, as each step in the process is a prerequisite for the next. However, the timetable may be controlled by implication. Parties may request specific deadlines and choose when hearings will be set, subject to the court's approval. Further, while courts frown on postponements, parties may ask for leave of the court to extend reglementary periods for submissions and defer trial dates or hearings for compelling reasons.

## Evidence – documents

### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

While there is no express requirement on the matter, diligence dictates that parties preserve their evidence prior to the termination of the trial. After the presentation of their testimonial, documentary and object evidence in open court, parties submit their evidence to the court through a formal offer of evidence. It then becomes the court's duty to preserve the parties' evidence until the final disposition of the case.

Parties need not volunteer documents; however, they may seek leave of the court to compel another party to produce documents (ie, non-privileged) that are material to the case.

## Evidence – privilege

### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Communications between the following persons are generally privileged:

- husband and wife;
- attorney (or person reasonably believed by the client to be licensed to engage in the practice of law) and client;
- doctor (or person reasonably believed by the patient to be authorised to practice medicine) and patient; and
- minister or priest (or person reasonably believed to be a minister or priest) and penitent.

In-house lawyers are covered by the attorney-client privilege. However, the privilege may be waived by the person in whose favour the privilege was constituted.

In addition, communications made to public officers in confidence and in relation to their official capacity cannot be disclosed if the public interest would be disadvantaged.

Communications between the above-enumerated persons remain privileged even when obtained by a third party on the condition that the original parties to the communications reasonably protected the confidentiality of said privileged communications.

Aside from the foregoing, any person cannot be compelled to testify against their direct ascendants or descendants or about any trade secret. However, persons with knowledge of trade secrets may be directed by the court to disclose the same to avoid fraud or injustice.

## Evidence – pretrial

### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties may exchange written evidence from witnesses prior to the trial proper. In civil actions, and under the Revised Rules of Civil Procedure, the parties are required to state in their initiatory complaints or answers:

- the names of their witnesses;
- summaries of their witnesses' intended testimonies; and
- their documentary and object evidence.

It is also required that the parties attach their witnesses' judicial affidavits to the initiatory complaints or answers. Likewise, documentary evidence to be identified and authenticated by the witnesses is attached to these judicial affidavits.

Only those witnesses with attached judicial affidavits may be presented during trial. The sole exception to this rule is the presentation of additional witnesses who were not able to provide their judicial affidavits in a timely manner for meritorious reasons. Implied in this exception is that the primary witness's judicial affidavit must be attached to the initiatory complaints or answers.

## Evidence – trial

### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence is presented through the presentation of witnesses, who are tasked with identifying and authenticating the parties' documentary and object evidence. Witnesses may be subject to direct examination, cross-examination, redirect examination and recross examination. Moreover,

after both parties have concluded the presentation of their evidence, witnesses may be recalled with the court's permission.

In civil actions, witnesses' judicial affidavits take the place of their oral direct testimony. Nonetheless, the cross-examination, redirect examination and recross examination of the witnesses are given orally.

If a party wishes to present an unwilling witness summoned by the court through a subpoena, this witness must give oral evidence. The rule on judicial affidavits does not apply to unwilling witnesses.

### Interim remedies

#### 12 | What interim remedies are available?

Parties may apply for preliminary attachment, preliminary injunction, receivership, replevin or support as interim remedies. These remedies are available to local proceedings only.

The more common interim remedies are:

- preliminary attachment, which is available where the applicable fraudulent circumstances are present in a case and the applicant wishes to attach on the opponent's property as security for the potential judgment award; and
- preliminary injunction, which is available where:
  - the relief sought in the civil action is the performance or restraining the commission of a certain act;
  - the performance or non-performance of an act will result in injustice or irreparable damage to the applicant; or
  - there is a threat of violation of the rights of the applicant with respect to the subject matter of the action.

### Remedies

#### 13 | What substantive remedies are available?

Parties may seek relief in the form of specific performance or rescission of contracts and damages. The damages that may be recovered are as follows:

- actual damages or the loss capable of pecuniary estimation;
- moral damages, which compensate the claimant for (among other things) physical suffering, mental anguish and besmirched reputation;
- nominal damage, which is similar to punitive damages;
- temperate or moderate damages to compensate for a pecuniary loss where the amount cannot be determined with certainty;
- liquidated damages or an indemnity or penalty agreed to be paid based on a contract; and
- exemplary damages, which are imposed by way of example for the public good.

### Enforcement

#### 14 | What means of enforcement are available?

As regards judgments for money, the officer of the court may simply demand payment from the judgment obligor. If the judgment obligor cannot pay in full, the officer may levy on the properties of the judgment obligor, which includes debts due the judgment obligor and bank deposits. However, certain properties indispensable to the judgment obligor's livelihood and those qualifying as basic necessities are exempt from execution.

The execution of judgments for specific performance are straightforward. Failure to comply may result in the court directing the performance of the act at the cost of the judgment obligor, or contempt in some cases.

### Public access

#### 15 | Are court hearings held in public? Are court documents available to the public?

In general, court hearings for civil cases are conducted in public, except those concerning children and family cases and adoption proceedings, which are confidential in nature. Similarly, case files are generally available to the public, except records concerning children and family cases and adoption proceedings.

In light of the covid-19 pandemic, the Supreme Court of the Philippines issued rules on the conduct of remote hearings through videoconferencing. Where a hearing is conducted via videoconferencing, some courts do not allow litigants and lawyers who are not involved in a particular case that is being heard to join the gallery of the videoconferencing. A similar practice is employed for physical court hearings to avoid the spread of the covid-19 virus.

### Costs

#### 16 | Does the court have power to order costs?

Yes. The courts may rule that either party pay the costs of an action, or that it be divided. Costs are calculated in accordance with the Supreme Court's guidelines.

### Funding arrangements

#### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Yes, contingent fee arrangements are accepted in the Philippines as these are beneficial to parties that have meritorious claims but are unable to secure legal counsel owing to insufficient funds. Under contingent fee arrangements, legal fees are usually a fixed percentage of what may be recovered in an action. Hence, a lawyer would be able to collect legal fees only if the litigation succeeds.

A party may commence an action using third-party funding. However, in the strict sense, the court will not recognise the funding arrangement. Hence, the third party may not be able to collect from the judgment award. Instead, the third party may demand payment from the party pursuant to their agreement.

### Insurance

#### 18 | Is insurance available to cover all or part of a party's legal costs?

Yes, legal costs may be covered by liability insurance, including indemnity insurance, director and officer liability insurance and comprehensive general liability insurance.

### Class action

#### 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, the Philippines allows class action suits to be filed in regular courts. The general rule for a class suit to be filed is that:

- the subject matter is of common or general interest to many persons; and
- the persons are so numerous that it is impractical to bring them all before the court.

Class action suits aim to obtain relief for or against numerous persons as a group or as an integral entity, and not as separate, distinct individuals whose rights or liabilities are separate from and independent of those affecting the others.

### Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, appeals to higher courts are available against adverse decisions rendered by lower courts. The appeal, when available, usually requires the listing of an assignment of errors by the court in rendering the decision on any question of law or fact that has been raised in the lower court and that is within the issues framed by the parties.

Court of Appeals decisions may be appealed to the Supreme Court, which is deemed the final arbiter for all cases.

### Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The Philippines recognises foreign judgments and allows procedures for the enforcement thereof. This practice is based on generally accepted principles of international law, by virtue of the incorporation clause of the Constitution that considers these principles as forming part of the laws of the land even if they are not derived from treaty obligations.

Although Philippine courts have not laid down the exact boundaries by which foreign judgments can be recognised and enforced, there is no question that this remedy is considered among the universally accepted tenets of international law. States generally accept in principle the need for such recognition and enforcement – albeit subject to limitations of varying degrees – and the Philippines is no exception.

Nonetheless, anyone seeking to enforce a foreign judgment or final order may be prevented by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact.

### Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Revised Rules of Evidence require documentary evidence arising from official acts of a sovereign authority, or its official bodies, tribunals or public officers to be proved by:

- its official publication; or
- a copy attested by the officer having legal custody of the document and a certificate that said officer has custody.

If the document is kept in a country that is a contracting party to a treaty or convention to which the Philippines is a party, or considered a public document under a treaty or convention in force between the Philippines and that country, the certificate of the officer having legal custody of the document must be executed in the form prescribed by the applicable treaty or convention, subject to the doctrine of reciprocity. If the treaty or convention abolishes the requirement for the certificate or exempts the pertinent document from its application, the certification need not be presented.

If there is no such treaty or convention, the certificate may be made by any officer (ie, secretary of the embassy or legation, consul general, consul, vice consul or consular agent) in the foreign service of the Philippines stationed in the pertinent foreign country. The certificate must also be authenticated by the seal of their office. Public documents not covered above must be authenticated at the Philippine embassy in the foreign country. The Philippines recently acceded to the Apostille

Convention, which allows for a simplified process in authenticating foreign-made or foreign-kept documents.

As regards oral evidence, depositions and written interrogatories are acceptable modes of preserving the testimony of witnesses located outside the Philippines.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes. The Alternative Dispute Resolution Act 2004 categorically adopts in its entirety the UNCITRAL Model Law, both for international and domestic commercial arbitration.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate a controversy arising between parties, as well as a submission to arbitrate an existing controversy, must be in writing and subscribed by the party sought to be charged or by their lawful agent.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of an agreed method to select an arbitrator, the parties must seek guidance from a first-level court, which will designate an arbitrator or arbitrators.

The court may appoint one or three arbitrators, according to the importance of the controversy involved.

The appointment of an arbitrator may be challenged if an arbitrator discovers any circumstances likely to create a presumption of bias or that they believe might disqualify them as an impartial arbitrator; the parties are made aware of such circumstances. Those challenges can be made even after arbitration has begun.

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

A person who wishes to be an arbitrator should be of legal age, with no imposed restrictions as to their capacity to exercise their civil rights and must be able to read and write. No person appointed to serve as an arbitrator may be related by blood or marriage within the sixth degree to either party to the controversy. No person may serve as an arbitrator in any proceeding if they:

- have or have had financial, fiduciary or other interest in the controversy or cause to be decided or in the result of the proceeding; or
- have any partiality or prejudice that may gravely affect the right of a party to a fair award.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Yes, there are specific provisions on how to initiate arbitration, appoint arbitrators and conduct arbitration hearings under Republic Act 876

(the Arbitration Law) and Republic Act 9285 (the Alternative Dispute Resolution Act 2004) and its implementing rules and regulations.

Arbitration is allowed when:

- two or more persons agree to submit to arbitration any controversy existing between them at the time of the submission, which may be the subject of an action; or
- the parties to a contract agreed in said contract to settle by arbitration a controversy thereafter arising between them.

To initiate arbitration, the provisions of the submission or contract must be complied with. For instance, where a prior demand is required under the arbitration contract, the claimant must serve on the responding party a demand for arbitration containing the nature of the controversy, the amount involved and the relief sought.

On the other hand, where a party to a submission to arbitration refuses to arbitrate, the other party must also serve a demand for arbitration as stated above.

However, the submission or contract may be revoked on such grounds that exist under Philippine law for revocation of any contract.

Further, the following matters cannot be the subject of arbitration by virtue of certain public policies that may be affected or violated:

- labour disputes covered by the Labour Code;
- a person's civil status;
- marriage validity;
- grounds for legal separation;
- courts' jurisdiction;
- future legitime (ie, a succession issue);
- criminal liability; and
- future support (ie, a family law issue).

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

Judicial intervention is permitted if:

- it is unclear whether the arbitration agreement and its provisions are valid and enforceable;
- it is unclear whether a dispute is covered by the arbitration agreement;
- an action demanding arbitration should be filed;
- interim remedies are necessary to conserve the subject matter of arbitration pending appointment of the arbitrators;
- a petition to quash or vacate the award is warranted;
- the confirmation and enforcement of the award is due;
- the appointment or challenge of an arbitration is necessary due to an event of default of the appointing authority; or
- appeals from a judgment of the court are filed.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. A request for an interim measure of protection to prevent irreparable loss, preserve evidence or compel the performance of an act may be made with the arbitral tribunal after its constitution and during the arbitral proceedings. The arbitral tribunal is deemed constituted when the final nominated arbitrator (ie, the sole arbitrator or the third arbitrator) has accepted the nomination and the party making the request received written communication of such acceptance.

Where an arbitral tribunal is powerless to act or unable to act effectively, the request may be made with the regular courts. If the arbitral tribunal is not yet constituted, the request for an interim measure must be filed in court.

### Award

30 | When and in what form must the award be delivered?

The parties may agree on the period within which the award must be rendered. This agreement must be in writing. In the absence of an agreement, arbitrators must render an award within 30 days of the closing of the hearings or, if the oral hearings have been waived, within 30 days of the arbitrators officially closing the proceedings in lieu of oral hearings. The parties may likewise agree to extend this period.

The award must be written and signed and acknowledged by the sole arbitrator or by a majority of the arbitrators, if more than one. Each party will be provided with a copy of the award.

### Appeal

31 | On what grounds can an award be appealed to the court?

The agreement by the parties to refer a dispute to arbitration means that the arbitral award is final and binding. A party to an arbitration is therefore precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award.

Unless a public policy is violated or the substance and format of the arbitration proceedings are infirm, as provided for under the UNCITRAL Model Law, the arbitral award may not be vacated by filing an appeal or set aside by filing an action with the appellate courts.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic arbitral awards are executed in the same manner as final and executory decisions of first-level courts.

The recognition and enforcement of international arbitral awards are governed by the rules set out in the New York Convention, to which the Philippines is a signatory.

### Costs

33 | Can a successful party recover its costs?

Under Philippine arbitral rules, costs are generally borne equally by the parties unless otherwise agreed on or directed by the arbitrator or arbitral tribunal.

There are specific instances in court filings where the parties that are unsuccessful in opposing the enforcement of arbitral awards or in questioning the jurisdiction of the arbitral tribunal are made to shoulder the costs of the suit, including the payment of lawyers' fees incurred by the prevailing party.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Aside from arbitration, the Philippines recognises other forms of ADR. Acceptable forms of ADR include:

- mediation;
- conciliation;
- early neutral evaluation;
- mini trial; or
- any combination thereof.



The most commonly used ADR methods (and mandated by the courts) are mediation and judicial dispute resolution conferences. These are normally conducted before the trial properly begins.

### Requirements for ADR

- 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In both civil and criminal cases, mediation and judicial dispute resolution conferences are ADR methods that parties to a case must undergo during the proceedings or before the trial begins. In criminal cases, only the civil aspect of the claim can be the subject of ADR proceedings.

### MISCELLANEOUS

#### Interesting features

- 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

If mediation fails and the case proceeds to trial, discussions or statements made during ADR hearings are generally inadmissible as evidence against the party making the statement.

Further, even at the appellate level, mediation is available in civil claims (except for those that cannot be compromised as a matter of public policy) and for minor crimes. Tax court and quasi-judicial agency judgments can also be the subject of appellate court mediation proceedings.

### UPDATE AND TRENDS

#### Recent developments

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

One of the more contentious issues in arbitration involves questions of law on jurisdiction, particularly cases heard and tried before the Construction Industry Arbitration Commission (CIAC). The construction industry in the Philippines is at the forefront of arbitration law practice owing to the fact that the CIAC was one of the earliest arbitral bodies created by law (ie, in 1985) and has the most experience among all other arbitral bodies.

The law creating the CIAC provides that the CIAC has original and exclusive jurisdiction in commercial disputes between parties to a construction agreement where there exists an arbitration clause, regardless of whether the parties themselves specified a different arbitration procedure or tribunal and venue (outside the Philippines) to hear and decide the dispute.

The Supreme Court has generally upheld the CIAC's right to assume jurisdiction regardless of the intent of the parties in the contract to confer jurisdiction to a different arbitral tribunal. However, this is particularly controversial, as one of the main elements of arbitration is giving importance to the wishes of the parties, including their choice of jurisdiction. Depriving the parties of this option (at least in construction agreements) nullifies one of the key elements of arbitration.

There has been a move to soften this position among some members of the CIAC, but to date the Supreme Court has made no ruling to the contrary. Notably, in a recent Supreme Court decision, the CIAC's jurisdiction was expanded to include government contracts involving construction projects even where the contract contains no arbitration clause.



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Aside from the CIAC, one of the more popular arbitration centres is the privately run Philippine Dispute Resolution Centre (PDRCI). In recent years the number of cases referred to the PDRCI has steadily grown.

Designed to expedite the adjudication of cases in the second-level courts (regional trial courts), Republic Act 11576 (RA 11576) was enacted in August 2021. The law expanded the jurisdiction of first-level courts (metropolitan trial courts and municipal trial courts (MTCs)) with the idea that cases that would ordinarily be filed with the second-level courts would now be tried and heard by the first-level courts, thus decongesting the higher courts.

As a result, the jurisdictional amount that can be heard by MTCs has been expanded to 2 million Philippine pesos for civil actions and monetary claims; whereas, previously, depending on the nature of the claim, the jurisdictional amounts were only 20,000 Philippine pesos to 400,000 Philippine pesos.

The Supreme Court, in March 2022 and in an effort to reconcile and harmonise its Rules on Summary Procedure and Small Claims with the enactment of RA 11576, came out with the Rules on Expedited Procedures for first-level courts. Thus, civil claims not exceeding 2 Million Philippine pesos will be now be covered by the Rules on Summary Procedure, while the threshold amount for the Rules on Small Claims has been increased to 1 Million Philippine pesos (from 400,000 Philippine pesos).

In addition, small claims court notices can be made through mobile phone calls, SMS messages or instant messaging software applications. Videoconferencing hearings can also be held through court-approved platforms. Alternative platforms or instant messaging applications with video call features may also be allowed at the discretion of the court. The Rules on Expedited Procedures took effect in April 2022.

# Romania

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The Romanian civil court system comprises the following subdivisions: the first court, the Tribunal, the Court of Appeal and the High Court of Cassation and Justice. Depending on its nature or size, a claim may be settled in first instance by any of these courts, except for the High Court of Cassation and Justice, which is solely an appeal court (with some exceptions in special matters).

As a rule, from the point of view of the hierarchy of courts, a claim that has been settled in the first instance by the first court will be subject to appeal at the Tribunal and to a second appeal at the Court of Appeal. Similarly, a claim that has been settled in the first instance by the Tribunal will be subject to appeal at the Court of Appeal and to a second appeal at the High Court of Justice. A claim settled in the first court before the Court of Appeal will be subject to (final) appeal at the High Court of Justice. No omission of either of these jurisdictions is acceptable in the course of appeals.

However, following a major modification of the Romanian Civil Procedure Code, which came into force on 15 February 2013 (the New Civil Procedure Code), there have been some changes to the civil court system. Previously, any litigation case would normally go through all three degrees of jurisdiction described above. Under the new provisions, most claims will be settled only in the first instance and appeal, that is, in two degrees of jurisdiction; however, if a claim is important enough either by virtue of its nature or size, a second appeal will be open. During the transition phase from the former Civil Procedure Code to the New Civil Procedure Code, all the situations described above are possible, depending on the date on which the claim was first filed, with the New Civil Procedure Code applicable to claims filed from 15 February 2013 onwards.

There is one judge in the first instance, two judges in appeal and three judges in second appeal, with some exceptions in special matters. A recent government ordinance, which applies to cases initiated from 1 January 2023, abolished appeals adjudicated by three judges.

Specialised courts exist in matters such as relations between professionals, insolvency, family and minors. In addition, there are specialised sections within the courts in matters such as labour law, administrative and fiscal law, and insolvency.

The New Civil Code of Romania (the New Civil Code), which entered into force on 1 October 2011, replaced both Romania's Civil Code of 1864 and the former Commercial Code of Romania of 1887. Consequently, after 2011, in Romania, the notion of 'commercial relation' no longer exists, its equivalent (with certain differences) being 'relations between professionals'.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The Romanian legal system does not include the participation of a jury in either civil or criminal proceedings.

The judge has an active, inquisitorial role, leading the settlement of the case and the hearings and, if necessary, asking for any clarifications and supplementary information and documents from the parties. A person may become a judge after taking a course at the Magistrates' National Institute and passing an exam. When graduating from the Magistrates' National Institute, a person may choose the court (that has openings available) where they want to adjudicate, in the order of their grades (as preference is given by the courts to those with higher grades).

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

The time limits for bringing civil claims differ, according to the nature of the claim and the subjective right at the basis of the claim. Generally, these limits range from one to 10 years, the general term being three years. However, some of the claims are not subject to a certain time limit, such as the claim for partition of certain goods jointly held by more owners.

According to the New Civil Code, in force since 1 October 2011, in certain limits provided for by the law, the parties may contractually agree to suspend time limits, to fix a different starting point of the time limit or to modify the duration of the time limit. Until the adoption of the New Civil Code, according to the former legal provisions on statutes of limitation (which still govern legal relations entered into before 1 October 2011), rules on limitation and its course were imperative and the parties could not derogate from them at their own will; although, the law described a small number of cases where limitation could be suspended or interrupted.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

In particular cases expressly established by law, preliminary procedures are compulsory. These procedures may consist of mediation, conciliation and inquiries at the notary public, and proof of fulfilment of these procedures will have to be attached to the action submitted to court. In addition, contracting parties may agree that preliminary procedures are to be followed pre-litigation. Other than such legal and contractual preliminary procedures, no pre-action exchange of documents may be considered a preliminary step for bringing an action. In Romania, there are no provisions allowing a pre-action disclosure order.

## Starting proceedings

- 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings commence at the moment of submission of an action or claim in court by the claimant. Following the registration of the action or claim, a preliminary written procedure takes place solely between the court and the claimant, during which the court makes sure that the claim complies with all the mandatory conditions regarding its contents and that the claimant has filed all the necessary documents that need to be attached to the claim. Only after the claim fulfils all formal conditions does the court proceed to communicate such claim to the defendant and proceed to the issuance of orders regarding the further requests to be fulfilled by the parties, according to the legal provisions regarding civil procedure.

The caseload is a constant concern for the Romanian judicial system. The high degree of congestion in the courts affects the time in which a case is settled, with the duration provided for by law usually being exceeded. Measures to reduce the necessary time for adjudicating a dispute have included increasing the number of judges and also the adoption of the New Civil Procedure Code [which entered into force on 15 February 2013], which – as opposed to the previous Civil Procedure Code – provides for a written submissions phase aimed at limiting the period when parties may submit defences and written evidence.

## Timetable

- 6 | What is the typical procedure and timetable for a civil claim?

According to the New Civil Procedure Code, applicable to claims submitted after 15 February 2013, the typical procedure and timetable for a civil claim are as follows: after verifying the fulfilment of the formal conditions of the claim, the judge organises the communication of the claim to the defendant, accompanied by a note obliging the defendant to submit a statement of defence within 25 days of the communication of the claim. If the statement of defence is not submitted in time, the defendant may be unable to propose further evidence in its defence or invoke objections regarding the claim (except for objections of public order).

The submitted statement of defence will thereafter immediately be communicated to the claimant, accompanied by a note obliging them to submit an answer to the statement of defence within 10 days of the communication of the statement of defence.

Within three days of the submission of the answer to the statement of defence, the judge establishes the first court hearing, which will be no later than 60 days from this date. In urgent matters, these terms may be reduced by the judge, according to the circumstances of each matter.

## Case management

- 7 | Can the parties control the procedure and the timetable?

The civil procedure and timetable are established by law. In practice, they are affected by the high degree of congestion in the courts, and the period in which a case is settled tends to be longer than what the law provides.

The parties have very little influence on the development of the case from this point of view, and their intervention is rather limited. The parties' conduct and diligence in fulfilling their procedural obligations and submitting the necessary documents on time may influence the duration of the case (which may be delayed on purpose), but under the New Civil Procedure Code, there are clear deadlines and sanctions for not meeting them, therefore limiting even more the possibility of the

parties to influence the procedure and timetable. However, the parties establish the procedural frame (that is, the parties and the object of the claim) and other relevant elements of the trial, such as the evidence presented in support of the claim, and such frame directly influences both the procedure and the timetable.

## Evidence – documents

- 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The admission and presentation of evidence before the court is an important stage of the civil trial. All documents invoked by a party in support of its claims must be presented to the court and to the other parties in certified copies. Upon the court's request, the party that submitted a certified copy of a document may be compelled to present the original. Failure to do so may result in the exclusion of the respective document from the body of evidence to the case.

The parties must share all relevant documents. If one of the parties informs the court that an opposing party owns a relevant document, the court may compel the latter to submit the document if the document is conjoint for both parties, if the party that owns it made reference to it or if, according to the law, the party is compelled to submit it.

## Evidence – privilege

- 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are several types of privileged documents. On the one hand, public authorities and institutions have a right to refuse the submission of documents related to national defence, public safety or diplomatic relations.

On the other hand, all documents that benefit from a confidentiality provision or agreement may only be presented upon the court's express instruction. The court may refuse to instruct the submission of a document if such submission would breach a legal confidentiality obligation, such as a lawyer's advice.

## Evidence – pretrial

- 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

In Romanian civil trials, all evidence is managed by and through the court. It is the court, at the parties' request, that allows for different types of evidence to be submitted. All exchanges of written evidence between the parties will be done only after the commencement of the trial. In addition, written evidence from witnesses and experts not appointed by court will only count as documents, not as witness statements or expert reports. The rule is that all evidence is presented directly in front of the judge and not by intermediary means.

## Evidence – trial

- 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

As a rule, evidence is presented directly to the court. The witness statement is given orally before the judge. Each of the parties has the right to address questions to the witness. The answers to these questions and the statement are written down by the court clerk and signed by the witness. The document thus drafted is attached to the file as a witness statement.

Experts primarily give written evidence in the form of an expert report that is submitted to the file. However, if the judge requires

additional information, the expert may be called before the court for an oral statement of clarification.

There also exists the possibility that the administering of evidence is conducted between lawyers without the participation of the court, within a deadline set in this respect by the court. In practice, this procedure is very rarely used.

### Interim remedies

#### 12 | What interim remedies are available?

Search orders are not available in the Romanian civil procedure. Interim remedies are, however, at the parties' disposal. An interim levy or a freezing injunction may be placed in relation to the debtor's assets in particular conditions, upon the creditor's request. This measure freezes the assets of the debtor and prevents him or her from selling them, taking them abroad, etc. The levy may be lifted if the debtor provides a sufficient guarantee that the debt will be paid.

### Remedies

#### 13 | What substantive remedies are available?

Both punitive damages and interest are available according to Romanian law. Punitive damages are available in the case of observance of the debtor's fault. Interest is payable upon request, and its amount is either previously established by the parties or, in the absence of an agreement, the legal interest rate.

### Enforcement

#### 14 | What means of enforcement are available?

Any final or otherwise enforceable court decision or order can be enforced with the assistance of an enforcement officer and under the court's supervision, following the request of the creditor, if the debtor does not willingly obey the dispositions of the court.

Disobeying a court decision or order, aside from the criminal consequences, gives the creditor the right to request the application of enforcement procedures that may consist of the capitalisation of movables and immovables or the garnishment of bank accounts.

### Public access

#### 15 | Are court hearings held in public? Are court documents available to the public?

As a rule, court hearings are held in public sessions. In particular cases, the law provides that some types of claims are to be settled in the presence of the parties only. In addition, following a grounded request of a party, the court itself may instruct that hearings are held in the presence of the parties only.

Under the provisions of the New Civil Procedure Code, the trial has been divided into two phases: the administration of evidence and debate of any prior issues necessary for the settlement of the case, and the closing arguments, both to be held as a rule in public sessions.

Court documents are only available to the parties in the trial and their representatives. To study a file, applicants must present an identification document proving their capacity. Under specific conditions provided by the law, members of the press may study court documents.

### Costs

#### 16 | Does the court have power to order costs?

The court has the power to order several types of costs, including a stamp fee, bail and an expert's fee. The stamp fee is determined by law, according to the object and value of the litigation, and the court ensures

that the claimant pays it. Payment of bail may be requested in several cases; for example, a request for suspension of the execution of a judgment. According to the New Civil Procedure Code, unless otherwise established by law, bail will not exceed 20 per cent of the value of the claim or 10,000 lei for claims that cannot be evaluated. The expert's fee is determined according to the complexity of the case and the amount of work to be completed by the expert. In Romania, there is no provision requiring a claimant to provide security for the defendant's costs. There are no new rules governing how courts rule on costs.

### Funding arrangements

#### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The legal provisions regulating the relations between lawyers and clients forbid a *pactum de quota litis*. However, the parties to the legal assistance contract are free to set any combination of fixed or hourly fees and success fees, the latter being due from the client only if a certain result is reached.

Litigation funding by a third party is not officially provided for within the Civil Procedure Code. Therefore, third-party funding of the proceedings is permitted, according to the principle that in civil proceedings everything that is not interdicted is permitted. However, third-party funding is not frequently used in Romania. The third-party funding will be governed by the agreement concluded between the funder and the beneficiary. Therefore, third-party funding of the proceedings generates private law effects between the third party and the beneficiary but does not affect the procedural frame unless the third party purchases the rights stemming from the claim and becomes a party in the trial. In this case, there are certain cases in which certain third parties cannot purchase the rights stemming from the claim. In the absence of such formal purchase, any understanding between a party of a trial and a third party exceeds the limits of the trial and will be dealt with separately.

### Insurance

#### 18 | Is insurance available to cover all or part of a party's legal costs?

It is possible to sign an insurance policy covering a party's legal costs, as well as the opponent's costs, if such a judgment is issued.

### Class action

#### 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The concept of class actions is not regulated in Romania. However, several litigants may address the court with a collective claim if their rights stem from the same cause or if there is a close connection between their claims. These elements (same cause, connection) must be justified in front of the court. In addition, class actions may be filed by organisations representing the interests of its members; for example, a trade union can represent its members in a claim with respect to labour rights. There are no new developments regarding class actions.

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties can file an appeal against the judgment of the first court. There are different grounds of appeal, depending on the particular conditions of each case. As a rule, all judgments issued in the first court can be appealed, unless otherwise provided by the law, because in Romania the double degree of jurisdiction principle is recognised by the law.

A second appeal is possible against a judgment issued in appeal. In particular cases expressly provided by law, a judgment can only be appealed once, with no possibility for a further appeal. The law enumerates the grounds for filing a second appeal. Failure to prove the existence of one of these grounds results in the annulment of the second appeal.

The law also provides further means of appeal that are only applicable in particular conditions.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The recognition and enforcement of foreign judgments is governed either by the Civil Procedure Code or by reciprocal agreements. According to the Civil Procedure Code, foreign judgments are directly recognised in Romania in expressly provided cases. Apart from these cases, foreign judgments are recognised after the fulfilment of several conditions, among them the existence of a reciprocal agreement with the issuing state.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions is possible, in accordance with the provisions of EC Regulation No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters. The applicable procedure provides that, to obtain evidence, the foreign court must address the Romanian court with a standard request, indicating the procedure step to be fulfilled and all relevant details.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

No; Romania has not transposed the UNCITRAL Model Law into national law. The provisions with respect to arbitration are contained within the Civil Procedure Code, which does not follow the Model Law.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be concluded in writing, otherwise it is deemed null. The condition of the written form is considered fulfilled when the referral to arbitration was agreed following an exchange of correspondence, notwithstanding its form, or exchange of procedural deeds. If the arbitration agreement refers to a dispute regarding the transfer of a right to immovable property or regarding the constitution of other real rights over immovable property, then the arbitration

agreement must be concluded in a notarised authentic form under the absolute nullity sanction.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In such a situation, three arbitrators will be appointed, one by each party and the third arbitrator – the chair – by the other two arbitrators.

An arbitrator may be challenged in cases of incompatibility, namely if he or she finds him or herself in one of the situations of incompatibility provided for judges in the Romanian Civil Procedure Code (eg, the arbitrator previously expressed his or her opinion in relation to the solution in the dispute that he or she was appointed to settle; there are circumstances that justify the doubt that he or she, his or her spouse, ancestors or descendants have a benefit related to the dispute; his or her spouse or previous spouse is related [at a maximum, to the fourth degree] with one of the parties; etc) or for the following reasons that cast doubt on the arbitrator's independence and impartiality:

- he or she does not meet the qualifications or other requirements regarding arbitrators provided in the arbitration agreement;
- a legal person whose shareholder the arbitrator is or in whose governing bodies the arbitrator is bears an interest in the case;
- the arbitrator has employment relations or direct trade links with one of the parties, with a company controlled by one party or that is placed under common control with the latter; or
- the arbitrator has provided consultancy to one of the parties, assisted or represented one of the parties or testified in one of the earlier stages of the case.

The challenge request must be filed within 10 days from the moment that the party was informed of the appointment of the arbitrator or from the moment that the cause for challenge occurred.

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Under Romanian arbitration law, any natural person with full capacity to exercise his or her rights may act as an arbitrator, without any other criteria needing to be met (eg, citizenship, as the previous rules stipulated, or certain qualifications).

If the parties agree to arbitrate under the purview of the Bucharest Court of International Commercial Arbitration (CICA), they must check the specific requirements set out in the regulations of this arbitral institution. For arbitral disputes initiated after 1 January 2018 under the purview of CICA, the new rules that entered into force on 1 January 2018 apply.

The list of arbitrators of CICA comprises reputed professors of law and lawyers with a high degree of experience in various areas of law, including niche areas of law. Thus, the pool of candidates meets the needs of the majority of complex arbitral disputes.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Under Romanian law, provided that the arbitration clause is valid, the parties are free to determine the procedural laws applicable to the arbitral proceedings or may entrust such choice to the arbitral tribunal.

However, there are some limitations as to the parties' freedom to determine the procedural rules applicable. In this respect, the law provides that the rules chosen by the parties must observe the fundamental principles of civil procedure, namely:

- no arbitrator can refuse to judge, arguing that the law does not provide for the specific case at hand or is unclear or incomplete;
- the arbitral proceedings must be conducted in such a manner to ensure equality of parties and that they are treated in an equal and non-discriminatory manner;
- the parties are free to dispose of their rights (by waiving them, acknowledging the other party's claims, etc) and can choose to initiate or not the arbitral proceedings;
- the object and limits of the arbitral proceedings are to be determined by the parties' claims and defences;
- the parties are obliged to oversee the obligations and deadlines imposed by the arbitral tribunal and to substantiate or prove their claims and defences, thus ensuring that the procedures are conducted in a timely manner;
- the parties must exercise their procedural rights in good faith, so as not to adversely affect the procedural rights of the other party;
- each party has a right to defence and is allowed to participate in any and all phases of the proceedings, have access to the case file, request evidence and present its oral and written pleadings;
- the arbitral proceedings must be conducted in an adversarial manner and ensure that all aspects presented during the proceedings are subject to comments or arguments from both parties;
- the arbitral proceedings must be conducted in an oral manner, except for the situation where the parties have expressly requested that judgment be based solely on the written submissions and evidence on file;
- the evidence must be administered before the arbitral tribunal, except for situations where the parties have decided otherwise;
- the arbitral tribunal vested with the resolution of the case cannot be replaced during the proceedings except for limited situations and in accordance with the law; and
- the arbitral tribunal must decide the case in accordance with the legal provisions applicable and must endeavour to establish the truth in the case, based on the parties' pleadings and evidence administered.

### Court intervention

#### 28 | On what grounds can the court intervene during an arbitration?

The court has a limited role with regard to an ongoing arbitration case. As a matter of principle, a court (namely the tribunal whose jurisdiction covers the seat of the arbitration), may intervene to remove impediments that occurred in the organisation and development of the arbitration proceedings or to fulfil particular duties belonging to the courts; for example, following the request of one of the parties, the court may order precautionary or provisional measures regarding the object of arbitration, ascertain various circumstances of fact, or intervene in the selection of arbitrators by appointing an arbitrator (when the party who should appoint him or her fails to cooperate) or the presiding arbitrator (chair) if the parties do not agree on the appointment of the sole arbitrator or, in the case of a three-panel arbitral tribunal, when the two arbitrators do not agree on whom should they appoint as presiding arbitrator.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

The arbitral tribunal has the power to grant interim relief by ordering precautionary or provisional measures or ascertaining various circumstances of fact, and if the parties do not obey those orders there is the possibility to request the intervention of the court.

### Award

#### 30 | When and in what form must the award be delivered?

If the parties do not agree otherwise, the arbitral tribunal must render its award within six months of its constitution, under the sanction of caducity of the arbitration (that is, the expiry or nullity of the arbitration proceedings following the lapse of the time allowed for its settlement). The party who intends to invoke such sanction if the arbitration term is not observed must indicate so in writing at the first hearing, or else the caducity sanction will not be applied.

The award must be delivered in written form, which must be communicated to all the parties involved within one month of its issuance.

### Appeal

#### 31 | On what grounds can an award be appealed to the court?

The grounds for setting aside an arbitral award are limited to the following:

- the dispute is not arbitrable;
- the arbitral tribunal was vested in the lack of an arbitration agreement or under a null and void or ineffective agreement;
- the arbitral tribunal was not constituted in accordance with the arbitration agreement;
- the party was not present at the hearing and the summoning proceedings were not legally fulfilled;
- the award was rendered outside the six-month deadline for arbitration, although one of the parties raised the time limitation objection and the parties refused to continue the proceedings (caducity of the arbitral tribunal);
- the arbitral tribunal ruled on aspects that had not been requested for or granted more than requested (*ultra petita*);
- the award does not include the relief granted and the reasoning, does not indicate the date and place of the arbitral seat, or is not signed by the arbitrators;
- the award is contrary to the public policy, good moral conduct or mandatory provisions of Romanian law; and
- following the date on which the award was rendered, the Romanian Constitutional Court declares as unconstitutional the law, the ordinance or any legal provisions part of a law or ordinance related to the arbitration.

The court decision rendered following a setting-aside claim can also be further appealed before the superior court of law for formal reasons.

### Enforcement

#### 32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic awards can be enforced in the same manner as court decisions. Foreign awards must first follow a special procedure for recognition and enforcement, with the observance of certain formal conditions similar to those provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, including situations in which recognition and enforcement are denied.



Enforcement procedures have not been affected by changes in the political landscape.

### Costs

#### 33 | Can a successful party recover its costs?

Yes; assuming there is no agreement between the parties regarding the costs incurred, the winning party can recover its costs on the condition that it requests and proves such costs. The arbitral tribunal will include the order for the defendant to pay those costs within the arbitral award.

The court has the power to order the losing party to cover several types of costs incurred by the winning party, including judicial taxes, experts' fees, lawyers' fees and other expenses incurred in relation to the court proceedings (eg, travel expenses). The court has the ability to limit the amount of the prevailing party's attorneys' fees by taking into account the difficulty of the litigation, the actual amount of work required from the attorneys and other similar elements. If a claim is only partly admitted, the court may order the costs to be shared (ie, each party will cover their own costs).

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

#### 34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The most commonly used ADR process until recently was conciliation. In the past couple of years, though, mediation has become more popular. However, because mediation is more expensive than conciliation, which is usually organised by the parties themselves or by the assisting attorneys, conciliation remains the more popular procedure. Also, mediation has seen a decline owing to the removal of its mandatory nature in particular cases, following a decision of the Romanian Constitutional Court issued in 2014.

Adjudication is also used, generally in disputes arising from International Federation of Consulting Engineers contracts.

### Requirements for ADR

#### 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Since August 2014, mediation has no longer been compulsory before submitting a claim to court.

If either the law or the contract provides for another type of preliminary procedure, such as adjudication, the courts or tribunals may compel the parties to undergo that procedure.

## MISCELLANEOUS

### Interesting features

#### 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

There are some interesting issues, such as the settlement of contradictory judgments, incidents during enforcement procedure and the rules of legal representation, but these require a more technical approach than is required for this publication.



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## UPDATE AND TRENDS

### Recent developments

#### 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

No updates at this time.

# Russia

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The Russian civil court system has two branches: the *arbitrazh* (commercial) courts, which handle commercial disputes involving legal entities and individual entrepreneurs, and have exclusive jurisdiction over corporate disputes and bankruptcy matters; and the courts of general jurisdiction, which handle other types of proceedings, mostly involving individuals.

There are also specialist courts within the civil court system, including military courts and the Intellectual Property Court. There are no separate financial courts.

Each branch of the civil court system has its own separate appeal courts. The court of highest instance for both general jurisdiction courts and commercial courts is the Supreme Court of the Russian Federation.

Hearings in the first instance courts are generally heard by a sole judge, whereas hearings at the appeal courts are heard by a panel of three judges.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The role of the judge is based upon the rule of fairness between the parties. The judge makes decisions taking into account the parties' arguments. The powers of the judge are rather broad and allow for the conduct of the proceedings with an active (inquisitorial) role of the judge. The judge can request explanations from the parties, interrogate parties and request production of documents from parties to the dispute (or even third parties), as the court proceedings require the judges to identify all relevant facts and interpret them. In practice, however, the case is very much dependent on the personality of the particular judge.

Juries are not involved in civil proceedings. Commercial courts can have '*arbitrazh* assessors' (ie, persons possessing specific knowledge or experience) to sit together with the judge.

Under the relevant rules, judges are assigned to specific cases depending on their prior experience (ie, their specialisation) and current workload. A conflict of interest with any of the parties must be avoided and a judge can be recused if the judge fails to avoid conflict.

Technically, the distribution of new cases in the general jurisdiction and commercial courts is carried out by the chair of the court. In some selected courts, however, new cases are automatically assigned via software.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

The Russian Civil Code (Civil Code) recognises two types of limitation periods: a general limitation period and a special limitation period.

Under the general limitation period, the claimant has three years to commence proceedings. This period starts from the day when the claimant learned (or should have learned) of the infringement of his or her rights and the identity of the defendant. In addition, there is a 'hard' limitation period of 10 years, starting from the day of violation of rights. A party is able to assert the three-year subjective limitation period as a defence within the 10-year objective long-stop period.

In the absence of a special limitation period, the general limitation period of three years applies. For example, as the law does not provide for a particular limitation period in relation to the protection of exclusive rights to a trademark, the general limitation term applies.

In some cases the law provides for special limitation periods, for instance:

- 20 days: for challenging the decisions adopted by the creditors' committee under the Insolvency Law;
- three months: for claims arising from alienation of shares in a non-public company in violation of pre-emptive rights;
- six months: for claims challenging decisions adopted by a meeting (on the condition that the claim is filed within two years after information about the decision became generally accessible to the participants), and for claims to enforce a 'preliminary agreement';
- one year: for claims filed in connection with the distribution of information damaging honour, dignity or business reputation; claims on challenging voidable transactions; claims on challenging public tenders; and claims seeking registration of a contract;
- three years: for claims against a carrier arising from transportation of passengers and their luggage by inland vessels; and
- five years: for claims filed by the Russian Federation in connection with the provision and execution by the Russian Federation of state guarantees.

Special limitation periods are also subject to the 10-year objective period (see above). Additionally, the law establishes other rules with respect to special limitation periods, such as rules determining the commencement date.

Certain claims are not subject to any statute of limitations. These are, for example:

- claims for the protection of personal non-property rights and other intangible benefits;
- claims of depositors against their banks for returning the amount of deposits;
- claims for compensation of personal injury;

- claims of the owner or possessor to terminate any infringement of his or her property rights, even if such infringements were not connected with the deprivation of possession; and
- certain other claims stipulated by law (eg, claims arising from family relations or claims for recovery of personal injury caused by a radioactive effect).

The time limits for bringing civil claims are mandatory under Russian law. The duration and calculation of limitation periods cannot be altered by an agreement between parties.

Limitation periods are suspended in certain cases where expressly provided by law, for instance:

- if the bringing of a claim was the result of an extraordinary and unavoidable circumstance (force majeure);
- if the claimant or defendant has enrolled in the armed forces of the Russian Federation;
- due to the suspension of performance of obligations (eg, a moratorium) established by a governmental decree; or
- due to the suspension of a law or regulation governing the relevant relationship.

Suspension of a limitation period should be distinguished from interruption of a limitation period. The latter occurs when a person acknowledges his or her debt or files a claim in the court. If suspended, the limitation period resumes once the circumstances for suspension terminate. When the limitation period has been interrupted, and then starts running anew, the time elapsed before interruption is not counted in the newly started limitation period.

The limitation period applies only upon application of a party to the dispute. Such application can be made at any stage before the court concludes the hearing to render its final decision. Once a limitation period has lapsed, then upon the motion of a party, it may serve as adequate grounds to dismiss the claim. However, if the lapse of a limitation period is not raised by a party, the court must consider the claim and render judgment regardless of the expiration of the limitation period.

### Pre-action behaviour

- 4 | Are there any pre-action considerations the parties should take into account?

Prior to issuing proceedings, parties must follow a mandatory pre-action procedure. For example, debt claims can only be filed at court 30 days after a debtor has been sent a request to pay the creditor. In other cases, such as corporate disputes among shareholders of a company, it is necessary to notify the company of the upcoming claim and outline the substance of the dispute prior to the filing of the claim. Publishing of a special notice is also mandatory prior to filing a claim for insolvency.

### Starting proceedings

- 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

There is a pre-action procedure for certain cases.

Civil proceedings are commenced by the claimant filing a lawsuit with the court.

The claim can be filed by post, courier or in person (although covid-19 protective measures have in most cases suspended filing in person). In addition, filing a claim in the commercial court can be made electronically. Once the court accepts the claim and commences

proceedings, the parties are notified of the hearing date and their obligations prior to the hearing.

The courts in larger cities (such as Moscow) are very busy. Accordingly, if claims are filed in a court in such a city, hearings are likely to be delayed and less time than normal will be allocated to oral hearings.

### Timetable

- 6 | What is the typical procedure and timetable for a civil claim?

The typical procedure for a civil claim comprises one preparatory and one or two court hearings on the merits, during which the parties may present evidence, testify, provide witnesses and plead their case.

A civil case typically takes between three and five months in the commercial courts (depending on caseload) and could take over a year for larger, more complicated cases.

Appeals of civil claims may take approximately six months, making the total time for both the original decision and the appeal approximately nine to 12 months at best.

### Case management

- 7 | Can the parties control the procedure and the timetable?

Generally, the parties cannot control the timetable. However, in certain situations, the parties can file motions with the court for an expedited review of the claim.

The parties can also ask the court to take into account their representatives' schedules in determining the date of the hearing and the necessity to travel. However, such requests are not binding on the court.

Additionally, courts are often ready to postpone hearings if the parties are in settlement discussions.

### Evidence – documents

- 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Both the Civil Procedure Code and the *Arbitrazh* Procedure Code provide that all parties to a dispute have equal rights to present evidence and to participate. Moreover, as a general rule, the court may not put any party in a preferential position or impede any party's rights. Accordingly, this rule also applies to the parties' access to evidence.

A Russian court will review and examine any documents provided by a party if they are relevant to the case. If a party cannot obtain evidence itself, it may ask the court to assist by seeking an order requiring the defendant or any third parties to provide evidence to the court. However, as there is no formal disclosure process in Russian proceedings, such a request must be very specific to the subject matter of the dispute, otherwise the court will deny it on the basis that it is too broad.

In the absence of such an order by the court, the parties have no obligations to share relevant documents with each other.

Under existing procedural rules there is no duty of the parties to preserve documents and other evidence pending trial, although the court may draw inferences if key documents to the dispute have not been made available without the parties having offered a reasonable explanation.

### Evidence – privilege

- 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

In general, Russian law does not recognise the concept of legal privilege for the parties' legal representatives in either civil or commercial courts

proceedings. There is an exception for attorneys-at-law (*advocats*) who are licensed members of the bar. However, even in that case, legal privilege is limited. Notably, a legally privileged document cannot be used as evidence in criminal proceedings (eg, if such a document has been seized by law enforcement authorities).

As a matter of Russian law, legal advice from an in-house lawyer (whether local or foreign) or outside counsel will not be considered privileged. Therefore, no objection may be made against including such documents as evidence. However, it will largely depend on the court whether it would be willing to review and consider the information provided in such legal advice and the weight that will be given subsequently to such evidence.

Particular procedural rules regulate the examination of documents containing legally protected 'secret information' (relating to bank secrets, commercial secrets, etc). For instance, if an open hearing of the case may lead to the disclosure of secrets, or when federal law directly provides for a closed hearing, the court shall conduct proceedings in a closed hearing, and the corresponding judgments will not be publicly available.

At the same time, the parties to a case and their authorised representatives, including experts, witnesses and interpreters, retain the right to participate in closed court sessions and, accordingly, even evidence that contains secret information can be admitted in the proceedings.

Certain privileges are granted to attorneys-at-law participating as defence lawyers in criminal proceedings, in cases relating to state secret information. The Law on State Secrets allows attorneys-at-law to access case materials containing state secrets without having to go through special clearance procedures. However, the court will notify all participants of the potential for criminal liability in the event of disclosure of legally protected secret information, and will require a written acknowledgement to be signed.

## Evidence – pretrial

### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties are not required to exchange written evidence (including witness statements and expert opinions) prior to commencing civil proceedings. However, the parties are under an obligation to disclose such evidence to the court and the other party in a reasonable time before the hearing (which in practice should be no later than several business days).

## Evidence – trial

### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Written evidence is generally submitted in originals or certified copies. Witnesses and experts must appear in person to give evidence, as otherwise their statements will not be accepted by the court.

## Interim remedies

### 12 | What interim remedies are available?

Under Russian procedural laws, the following interim measures are available to parties in civil proceedings in commercial and general jurisdiction courts, inter alia:

- arrest of funds in bank accounts or other property;
- prohibition against carrying out certain actions in relation to the subject matter of the dispute;
- imposition of an obligation to resume certain actions;
- seizure of disputed property to be held by the claimant or a third party; and

- suspension of performance of a writ of execution or sale of the property.

The courts are allowed to impose other interim remedies, so the above list is not exhaustive, provided that such remedies are proportionate to the claim.

Russian courts have the authority to order injunctions in support of arbitration proceedings (and case law extends this right in support of foreign court proceedings).

It should be noted, however, that injunctions are not widespread in practice.

## Remedies

### 13 | What substantive remedies are available?

The substantive remedies available under Russian law are listed in the Civil Code. These include:

- recognition of rights;
- restoration of the situation that existed before the violation of rights, and banning of any actions that violate rights or threaten their violation;
- recognition of a voidable transaction as invalid, and application of the consequences of invalidity;
- self-defence of rights;
- awarding specific performance;
- invalidation of a decision of a meeting;
- invalidation of an act of a state or local body;
- compensation of damages;
- claims for penalties;
- compensation of non-pecuniary damage;
- termination or modification of a contractual relationship;
- invalidation by a court of an act of a state or local body that contradicts the law; and
- other methods expressly provided by law (refutation of information discrediting honour, dignity or business reputation, suspension of performance of an obligation, retention of property, etc).

The application of each of these remedies can be exercised either through official proceedings (ie, in court or administrative bodies) or using an 'out-of-court' procedure (eg, exercising self-defence of a right, retention or property, suspension of performance of an obligation, withdrawal from a contract or refusal to accept undue performance under a contract).

The Civil Code expressly states that the list of substantive remedies provided by law is exhaustive. Therefore, the parties are not allowed to change or otherwise modify mandatory rules regarding jurisdiction over a dispute or to apply any remedy that is not provided by law. However, in practice, a bad choice of a remedy does not mean that the claim will be dismissed or returned. If the court, upon accepting the statement of claim, finds that the claimant's proposed remedy cannot ensure the correct restoration of rights, the court may determine which rules should apply.

Under Russian law, most types of remedies are compensatory. Punitive remedies can be applied only in exceptional cases. Although Russian law is not generally supportive of punitive damages (as damages should restore the rights that have been infringed, and not punish the wrongdoer), in practice, parties may seek a broad range of damages based on the evidence presented.

Russian law specifically provides for a remedy in the case of failure to perform a monetary obligation, and allows interest to be charged on a debt that has arisen out of a breach of contract, tort, unjust enrichment or other grounds. By default, interest accrues until actual repayment of the debt. If the interest is contractual, the defendant may argue that

it is excessive and punitive in nature. If the court agrees, it may reduce the amount of interest, but only subject to the defendant proving such interest to be excessive, disproportionate and significantly in excess of market practice.

## Enforcement

### 14 | What means of enforcement are available?

While Russian law recognises enforcement both in court and out of court (eg, through a notarial writ), enforcement via court proceedings is the most common method.

Once a court decision is issued, the claimant receives a writ of execution from the court that rendered the decision. Based on the writ of execution, the decision can be enforced either through members of the Federal Bailiffs' Service or, alternatively, judgments relating to monetary claims can be enforced by the bank where the debtor has an account. The bank must debit the adjudicated amount directly from the debtor's account within five days of the claimant's request. If the claimant does not have information relating to the accounts of the debtor, it can submit an inquiry to the Federal Tax Service, which will provide this information if the debt has been adjudicated by the court. Enforcing a judgment through a bank is a quicker option, but it is not always available if the debtor has no money in his or her accounts.

Enforcement is regulated by Federal Law No. 229-FZ, dated 2 October 2007, on enforcement proceedings (the Enforcement Law).

The Enforcement Law provides for the following means of compulsory enforcement:

- collection of the debtor's property, including cash and securities;
- collection of the debtor's salary;
- limitation of property rights of the debtor;
- seizure of the debtor's property;
- arrest of the debtor's property;
- compulsory eviction of the debtor from his or her residential premises;
- compulsory release of non-residential premises from the stay of the debtor and his or her property;
- compulsory expulsion of foreign citizens out of the Russian Federation; or
- other actions stipulated by federal law or by an execution writ.

If the debtor lacks available funds (either in cash or held in bank accounts), any seized property of the debtor will be sold at a public auction organised by the bailiffs, where the proceeds of sale are then transferred to the creditor.

Failure to comply with the requirement of an execution writ may lead to a court penalty being imposed (approximately US\$43 for individuals and US\$1,730 for legal entities). Payment of a court fine does not negate the obligation to comply with the execution writ. In addition, wilful failure to comply with the court judgment may entail criminal liability ranging from monetary fines to imprisonment.

Finally, sometimes creditors choose to apply for bankruptcy of the debtor (especially as bankruptcy of individuals is now allowed in Russia) and will seek to enforce their claims as part of bankruptcy proceedings.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

The court hearings are generally held in public, and any person can come and watch the court hearing. If there is a risk of disclosing state or commercial secrets, the court can hold hearings that are closed to the public. The court decisions are publicly available (including publication on specific websites, especially for commercial courts), but

the pleadings and evidence submitted by the parties are accessible only to them.

## Costs

### 16 | Does the court have power to order costs?

The courts have the power to order costs and can make any order in relation to these. The losing party may have to pay the legal fees of the winning party, or the court may decide that each party pays its own fees. The court may base its decision on various grounds, such as which party lengthened the proceedings or acted in bad faith, and has the power to make the winning party pay both its own and the losing party's fees if appropriate under the circumstances.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The approach of the Russian courts towards contingency fees (or 'success fees') is not settled. On the one hand, there is a widespread opinion that a success fee for legal representation cannot depend solely on the decision of the court or public authority (Resolution of the Constitutional Court of the Russian Federation of 23 January 2007 N 1-P). Therefore, no 'no win, no fee' agreements are enforceable in the Russian courts, and in such cases the fee for representation will be calculated by the court taking into account the average market price for comparable services (Resolution of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation dated 24 July 2001 N 921/01).

On the other hand, some courts hold that contingency fees are legal if reasonable and proportionate to the services performed (eg, Information letter from the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 12 December 2007 N 121, Decision of the *Arbitrazh* Court of the Moscow District of 19 February 2015 N F05-4768/2014).

The most recent trend is that contingency fee agreements are not void as such, but do not allow the winning party to recover the success fee from the losing party (Ruling of the Supreme Court of the Russian Federation dated 26 February 2015 N 309-ES14-3167).

There is no general prohibition against obtaining third-party funding. However, this is currently not widespread and not formally regulated.

## Insurance

### 18 | Is insurance available to cover all or part of a party's legal costs?

It is generally possible to insure potential legal costs under Russian law, as there is no express prohibition. There are a number of insurance companies that list 'insurance of legal costs' among their list of services. However, the insurance of monetary losses incurred as litigation costs is not widespread in Russia.

## Class action

### 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

There is no concept of 'class actions' in Russia. However, it is possible to bring collective claims in administrative and commercial proceedings.

The *Arbitrazh* Procedure Code establishes the general rule for bringing a class action: an individual or legal entity who is a party to the legal relationship from which the dispute or claim arose may apply to the court in defence of the violated rights and legitimate interests of other persons who are participants in the same legal relationship. The Code specifically mentions that the class action claim can be brought with regard to corporate claims, disputes related to the activities of professional participants in the securities market and other claims. Another important requirement is that on the date of filing, there need to be at least five claimants. A collective application under the Administrative Procedure Code is possible if the following conditions are met:

- a large number of claimants (at least 21 entities);
- similarity of the subject matter of the dispute;
- a common administrative defendant or defendants; and
- the same remedy for each claimant.

In practice, class action claims are not widespread and are mainly used in corporate and consumer claims.

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

As a general rule, each party can appeal the decision of the court to a higher instance court and, in most cases, bring a further appeal against the appellate court decision to the 'cassation' (second appeal) court. The party bringing the appeal must prove that there have been substantial violations by the lower instance court through wrongful application of the law, wrongful interpretation of the facts or violation of mandatory procedural requirements.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The general rule is that foreign judgments are recognised and enforced on the basis of bilateral or unilateral treaties between Russia and the country where a judgment is rendered. Currently, there are more than 30 treaties relating to the recognition and enforcement of foreign judgments.

In the absence of such a treaty the judgment may be recognised and enforced according to the principle of 'dual comity and reciprocity'. In practice, however, the chances of recognising and enforcing a judgment under this principle are rather unpredictable, as courts have not adopted a unanimous approach as to what exactly would constitute 'dual comity and reciprocity'. This being said, there have been instances of precedents where foreign judgments were enforced by the Russian courts on the basis of broader multiparty treaties and conventions.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

It is possible to obtain oral or documentary evidence via judicial request from a foreign court where evidence is needed. Generally, Russian courts cooperate and comply with foreign judicial requests if there is an international treaty between the countries. The Russian Federation, inter alia, is a party to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. According to the *Arbitrazh* Procedure Code, a court may refuse to provide evidence in the following circumstances:

- if the execution of the request could damage the sovereignty of the Russian Federation or endanger the security of the Russian Federation; or
- if the execution of the request is not within the jurisdiction of the court.

In practice, in most cases such requests from foreign courts will be guided through the Russian Ministry of Justice before being sent to the local Russian court, which may cause significant delays.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The preamble of Law No. 5338-1 on International Commercial Arbitration dated 7 July 1993 (the ICA Law) expressly mentions that it takes into account the provisions of the UNCITRAL Model Law of 1985 with amendments dated 2006. In fact, the text of the ICA Law mirrors the initial version of UNCITRAL Model Law of 1985 with some minor modifications to reflect the 2006 amendments.

The Federal Law N 382-FZ on Arbitration (Arbitration Proceedings) in the Russian Federation dated 29 December 2015 (the Arbitration Law) is structured in a similar manner to the ICA Law, and also follows the UNCITRAL Model Law with certain additions and modifications.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement shall be in writing or in any other form that is deemed equivalent to the written form, such as the exchange of emails and inclusion in relevant clearing or trading rules. The arbitration agreement can be concluded as an arbitration clause or as a separate agreement. With regard to corporate disputes, the arbitration agreement can be inserted into the charter of a Russian company, as long as it is adopted unanimously by the shareholders (provided that there are fewer than 1,000 in total); however, it may not be included in the charter of a public joint stock company.

Both the ICA Law and the Arbitration Law provide that the arbitration agreement can also be concluded by the exchange of procedural documents (including a statement of claim and a statement of defence), whereby one party declares an arbitration agreement and the other party does not object to jurisdiction.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Both the ICA Law and the Arbitration Law have the same default procedure for the appointment of arbitrators, applicable in the event that the parties to the arbitration do not refer to any particular rules or do not specify the appointment procedure to be used in the arbitration agreement.

In an arbitration with three arbitrators, each party appoints one arbitrator and the two selected arbitrators appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days after receiving a request from the other party or if the two selected arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made upon the request of any party by a competent state court.



In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the appointment is made upon the request of any party by a competent state court. A panel of three arbitrators is appointed in the absence of the parties' agreement.

Further, state courts may (upon a request of any party) assist in appointing arbitrators in the event that one of the parties violates the procedure for appointment; or if a third party (including the relevant arbitration institution) fails to perform certain functions in connection with the appointment procedure.

### Arbitrator options

#### 26 | What are the options when choosing an arbitrator or arbitrators?

Most Russian arbitral institutions recommend the appointment of arbitrators from a pool of candidates uploaded to their official websites, including the following:

- the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of Russia (CCI);
- the Maritime Arbitration Commission at the CCI of the Russian Federation (MAC);
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (RUIE Arbitration Center); and
- the Arbitration Centre at the Institute of Modern Arbitration.

However, the parties have the right to nominate any arbitrators they think are suitable subject to certain general restrictions. The arbitrator:

- must be at least 25 years old;
- must have full legal capacity;
- must have no criminal record;
- if applicable, must not have had former special powers (as a judge, public notary, prosecutor, etc) terminated as a result of an offence; and
- must be fully independent and unbiased.

### Arbitral procedure

#### 27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The general rule is that the parties to an arbitration agreement determine the arbitration procedure. In the event that no procedure is specified (eg, the arbitration agreement contains no reference to institutional rules), the tribunal may follow any procedure it deems appropriate, taking into account the applicable law, notably the ICA Law for international arbitration or the Arbitration Law for domestic arbitration.

### Court intervention

#### 28 | On what grounds can the court intervene during an arbitration?

The general rule is that court intervention is not possible unless specifically provided for in the applicable law. A court may use its discretion to intervene and set aside an award in circumstances where the dispute in question could not be resolved by arbitration under applicable Russian law, or where the award contradicts public policy. There are a number of instances where parties may contract out the right of the state courts to intervene in arbitration proceedings.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Both courts and arbitral tribunals have the right to award interim measures. A Russian state court located at the place of the arbitral tribunal,

or at the location (residence) of a debtor or its property, is empowered to grant interim measures at the request of a party to the arbitration before or after arbitration proceedings have been initiated, including, but not limited to:

- freezing the respondent's money and other assets;
- prohibiting the respondent and other persons from performing certain actions relating to the subject matter of the dispute;
- ordering the respondent to take specific actions to prevent the deterioration of the property in dispute; or
- ordering the respondent to hand over the property in dispute, to be held in custody by the claimant or a third party.

The arbitral tribunal may, at the request of a party, grant interim measures that it considers appropriate, unless the party agrees otherwise. The Arbitration Law and the ICA Law do not provide for any specific measures that might be imposed by the tribunal. The arbitral tribunal may require either party to provide counter-security in connection with such measures.

Orders of domestic and foreign arbitral tribunals on interim measures remain non-enforceable in Russia (for example, Ruling of the Supreme Court of the Russian Federation dated 19 January 2015 in case No. 307-ES14-3604, A21-9806/2013), unless such order is part of a partial arbitral award. However, a possible approach to seek enforceability could be to apply to a state court for an award of the same interim measure and to refer to the relevant interim order issued by the tribunal.

### Award

#### 30 | When and in what form must the award be delivered?

The Arbitration Law and ICA Law provide similar requirements for the form of arbitral awards. The arbitral award shall be evidenced in writing and signed by a sole arbitrator, or at minimum a majority of the arbitrators where there are more than one.

According to provisions of the Arbitration Law (which impose generally similar requirements to the ICA Law), the following shall be contained within the arbitral decision:

- the date of the award;
- the place of the arbitration;
- the composition of the arbitral tribunal and the procedure for its formation;
- the names and locations of the parties;
- the grounds for jurisdiction of the arbitral tribunal;
- the claims of the claimant and the respondent's objections, and the parties' petitions;
- the circumstances of the case as established by the arbitral tribunal, the evidence on which the findings of the arbitral tribunal are based, and the legal norms;
- the decision on the merits; and
- the distribution of costs.

### Appeal

#### 31 | On what grounds can an award be appealed to the court?

Where the parties agree to assign the dispute to a permanent arbitration institution under the terms of the arbitration agreement, they could agree that the resulting award is final and may not be subject to further challenge. In the event that such an agreement is not made, awards may be challenged within three months of the date the award was granted. Where a commercial court considers a claim to challenge an arbitration award, the resulting judgment will enter into force immediately. The parties could subsequently appeal that judgment further to the cassation level (ie, the commercial court of the relevant circuit) and then to the Supreme Court if necessary or desired.

The award can be challenged at a party's request on the following grounds:

- one of the parties to the arbitration agreement was not fully legally capable, or the agreement is invalid under the applicable law (in the absence of choice, the law of the Russian Federation);
- one of the parties was not duly notified of the appointment of an arbitrator or of the arbitral proceedings, including the time and place of the arbitral tribunal's hearing, or was unable to provide its explanations in the case for other reasons;
- the arbitral decision was concluded on a dispute that was not covered by the arbitration agreement, or was not subject to its terms, or the decision was concluded on issues that went beyond the scope of the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement of the parties or federal law.

The courts have discretion to set aside an arbitration award in circumstances where:

- the dispute in question could not be resolved by arbitration under applicable Russian law; or
- the award contradicts public policy.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Unless there are grounds for setting aside the award, the award will be enforced by the courts. It should be noted that it is easier to enforce an arbitral award than a foreign court decision. Enforcement of an award requires a straightforward application to be made to the state court, attaching the award and the arbitration agreement. Normally, at the stage of enforcement the state court should not review the award on its merits; however, in practice, courts often do so to identify whether there are any issues that would either make the dispute unable to be concluded via arbitration, or would be contradictory to public policy.

### Costs

33 | Can a successful party recover its costs?

According to the Arbitration Law, the costs in domestic arbitration are allocated in accordance with the agreement of the parties, or in the absence of such agreement, in proportion to the granted and dismissed claims. At the request of the winning party, the tribunal can allocate counsel fees of such party and any other proceeding-related costs to the losing party. Depending on the parties' conduct during the arbitration, the tribunal may order costs to be paid by one of the parties, irrespective of the outcome.

Third-party funding is not widespread and therefore it is difficult to respond to a possibility of recovering third-party funding costs. Such costs would generally fall in the category of arbitration-related fees and legal costs, so should be recoverable, but any interest and commission related to attracting funding itself may be arguable.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

There are generally three types of ADR mechanism that are legally recognised and used throughout the Russian Federation: negotiation, mediation and arbitration. Negotiation is one of the more commonly

accepted forms of ADR and is usually used as a first stage of dispute resolution.

The second type of ADR is mediation, which is regulated by the Federal Law N 193-FZ on an Alternative Procedure for the Settlement of Disputes with the Participation of an Intermediary (Mediation Procedure) dated 27 July 2010 (the Mediation Law). A mediation agreement is concluded in writing, and the Mediation Law requires that it shall contain information about the parties, the subject matter of the dispute, the mediation procedure, the mediator, and details of the agreed obligations, their provisions and term. As decisions of the mediator are not legally binding, compliance with the mediation agreement is based upon the principles of cooperation and good faith of the parties.

In practice, some disputes may be resolved by expert determination, which does not exist as a distinct form of ADR under Russian law but is widely used in complex construction disputes as a variation of traditional negotiation.

In recent years Russian law has enhanced the role of a mediator for settling disputes and the courts refer to the possibility of such ADR mechanism of settling the disputes, indicating that the parties would have the option to properly set their respectful cases with the mediator. This is still a developing trend.

### Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

A requirement to consider ADR mechanisms becomes binding only if their application is explicitly referred to in the dispute resolution agreement. However, in litigation proceedings there is often a mandatory period (30 days by default) of negotiation whereby the parties should undertake to resolve the dispute amicably. Where a negotiation or mediation attempt is made and fails to resolve the dispute, the parties may commence litigation or arbitration proceedings.

In the event that a claim is submitted to the court containing a valid and unperformed ADR clause, upon request from the defendant, the court is obliged to terminate the proceedings and revert the parties to ADR. Therefore, parties may only bypass the consideration of ADR with consent.

## MISCELLANEOUS

### Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Russian court system might appear to still remain in a somewhat transitional stage, as there are ongoing debates about the unification of commercial and civil procedure rules, including the consolidation of the two court systems. Some steps of unification have been implemented over the past few years; however, this process remains ongoing. The system of the general jurisdiction courts is facing repeated reforms and restructurings to make it better consolidated and comprehensive; the latest reform in this area was the creation of new cassation (second appeal) courts in the general jurisdiction system in line with the one existing within the *arbitrazh* courts.

Russian arbitration reform in 2016 was initially designed to encourage greater arbitrability of certain disputes and quality assurance, but in fact resulted in a massive reduction of arbitration institutions and the enactment of quite complex rules for the arbitration of corporate disputes, which raises questions regarding the success of the reform.

The reform has also affected procurement contracts, but has had little impact on international commercial contracts.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

One of the most controversial laws enacted in June 2020 was an amendment to the Arbitrazh Procedure Code that allowed Russian individuals and companies (and foreign companies) that have become sanctioned under the US, EU (and other) sanctions programs to insist that a contract-based dispute involving them be heard only in a Russian *arbitrazh* (commercial) court; and to apply to a Russian *arbitrazh* court for an injunction ordering the foreign claimant to halt a pending or threatened foreign litigation or arbitration regarding such dispute (the amendments also provide for the possibility to order substantial penalty damages by the Russian court against a claimant that refuses to do so). Court practice that followed was not clear as to the circumstances when this rule may be invoked by a sanctioned party. However, some courts in 2021 indicated that such an impediment must be real (not alleged) and the sanctioned party must undertake efforts to comply with existing dispute resolution provisions in its contracts.

\* *The information in this chapter was accurate as at 31 March 2021.*

# Morgan Lewis

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# Serbia

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The civil court system is divided between courts of general jurisdiction and commercial courts. General courts operate in the following hierarchy: basic courts, higher courts, appellate courts and the Supreme Court of Cassation. Basic and higher courts act as courts of first instances. The main difference between the competencies of these two types of courts is in the value of the disputes – higher courts are competent for the disputes where the value is higher than €40,000. In most cases, higher courts decide on appeals against the decisions rendered by the basic courts. Appellate courts decide on the appeals filed against the decisions rendered by the higher courts. The Supreme Court of Cassation decides on extraordinary legal remedies in both commercial and non-commercial disputes.

Commercial courts serve as courts of first instance in commercial disputes (in general, disputes between two commercial entities). The Commercial Appellate Court decides on appeals on decisions issued by commercial courts.

The Constitutional Court decides on constitutional appeals. Constitutional appeals are appeals against final decisions that allegedly infringe rights granted by the Constitution.

In most cases, decisions of the court of the first instance are rendered by single judge. In second instance courts, three professional judges form a trial chamber. The Supreme Court of Cassation also decides in a trial chamber, which comprises five professional judges.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The role of a judge is a passive one. However, the court is authorised to present evidence and establish the facts that have not been introduced or recommended by the parties, if it follows from the proceedings or presentation of evidence that the parties are disposing of claims being contrary to mandatory norms, public policy, morals or good customs.

There are no juries in civil proceedings, but there are lay judges involved in some first instance proceedings, such as family law disputes or some non-adversarial proceedings. A professional judge always serves as a president of a trial chamber.

When selected for the first time, judges are selected by the National Assembly for a period of three years. After this period, judges are selected for a lifetime by the High Court Council (the independent and autonomous organ ensuring and guaranteeing the independence and autonomy of courts and judges).

During the selection of judges, the following is taken into account: the national demographic, adequate representation of members of national minorities, and knowledge of professional legal terminology

in the language of the national minority that shall be officially used by the court.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

For most civil claims, there are no time limits for bringing a claim to court. Nevertheless, in certain cases, statutes prescribe time limits for bringing claims. Examples include annulment of a decision of a company's assembly: 30 days from the date of receiving the information about the decision, but no later than three months from the date when the decision was enacted; 30 days for filing a lawsuit of dissenting shareholders that were against the specific type of decision of the company; and, to initiate proceedings for protection of employee's rights, 60 days from the date of receipt of a decision that violates employees' rights.

Parties are not allowed to agree on clauses to suspend time limits or other time limits.

A statute of limitation is not a procedural issue. The court will only pay attention to the statute of limitation expiring if the parties invoke this argument.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

There are no mandatory pre-action considerations that parties should take into account. Before filing a lawsuit against Serbia, a party may file a request for peaceful settlement of the dispute to the state attorney, which suspends debt for a time-barred 60 days.

If the court estimates that there is a justifiable danger that it will not be possible to present some evidence or that its subsequent presentation might be difficult, it can order a presentation of evidence. These proceedings are urgent and the court can present evidence, including a pre-action exchange of documents between the parties or from a third person; however, there will be no examination of the parties as, in pre-action behaviour, the court cannot order examination of the parties.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are initiated by filing a lawsuit before a competent court and are commenced once a respondent receives the lawsuit. A plaintiff is notified by receiving a piece of evidence that the court has received a lawsuit, while a respondent is notified by the court by receiving a lawsuit and exhibits, accompanied by instructions about its rights and obligations arising from the lawsuit.

Currently, courts in Serbia are short on capacity for handling their caseload and are unable to act within prescribed time limits. This is because there are not enough judges and administrative staff in comparison to the number of cases. In most cases, judges share court-rooms, which results in one judge holding hearings on odd days and the other on even days. Some of the proposals to ease capacity issues are employing new judges, delegating some of the court's responsibilities to public notaries, adopting the Law on Protection of the Right to Trial within a reasonable time and introducing licensed mediators to help parties reach an agreement before the lawsuit.

### Timetable

#### 6 | What is the typical procedure and timetable for a civil claim?

Even though there are specifics for every kind of proceeding, a typical procedure is as follows:

- the plaintiff files a lawsuit;
- the court performs a formal check of the lawsuit;
- if the lawsuit passes this formal check, it will be delivered to the respondent for a response within 15 days of receipt;
- the respondent then has 30 days to provide a response to the lawsuit;
- the court schedules and holds a preparatory hearing within 30 days of its delivery to the plaintiff of the response to the lawsuit. However, a preparatory hearing can be postponed an unlimited number of times, which can make procedures lengthy;
- one or more hearings, with possible submissions between them;
- conclusion of the hearing;
- first instance decision (in writing within eight days of the announcement or, in more complex cases, within 15 days, which is rarely fulfilled in practice);
- appeal: 15 days from receipt of the written judgment;
- the opposing party has 15 days to provide a response to the appeal (response is optional);
- the appeal, response to the appeal and complete court records are delivered to the court of second instance within eight days of receipt of the response;
- the court of second instance usually decides without a hearing, the deadline for the decision being nine months after the receipt of a case file;
- if the second instance court sends the case back to the court of first instance for another decision, it sends it within 30 days of the decision and the court of first instance must hold a new hearing within 30 days of receipt of records from the court of second instance;
- if the second instance court decides not to send the case back for another decision and to decide on its own, the decision becomes final; and
- in certain cases, the parties have the right to extraordinary legal remedies; however (unlike appeal), they do not have suspensive effect over the decision.

### Case management

#### 7 | Can the parties control the procedure and the timetable?

The parties can only recommend the timetable to the court. The judge then issues a final decision on the timetable. Failure to conduct the proceeding in accordance with the adopted timetable is the basis for initiation of disciplinary proceedings against the judge.

### Evidence – documents

#### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

During proceedings, both parties can request evidence, especially relevant documents to be obtained from the other party and also from a third party that is not directly involved in the proceedings.

If one party states that there is a relevant document that the party wants to use as evidence, and claims that document is in the possession of another party, the court can order that party to submit that document to the court. The party is allowed to refuse to submit the document if it contains privileged information. If the other party denies possession of that evidence, the court can perform a presentation of evidence to establish where the evidence is located.

### Evidence – privilege

#### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Witnesses are allowed to withhold answers about the information entrusted to them by the party as the party's proxy or as the party's religious confessor. Facts learned by the witness in the capacity of lawyer, medical doctor or other professionals are also considered privileged if there is an obligation to maintain professional secrecy. The parties to the proceedings, as well as witnesses, are allowed to refuse to give an answer or provide a document that contains sensitive information or could expose the party or witness to a criminal or civil (material) liability. This privilege of party or witness can be used as protection against exposing the party or witness, as well as his or her spouse, civil partner, direct ascendants and descendants, and distant relatives.

Advice from an in-house lawyer is not privileged, but a company's representative is entitled to refuse to give an answer about the internal company conversation. The court will assess the importance of the party's denial to testify.

### Evidence – pretrial

#### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties do not usually exchange written evidence before trial, except where documents must be obtained upon request. Although it is not prohibited, parties are cautious regarding voluntary disclosure of their tactics.

### Evidence – trial

#### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The presentation of evidence depends on the type of evidence, the most common being witnesses, experts and relevant documents. Witnesses usually give oral testimony. A witness may submit a written statement, which must be certified before the public notary. The court can call upon a witness to confirm his or her testimony before the court at the hearing or through a conference call, via phone or video.

Experts give written statements about their observations and opinions on facts. If observations and opinions issued by the expert are unclear, incomplete or contradictory, the court shall order the expert to supplement or correct the observations and opinions and set a deadline for elimination of deficiencies, or invite the expert to come to a hearing to orally present his or her submission.

## Interim remedies

### 12 | What interim remedies are available?

Interim remedy can be granted if a party shows that its claim is probable, and that, without a granted interim remedy, collection of its claim would be jeopardised. The Law on Enforcement and Security, which regulates this topic in Serbia, stipulates a non-exhaustive list of possible interim remedies (measures). There are two groups of interim remedies, for securing pecuniary and for securing non-pecuniary claims. As regards freezing injunctions, the freezing of bank accounts is available. Search orders are available as a part of seizure of assets.

Interim measures can be issued in support of foreign proceedings.

## Remedies

### 13 | What substantive remedies are available?

The court can order a respondent to give or perform something to stand or prohibit the respondent from doing something to the plaintiff's detriment. If requested, the court can only determine the existence, that is, the absence of a right or legal relationship, violation of the rights of a person or the truth or inaccuracy of a document.

Punitive damages or liquidated damages are not recognised by the Serbian legal system. Interest is payable on money judgment after the voluntary obligation for fulfilment deadline, stated in a judgment, has passed, unless stated otherwise in the agreement or in the law. Courts can only order single interest, while compound interest is forbidden.

## Enforcement

### 14 | What means of enforcement are available?

In most cases, enforcement is performed by the public bailiffs by prescribed methods of seizure of assets and their monetisation or compulsory performance of specific non-pecuniary performance. A debtor that disobeys orders from public bailiffs or that alienates, hides, damages or diminishes its property or undertakes actions that may cause irreparable damage that is difficult to repair to the enforcement creditors can be sanctioned with a monetary fine. If a debtor does not fulfil its obligation to perform, non-perform or stand what is established by enforceable document, a court can give that party additional time for fulfilment and instruct the debtor that if he or she fails to fulfil their obligation within the additional time it will be obliged to pay to the creditor a certain amount of money for each day of default or some other unit of time (court penalties).

Serbian criminal law recognises refusal to act upon a final court decision or failure to act within the stipulated time by the responsible person in a legal entity as a criminal act.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

Generally, hearings are public, except for special proceedings, such as family law proceedings. The court may exclude the public from all or part of the hearings to protect the interests of national security, public policy and morals in a democratic society, as well as to protect the interests of minors or the privacy of participants in the proceedings if the measures for maintaining the order prescribed by law cannot ensure a smooth running of the hearing.

The parties, their representatives and proxies are allowed, with the permission of a judge, to review, photocopy, photograph and transcribe the case file in which they participate. A third party that has a legitimate interest can also request this insight into case files.

## Costs

### 16 | Does the court have power to order costs?

The court has the power to order costs. Costs consist of court fees, attorney fees and other expenses necessary for conducting a hearing (eg, experts). The general principle is that the 'loser pays', that is, if the party succeeds with its claim or its defence in full, the opposing party will be entitled to reimbursement of costs in full; if the party succeeds partially, the court will order an equal percentage of the requested costs. The party is obliged, regardless of the outcome of the proceedings, to reimburse the opposing party for the costs caused by its own fault or by a case that has occurred to that party. This rule also applies to proxies of the parties.

A foreign or stateless plaintiff may be required to provide security for the respondent's costs if the respondent has requested it. The main exception to this obligation is the exclusion of this obligation by international convention or if the domestic respondent is not obliged to provide security for costs in the jurisdiction from which the respondent originates.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In proceedings related to property claims, lawyers are entitled to conclude a written agreement with their clients stipulating that the lawyer's fee will be paid in proportion to the success in the proceedings. The agreed percentage must not exceed 30 per cent. 'No win, no fee' agreements are available, but only for property claims, while for non-property claims the parties are only allowed to agree to a 50 per cent deduction of the lawyer's fee. An agreement that would stipulate that a lawyer would purchase a disputed right entrusted to him or her, or contracted for itself participation in the division of the amount awarded to his or her principal, is null and void.

Third-party funding is not regulated by Serbian law. Court decisions can award the costs only to parties in the proceedings, not to third parties. Regarding participation in the liability, the respondent is entitled to conclude an agreement on the assumption of fulfilment with a third party, subject to the deferred condition that the party needs to pay anything to a plaintiff. Nevertheless, in this scenario, the plaintiff has an obligation to accept payment from a third party, but it would not have any right toward third persons. During the proceedings, the parties are not explicitly obliged to disclose these agreements on third-party funding, but as it can lead to a conflict of interest and threaten the judge's impartiality and independence, it is recommended to disclose those agreements.

## Insurance

### 18 | Is insurance available to cover all or part of a party's legal costs?

Insurance as the protection of an obligation to pay all or part of the legal costs of a party is not used in Serbia and, to the best of our knowledge, insurance companies do not offer these types of insurance. Insurance legislation does not prevent the conclusion of these types of agreements.

However, an insurance agreement is considered null and void if:

- the insured risk has already occurred;
- it was certain that it would occur; or



- it is possible that it had already ceased to exist (therefore, frivolous claims are uninsurable).

During the negotiation process, the party is obliged to disclose to its insurance company all information about the case, as hiding this information can lead to an insurance agreement being void.

### Class action

- 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The Serbian legal system does not recognise class action litigation. Previous attempts to introduce consumer class action lawsuits ended when the Constitutional Court decided that those lawsuits were unconstitutional. There have been many attempts, mainly from organisations for the protection of consumer rights, to change laws so that they permit class action lawsuits. To date, these attempts have been unsuccessful.

### Appeal

- 20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The first instance judgment is always subject to appeal. General grounds for appeal are: significant breach of provisions of rules governing the adversarial proceedings, erroneously or incompletely established factual situation, and erroneous application of substantive law.

The Serbian legal system recognises three types of extraordinary legal remedies: revision before the Supreme Court of Cassation, motion to reopen the proceedings filed by the party and motion to reconsider final and binding judgment, which can only be filed by the public prosecutor.

### Foreign judgments

- 21 | What procedures exist for recognition and enforcement of foreign judgments?

Recognition and enforcement of foreign judgments is regulated by international treaties, as well as by the domestic private international law. There are two types of proceedings: the first is a non-adversarial proceeding, which is limited to the process of recognition. After this proceeding is completed and if the foreign judgment is recognised, it has the status of a domestic judgment.

The second type is a proceeding for recognition of judgment as a preliminary issue in some other proceedings, including enforcement proceedings. In these proceedings, the decision on recognition has effect only for the main proceedings.

The condition for recognition is reciprocity with the country where the decision is rendered. Reciprocity can be established by law, by international treaty or by fact.

### Foreign proceedings

- 22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

These proceedings do exist in the Serbian legal system. Rules regulating these proceedings are prescribed mainly by international or bilateral treaties on international legal aid or in the Law on Adversarial Proceedings, which are applicable unless stated otherwise in the particular agreement.

The general rule is that the procedure of international legal aid is initiated at the request for help from the foreign court that is communicated via diplomatic channels. Presentation of evidence is done in accordance with domestic procedural law or in accordance with the

foreign procedural law, unless such presentation of evidence is not contrary to the public policy of Serbia.

## ARBITRATION

### UNCITRAL Model Law

- 23 | Is the arbitration law based on the UNCITRAL Model Law?

The Serbian Law on Arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration. Furthermore, Serbia is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards.

### Arbitration agreements

- 24 | What are the formal requirements for an enforceable arbitration agreement?

For arbitration agreements to be enforceable, they must be in writing. An arbitration agreement is in writing if it is concluded by an exchange of messages that enable written evidence of the agreement of the parties, regardless of whether those messages have been signed by the parties. An arbitration agreement can be a separate agreement, part of a written commercial agreement, part of some other agreement or part of the terms and conditions of one party to which the agreement in writing refers.

Except when an arbitration agreement is not in writing, it is deemed null and void if a dispute is not arbitrable; the contracting parties did not have the capacity or ability to conclude it; it is concluded under the influence of coercion, threats, fraud or misrepresentation; or if the parties chose an even number of arbitrators.

### Choice of arbitrator

- 25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement and relevant rules are silent on the number of arbitrators, their number will be determined by the chosen appointment authority (a person or institution designated by the parties). If the parties have not chosen that appointment authority, the number will be determined by the court. If the permanent arbitral institution organises arbitration, that institution will be the appointing authority.

If the case is to be decided by a sole arbitrator, the appointment of that arbitrator will be agreed by the parties. If the parties fail to reach an agreement on the appointment in 30 days, the arbitrator will be appointed by the person or institution to which the parties entrusted this task. Finally, if the parties are silent on that matter, the arbitrator will be appointed by the court.

If the case is to be decided by a panel of three arbitrators, then each party appoints one arbitrator, and if the party does not appoint an arbitrator, the appointing authority will appoint the arbitrator. If the parties are silent on this matter, the arbitrator will be appointed by the court. The president of the tribunal is appointed by the already appointed arbitrators, or if they do not reach an agreement, by the person or institution to which the parties entrust this task. If the parties are silent on this matter also, the arbitrator will be appointed by the court. An appeal against the decision of the court to appoint an arbitrator is not allowed.

An arbitrator may only be challenged if there are facts that can justifiably raise concerns about the arbitrator's impartiality or independence, or that he or she does not meet the criteria established by the parties' agreement. The parties can challenge the appointment up to 15 days from the day they were notified about the appointment or from

the day that they become aware of the reasons on which they base the challenge.

### Arbitrator options

#### 26 | What are the options when choosing an arbitrator or arbitrators?

An arbitrator may be any person with legal capacity, irrespective of nationality or profession. The arbitrator must be impartial and independent from the parties. Before accepting the appointment, he or she must declare all the facts that might raise doubts about his or her impartiality and independence. The potential arbitrator cannot be appointed if he or she is sentenced to unconditional imprisonment, while the consequences of conviction last.

None of the two currently active permanent commercial arbitration institutions in our jurisdiction (Belgrade Arbitration Center (BAC) and Permanent Arbitration at the Chamber of Commerce and Industry of Serbia) have a pool of arbitrators. Although the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia has no roster of arbitrators, to assist the parties with the choice of arbitrators, the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia prepares a list of persons qualified for dispute resolution who may be appointed as arbitrators by the parties.

### Arbitral procedure

#### 27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to choose rules for regulating their dispute or to point to the rules of some permanent arbitration institution. If the arbitration is international, the parties may agree to apply foreign law to the arbitration proceedings. If the parties are silent on this matter, the arbitrators will apply rules that they find appropriate. The parties are equal in the proceedings and the arbitration court has a duty to enable each party to present its arguments and evidence, as well as to present its arguments in relation to the acts of the other party.

### Court intervention

#### 28 | On what grounds can the court intervene during an arbitration?

Except where the court intervenes to determine the number of arbitrators and arbitrator appointments, the court can decide upon a request for interim relief whether the seat of arbitration is in Serbia or another country. The court can also assist in the presentation of evidence. That evidence has equal power as any other presented before the arbitrator or arbitrators.

If the arbitral tribunal decides on the objections to its jurisdiction and scope of the agreement, as a preliminary question either party may request the court designated by law to decide on this matter, within 30 days of the date of receipt of the decision. No appeal shall be allowed against this decision of the court.

If the parties mutually agree, ad hoc arbitration or a permanent arbitration institution may deposit the final award at the court, for the court to deliver the award to the parties.

Except for challenging the jurisdiction of the tribunal, the court's powers can be overridden by an agreement, as the court can only have a role if the parties have not used their right or are silent on that matter, as well as when the arbitrators need assistance.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Unless the parties explicitly provide differently, the arbitrator or tribunal has powers to grant interim relief before or during the arbitration. The arbitrators may grant any type of interim relief they find suitable, taking into consideration the type of dispute. The arbitrators may condition their decision on interim relief, subjecting another party to provide reasonable securitisation.

### Award

#### 30 | When and in what form must the award be delivered?

The arbitrators decide on the case in the form of a written final arbitral award. The arbitral tribunal may make separate awards on different issues at different times (partial award) or on cross-claims (interim award). An arbitral award is issued after the deliberation of all the arbitrators, unless the parties have agreed otherwise. A majority of arbitrators have to vote for the award, unless the parties have agreed otherwise.

According to the rules of two permanent arbitration institutions in our jurisdiction, arbitrators have six months from the date of constitution of the arbitral tribunal to solve the dispute. However, this period can be prolonged at the request of the parties, tribunal or presidency of the BAC or Permanent Arbitration at the Chamber of Commerce and Industry of Serbia. The rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia stipulate that the final award shall be made within 30 days of the last non-public hearing of the arbitration tribunal.

### Appeal

#### 31 | On what grounds can an award be appealed to the court?

The final (domestic) arbitral award has the effect of a final and binding decision and it cannot be appealed.

In ad hoc arbitrations, the parties are able to agree to an arbitral appeal mechanism that should postpone the final and binding effect of the award.

### Enforcement

#### 32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic final awards have the legal effect of a final and binding judgment issued by the court, while foreign arbitral awards have that effect once they are recognised. The Serbian Law on Arbitration contains exactly the same rules as those in the New York Convention. Domestic awards are enforced equally as any court's judgment. Control of domestic awards is possible through the process of annulment of an arbitral award.

A foreign arbitral award must be recognised before enforcement. There is a right to appeal the first instance decision within 30 days of its receipt. Once the award is recognised, it has domestic final and binding effect.

This procedure has not been affected by changes in the political landscape.

### Costs

#### 33 | Can a successful party recover its costs?

The parties are obliged to pay for the costs of arbitration in advance. A decision on costs is a mandatory element of the final award. The law

does not contain provisions on when and if a party can recover the costs of arbitration. Usually, the tribunal would apply the 'loser pays' principle.

The Law on Arbitration does not regulate third-party funding, nor has a Serbian court yet decided on the matter.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

ADR processes are not commonly used in Serbia. The most commonly used ADR process is mediation.

There is no mandatory provision regarding referral of the parties to mediation.

Serbia was one of the first countries in the world to sign the Singapore Convention on Mediation, which applies to international settlement agreements resulting from mediation.

Adjudication is mostly used in resolving construction disputes.

### Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The court does not have the power to compel parties to mediation before or during the proceedings. At the beginning of the preparatory hearing, the parties are informed that they can peacefully solve their dispute if they wish. If the parties choose mediation, they are obliged to engage licensed mediators. Mediation proceedings are initiated by accepting a proposal for mediation, and, if the other party is silent on the proposal, it is deemed that the proposal is rejected. The parties are allowed to initiate mediation proceedings during the proceedings, even during appeal proceedings. If the parties solve their dispute through mediation, they are released from paying the court's administrative fee.

## MISCELLANEOUS

### Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One particularly interesting feature about the dispute resolution in our jurisdiction is the possibility of retorsion. This enables a Serbian natural or legal citizen to establish jurisdiction of domestic courts over foreign nationals if there is jurisdiction in a foreign country over Serbia. Domestic plaintiffs can use that criterion (not prescribed in Serbian law, but prescribed in a foreign legal system) to establish jurisdiction against a foreigner coming from that state whose law has such provision.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The Ministry of Justice recently announced the development of a portal for online payment of court fees. It provides all parties (natural and legal entities) with an opportunity to inspect their court case fees in one place and to settle them via electronic payment.

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Serbian courts are currently dealing with around 200,000 claims for reimbursement of loan costs, out of which around 30,000 have been settled, obliging banks to reimburse loan processing fees. The Supreme Court of Cassation issued a legal position on the permissibility of contracting loan processing fees. It stated that banks have a right to collect costs and banking service fees (including the disputed loan costs paid to the bank (ie, the costs of loan processing and loan issuance)), provided that the bank's offer preceding the conclusion of the agreement contained clear and unambiguous information on loan processing fees. The bank is not obliged to prove the structure and amount of costs that are included in the total amount of loan costs, which should have been stated in the accepted offer for conclusion of the agreement. These costs can be expressed as a percentage of the amount of the loan, and they are paid through the payment of effective interest rate.

# South Korea

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

Korean courts are divided into three levels: courts of first instance (district courts), courts of the appellate level (high courts or appellate divisions in the district courts) and the Supreme Court. Civil cases generally start in a district court with jurisdiction over the defendant. There are 18 district courts, six high courts and one Supreme Court. There are roughly 2,500 judges at the district court level, 400 judges at the high court level, 100 Supreme Court research judges (chief judge level) and 14 Supreme Court justices as at December 2020.

In civil actions, the amount in dispute determines the proper court for appeal and the number of judges assigned to the case. Beginning 1 March 2022, cases with claims of 500 million won or less are heard by a single judge in a court of first instance. For cases with claims of more than 500 million won, a panel of three judges hears the case in a court of first instance. For cases with claims of 200 million won or less, appeals are heard by the appellate division of a district court before a panel of three judges. For cases with claims of more than 200 million won, appeals are heard by a high court before a panel of three judges.

Korea has specialised courts handling specific matters, and some district courts and high courts also have specialised divisions assigned to specific issues. The Family Court and the Administrative Court are courts of first instance, and the Patent Court functions as an appellate level court. The Patent Court hears matters appealed from the Intellectual Property Trial and Appeal Board. Appeals from the Patent Court are made to the Supreme Court. In addition, the Seoul Rehabilitation Court handles bankruptcy matters.

Korea's Constitutional Court exercises jurisdiction over cases involving:

- adjudication on the constitutionality of statutes upon petition by ordinary courts;
- impeachment;
- dissolution of a political party;
- competence disputes between government agencies, between government agencies and local governments, and between local governments; and
- constitutional complaints.

The Court consists of nine justices who are appointed by the President. Issues of impeachment, dissolution of political parties and competence disputes must be raised by the government. Individuals may file a constitutional complaint if a fundamental right has been infringed by the government. Constitutional Court cases are preliminarily reviewed by a panel and then transferred to the full bench of justices.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

Civil cases are decided by the presiding judge or a panel of judges. There are no jury trials for civil actions. Korean judges play an inquisitorial role in civil hearings. Judges can question the parties *sua sponte* and order submission of briefs or evidence.

Diversity is a factor considered by the chief justice in the appointment of justices to the Supreme Court.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

Under the Civil Code, the general statute of limitations is 10 years. However, certain types of claims may be subject to a special statute of limitations. For instance, monetary claims arising out of commercial transactions must be brought within five years (article 64 of the Commercial Code). Claims for interest, support fees, salaries, rent and other claims based on the delivery of money, etc, within one year must be brought within three years (article 163-1 of the Civil Code). Claims for insurance premiums must be brought within two years, while claims for insurance coverage must be brought within three years.

Tort claims must be brought within the following periods (whichever ends earlier): three years from the date the injured party became aware of the injury and the tortfeasor's identity or 10 years from the date the tort was committed.

The statute of limitations period begins to run the day after a claim could have first been raised. It may be suspended by way of the claimant's demand notice followed by judicial proceedings, attachment or the obligor's acknowledgment of the claim. A tolling agreement between parties to suspend time limits is not recognised under Korean law. The time limit begins to run anew from when the cause of suspension ceases to exist.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

There are no pre-action requirements prior to filing a civil proceeding.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings commence when a complaint is filed in a court with jurisdiction. In Korea, the court is responsible for service of process. A party is served when a court official or mail carrier delivers the complaint

and related documents to the party. If there is no known address for the defendant, the court may allow service by public notice if there is no other way to effectuate service. For foreign defendants, service is determined by the defendant’s country of residence. Defendants residing in a member state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or a bilateral treaty are served accordingly. All other foreign defendants are served through diplomatic channels.

The Supreme Court has a high caseload, and it may take several years for a final judgment to be issued by the Supreme Court. However, the first instance and the appellate courts are capable of rendering decisions in a relatively timely manner. Nonetheless, because of the covid-19 pandemic, most civil proceedings have experienced delays during the past two years. Courts have been encouraging ADR to ease capacity issues.

**Timetable**

**6 | What is the typical procedure and timetable for a civil claim?**

Once a complaint is filed, the court will serve the complaint within one to two weeks. The defendant must file an answer within 30 days of receiving the complaint, in principle. However, answers are often filed late, and courts are generally lenient with excusable delays. Subsequent written submissions do not have fixed deadlines. Parties may continue to submit preparatory briefs and supporting evidence until the hearing is closed. Once the hearing is closed, supplementary briefs may be submitted until judgment is rendered.

The court typically schedules oral hearings four to six weeks apart. The number of hearings held depends on the complexity of the case. In complex cases, the presiding judge may order preparatory hearings and pleadings to set out the main issues for decision, as well as each party’s claims and evidence.

Once the hearing is closed, the court typically announces its decision within four to six weeks. The court thereafter issues a written judgment usually within a week.

Appeals to the appellate court or the Supreme Court must be filed within two weeks of receiving a written copy of the judgment. The grounds of appeal to the appellate court may be submitted after filing a notice of appeal, while the grounds of appeal to the Supreme Court must be submitted within 20 days of notice of the court’s receipt of the litigation record.

In general, a civil action before the court of first instance or the appellate court takes approximately 12 months to conclude. Pursuant to the Act On Special Cases Concerning Procedure For Trial By The Supreme Court, the Supreme Court can reject an appeal without stating any reason within four months of the records of appeal being received. More than 70 per cent of cases appealed to the Supreme Court are dismissed at this early stage following the above Act. If an appeal is not dismissed at the early stage, it may take several years for the judgment to be issued by the Supreme Court.

**Case management**

**7 | Can the parties control the procedure and the timetable?**

The court determines the schedule for the proceedings. However, parties may request extensions or changes to set dates. These requests are generally allowed unless it is deemed to cause undue delay.

**Evidence – documents**

**8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?**

Compared to common law jurisdictions, the scope of discovery is substantially limited. There are no pre-litigation discovery requirements. Parties need only submit the documents necessary to prove their case.

If a document known to exist is held by the other party or a third party, a party may request the court to order this document be produced. A party or third party must produce a requested document when (1) they hold the document in question; (2) the applicant is legally entitled to seek production; or (3) the document has been prepared for the benefit of the party requesting it or prepared as to a legal relationship between the requesting party and the document holder. If a party does not comply with the court’s order to produce a document, then the court may draw an adverse inference against the party.

There is no duty to preserve evidence pending trial. However, if a party intentionally destroys evidence pending trial, the court may draw an adverse inference, and the party may be prosecuted for procedural fraud.

**Evidence – privilege**

**9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?**

A party or a third party may refuse a production order if the document in question contains confidential information related to the duties of government officials, if disclosure may incriminate the person or his or her relatives or if the document in question is exempt. Under the Civil Procedure Act, documents are exempt from production orders containing the advice or work products of attorneys-at-law, patent attorneys, notaries public, certified public accountants, certified tax consultants, persons engaged in medical care, pharmacists, etc (ie, those who have a duty of confidentiality). Documents containing the advice or work products from foreign and locally licensed in-house lawyers are also protected from disclosure to the extent they are under a duty of confidentiality.

Attorney–client privilege is not recognised under Korean law. The Korean Supreme Court has ruled that attorney–client privilege cannot be inferred from the constitutional right to counsel or the rights of attorneys to refuse testimony (Supreme Court Decision 2009 Do6788, 17 May 2012). However, attorneys have a duty to maintain confidentiality under the Attorney-At-Law Act and must not divulge confidential matters that were learned in the course of performing their duties. There have been several attempts to enact legislation establishing attorney–client privilege; however, none has been successful to date.

**Evidence – pretrial**

**10 | Do parties exchange written evidence from witnesses and experts prior to trial?**

Parties may submit written evidence and statements during the trial phase before the hearing is closed. While article 149 of the Civil Procedure Act prohibits the late submissions of evidence, presenting new evidence in an appellate court is allowed in principle.

**Evidence – trial**

**11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?**

Parties submit documentary evidence to the court during the course of the proceedings. As a private document is presumed to be authentic

when it bears the signature, seal or thumbprint of the principal or of his or her representative, witnesses or attorneys are not required to authenticate documentary evidence in advance of submission.

A party may request a witness to provide oral testimony at trial. If deemed reasonable, a witness may be permitted to provide a witness statement instead of oral testimony.

A party may also request that the court appoint an appraiser. Court-appointed appraisers must be impartial. Appraisers generally provide an appraisal report and sometimes provide oral testimony at trial. A party may hire their own expert witness and submit the expert's opinion as supporting evidence. However, testimony from a court-appointed appraiser generally has more evidentiary value than a party's own expert.

When witnesses provide oral testimony, the party calling the witness first conducts direct examination and must submit a list of questions in advance to the court. The opposing party may then cross-examine the witness, but cross-examination is, in principle, limited to the matters presented on direct examination.

## Interim remedies

### 12 | What interim remedies are available?

The most frequently sought interim remedies are provisional attachment and preliminary disposition as stipulated in the Civil Execution Act. A party with a monetary claim to enforce may request a provisional attachment order to freeze the other party's assets. The requesting party must demonstrate a need to preserve the asset. For non-monetary claims, a party may request a preliminary disposition ruling. The court generally issues two types of provisional dispositions. The first type is an injunction prohibiting a party from disposing of property at issue. The petitioner must demonstrate the existence of circumstances that may threaten or prevent the party from exercising its rights. The second type is an injunction temporarily fixing the parties' respective positions in relation to a disputed right. The petitioner must show that it is likely to suffer substantial injury before final judgment if an injunction is not issued.

An application for provisional attachment or preliminary disposition may be granted only against properties, assets located in Korea and persons over whom the Korean courts have jurisdiction. Such application may be made in support of a foreign proceeding.

Under the Civil Procedure Act, a party may also move for the preservation of evidence by requesting the court to examine the evidence in advance. A party may apply for preservation of evidence before or after the filing of a complaint. The court may render a ruling *ex officio* for the preservation of evidence during trial.

## Remedies

### 13 | What substantive remedies are available?

In addition to injunctive relief for specific performance and declaratory remedies, a court may order payment of monetary compensation for both economic and non-economic damage. In general, punitive damages are not allowed. There are only a few specific statutes that allow punitive damages, capped at three to five times the amount of actual damages, in cases of serious accidents, product liability, patent infringement and fair trade violations, among others. Both pre- and post-judgment interest is available. Unless the parties contracted otherwise, interest rates are set by the law. The statutory interest rate is 6 per cent per year for commercial claims and 5 per cent per year for civil claims. The Act on Special Cases Concerning Expedition of Legal Proceedings prescribes a statutory interest rate of 12 per cent per year, which accrues from the date the defendant is served with the complaint. If the court finds that the

defendant had grounds to dispute the complaint, this interest accrues from the date of the court's judgment.

## Enforcement

### 14 | What means of enforcement are available?

A judgment is enforceable when it is final and can no longer be appealed, but courts often allow provisional enforcement. A creditor may petition the court for compulsory performance, compulsory auction, compulsory administration or seizure of the debtor's property. A party can also request an order to set a date for the debtor to perform an obligation and order indirect compulsory damages for delayed performance.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are open to the public. However, the court can limit access for national security or public policy reasons.

The case record, including parties' filings, is in principle not publicly available. While a third party vindicating legitimate interests may request to view and copy litigation records, these requests may be denied if the party refuses access. A party may apply in advance for restriction on perusal of the portions of litigation records containing secrets.

Court judgments can be made available to the public with personal information redacted. The court may decide not to disclose a judgment on national security or public policy grounds, or for the protection of individual privacy or trade secrets. Supreme Court and some lower court judgments are published through press releases or can be found on the Supreme Court's website. Copies of a judgment can be requested online.

## Costs

### 16 | Does the court have power to order costs?

Korean courts have the power to order costs. Generally, the losing party is responsible for the winning party's costs. However, the court has discretion to allocate costs between the parties. In practice, costs are allocated to each party in proportion to the success of each parties' respective claim.

Once a judgment becomes final, the court determines the cost of litigation. The litigation cost consists of attorneys' fees, filing fees, service of process fees and other out-of-pocket expenses. Legal fees are fixed according to the formula found in the Supreme Court Rule on the Calculation of Legal Fee of Litigation Cost.

A plaintiff is not required to provide security for the cost of defence unless the court decides otherwise. If the plaintiff has no domicile, office or business place in Korea, or the claim is groundless, the defendant may request the court to order the plaintiff to pay security for the cost of litigation. The security may be satisfied through a surety bond.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency or conditional fee arrangements are allowed in civil cases in Korea. Other fee arrangements, such as hourly or task-based billing, are also allowed. However, in exceptional circumstances, a court may reduce the legal fee if it determines that it is unreasonably excessive.



There are no laws or regulations that address third-party funding. However, the Attorney-at-Law Act prohibits attorneys from becoming assignees to any rights in dispute.

### Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance is available to cover all or part of a party's legal costs. Both a party's own costs and its potential liability for an opponent's costs can be covered by insurance.

### Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants with similar claims may join a lawsuit as co-litigants.

Class actions are permitted only for certain securities-related cases, such as an action for damages based on false disclosure, insider trading or market manipulation. The representative party must file an application for class action permission along with the complaint. To certify a class, the following requirements must be met:

- there must be at least 50 class members;
- at least 1/10,000 of the outstanding shares must be held by the class members;
- there must be common questions of law and fact; and
- a class action must be an appropriate means of enforcing the rights of the class members.

Once permission is granted, members of the class are bound by any decision in the lawsuit unless they opt out.

A bill was proposed to allow class actions in all areas of civil litigation. Public comments were received but no legislation has been enacted.

### Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Grounds for appeal depend on which court the appeal originates from. When decisions of the court of first instance are appealed, the appellate court reviews the case de novo. Parties are allowed to introduce new evidence and arguments.

Decisions of the appellate court may only be appealed to the Supreme Court on questions of law. Appeals to the Supreme Court must be based on one of the following grounds:

- there is a violation of the Constitution, statutes, administrative decrees or regulations that affected the judgment;
- there was erroneous determination of whether an order, rule or disposition is unlawful;
- an act, order, rule or disposition has been interpreted contrary to a Supreme Court precedent;
- a relevant Supreme Court precedent needs to be changed;
- there is a serious violation of any act or subordinate statute; or
- there are other grounds for appeal as prescribed in the Civil Procedure Act.

### Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

To enforce a foreign judgment, the party seeking enforcement must obtain an enforcement judgment from the Korean court.

A final and conclusive judgment from a foreign court can only be recognised and enforced if it meets four requirements. First, the foreign court that issued the judgment must have international jurisdiction recognised under a Korean law or treaty. Second, the defendant must have been properly served with enough time to prepare a defence. Third, recognition of such judgment must not violate the public policy of Korea. Fourth, there must be a guarantee of reciprocity such that a Korean court judgment would be recognised and enforced in the courts of the foreign country in question or the recognition requirements in Korea and in the foreign country are not off-balance and do not differ on important points.

### Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Act on International Judicial Mutual Assistance in Civil Matters stipulates detailed procedures for obtaining evidence both by and from a foreign country. However, in jurisdictions where a bilateral treaty and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters are in force, the bilateral treaties or the Hague Convention prevails.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Arbitration Act of Korea is based on the UNCITRAL Model Law on International Commercial Arbitration. The law was revised in 2016 to adopt the amendments of the 2006 UNCITRAL Model Law, with some variations.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

For an arbitration agreement to be enforceable, it must be in writing. The agreement may be in the form of an arbitration clause or a separate agreement.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Unless the parties agree otherwise, the number of arbitrators under the Arbitration Act is three. Absent a party agreement, the manner of appointment is determined by law. For one arbitrator: if the parties cannot agree on an appointment within 30 days of a party's request to appoint an arbitrator, the appointment is made by a court or an arbitration institution designated by the court upon the request of a party. For three arbitrators: each party appoints one arbitrator, and the two arbitrators appoint a third arbitrator by mutual agreement. If the arbitrators cannot agree on the third appointment, a party may request that a court or an arbitral institution designated by the court appoint the third arbitrator.

Even if the parties have an agreement regarding the appointment of arbitrators, a party may request appointment of the arbitrator or arbitrators by a court or an arbitral institution designated by the court if an arbitrator cannot be appointed. Challenges to the appointment of an

arbitrator are restricted to lack of impartiality or independence and lack of qualifications as agreed between the parties.

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The Korean Commercial Arbitration Board (KCAB) has a pool of 1,200 domestic arbitrators and 400 international arbitrators. Arbitrators have diverse backgrounds in, for example, industries, business, the government, the law and academia. Parties may nominate or appoint arbitrators from outside the KCAB's pool.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Under the Arbitration Act, parties are free to agree on the arbitral procedure, except those contrary to the mandatory provisions. If there is no agreement, the arbitral tribunal may conduct the hearing in a manner it considers appropriate. An arbitral tribunal sitting in Korea must follow the Arbitration Act, including notice of written communication [article 4], grounds for challenge [article 13], equal treatment of parties [article 19], and form and contents of arbitral award [article 32].

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

The Arbitration Act follows the UNCITRAL Model Law and limits court intervention, except for on those grounds specifically provided for in the Act. A court with jurisdiction may consider the following matters:

- appointment of arbitrators and designating an arbitral institution;
- requests for challenging an arbitrator;
- requests for terminating an arbitrator;
- requests to examine the authority of the arbitral tribunal;
- recognition of an interim measures, court decisions regarding interim measures or orders to provide assets as security;
- requests to challenge an expert;
- retention of the original copy of an arbitral award;
- actions for setting aside an arbitral award to court;
- recognition or enforcement of arbitral award; and
- other matters stipulated in the Arbitration Act.

The Korean Supreme Court has ruled that courts may intervene only in matters enumerated in the Arbitration Act, and specifically held that applications for preliminary injunctions to stay an arbitration on the grounds of non-existence or invalidity of an arbitration agreement would not be allowed (Supreme Court Decision 2017 Ma6087, 2 February 2018).

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators have the power to grant interim relief under the Arbitration Act unless otherwise agreed by the parties. Arbitrators may order a party to maintain or restore the status quo, act or not act to prevent harm to the proceeding, preserve assets and preserve evidence.

To grant an interim measure, the petitioner must show that without the interim measure they would be irreparably harmed, and that harm would be greater than any harm to the other party as a result of the interim measure. The petitioner must also demonstrate that they are likely to succeed on the merits of the claim.

### Award

30 | When and in what form must the award be delivered?

Under the Arbitration Act, an arbitral award must be in writing, state the reasons on which it is based, state the date and the place of arbitration, and be signed by all arbitrators. The arbitral award must be delivered to each party. Upon the request of the parties, the arbitral tribunal may deliver the original copy of the award to a court with jurisdiction along with a document certifying delivery. The Arbitration Act does not stipulate when the award must be delivered.

### Appeal

31 | On what grounds can an award be appealed to the court?

Once an arbitral award has been issued, a party challenging the award must file a request to set aside the award in a court with jurisdiction within three months of receipt of the arbitral award. An action to set aside an arbitral award is limited to the following grounds:

- a party was under some incapacity, or the arbitration agreement is not valid under the parties' chosen law or Korean law;
- the petitioner was not given proper notice or was otherwise unable to present its case;
- the award deals with a dispute that is not subject to the arbitration agreement or is beyond the scope of the arbitration; or
- the arbitral tribunal or procedure did not comply with the arbitration agreement of the parties.

The court, on its own initiative, may set aside an arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under Korean law or the award is against the public policy of Korea. Under the Arbitration Act, disputes over property rights and disputes over non-property rights that are capable of resolution without a court judgment are considered proper subjects for arbitration.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A party may apply for recognition and enforcement of an arbitral award. A domestic award will not be recognised if the award has no binding power over a party or if the award has been set aside by a court.

For foreign awards subject to the New York Convention, recognition and enforcement of foreign arbitral awards is determined in accordance with the Convention. If the New York Convention does not apply, foreign arbitral awards are recognised and enforced in the same manner as foreign judgments.

### Costs

33 | Can a successful party recover its costs?

Under the Arbitration Act, the arbitral tribunal may allocate costs and order payment of interest.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Judicial conciliation, judicial and administrative mediation, and arbitration are widely used in Korea. ADR is gaining popularity.

**Requirements for ADR**

- 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

ADR is not compulsory. Korean courts generally encourage judicial conciliation to resolve disputes. Either party may object to the court's recommendation, and there is no sanction for refusal.

**MISCELLANEOUS****Interesting features**

- 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The following features are notable in Korean litigation: [1] the court has broad case management discretion on both procedural and substantive matters; and [2] more emphasis is placed on documentary evidence than on witness testimonies.

**UPDATE AND TRENDS****Recent developments**

- 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

In the past year, there have been several key developments. The Serious Accident Punishment Act was enacted. The Act imposes criminal liability against (1) business owners or executives who fail to ensure the safety of their business operations and (2) businesses or institutions that fail their supervisory duties. The Act also imposes punitive damages of up to five times the actual damages. The Civil Procedure Act and Criminal Procedure Act were amended to expand video trials in response to the covid-19 pandemic. The Supreme Court extended CEO liability in shareholder derivative actions to cartel violations (Supreme Court Decision 2017 Da222368, 11 November 2021).

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# Switzerland

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

Switzerland has a federal structure. Accordingly, its jurisdiction and court system lies in the competence and responsibility of the different states, which are called cantons. However, the law of civil procedure (unlike the laws of court organisation) is federal law and, therefore, unified in Switzerland, and the cantons are obliged by federal law to provide two instances of civil jurisdiction, that is, district courts and courts of appeals, where certain areas of law (such as labour law and rental law) are assigned to specific, specialised departments within the district courts.

There are certain exceptions to the requirement of two instances, which pertain, in particular, to intellectual property and antitrust matters that must be referred to a single (higher) cantonal instance or (for patent matters) to a specialised federal court. Furthermore, four cantons (Zurich, Berne, St Gallen and Aargau) maintain commercial courts that are as single cantonal instance competent for commercial disputes with a certain amount in controversy between legal entities registered in a Swiss commercial register or a comparable foreign register.

The ordinary procedure is generally preceded by a conciliation procedure before a justice of the peace (there are numerous exceptions, for example, if a single cantonal court has jurisdiction or if the summary procedure is used). If no agreement can be reached at such a hearing, the case must be brought before the ordinary court.

In ordinary proceedings, the district court generally judges in tribunals. In simplified proceedings (ie, for amounts in dispute of up to 30,000 Swiss francs) or in summary proceedings (which also include proceedings concerning provisional measures or injunctions), a single judge has jurisdiction. The higher courts (which also include single cantonal instances) are adjudicated by between three and five judges.

Judgments of the district courts may, if the preconditions are met, be referred to the courts of appeal, and those judgments (as well as those of single cantonal instances), if the preconditions are met, to the Swiss Federal Supreme Court.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The judges conduct the proceedings, including the taking of evidence, and apply the law *ex officio*, while the facts (with exceptions) must be substantiated by the parties (the requirements in this regard are comparatively high in Switzerland). The Swiss system does not hold pretrial discovery proceedings conducted by the parties and does not provide for jury trials.

In principle, judges are elected directly by the people or by representatives of the people within the framework of a political process,

which does not alter their obligation to remain strictly impartial and independent. This system ensures that the political spectrum is also reflected in the judiciary.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

Under Swiss law, limitation periods are a matter of substantive law and are mainly set forth in the Swiss Code of Obligations. Contractual claims generally become time-barred after 10 years, or five years if it is a periodic performance such as salaries or rent. There are many exceptions to these general rules, depending on the nature of the claim. Tort claims and claims out of unjust enrichment become time-barred after three years. The prescription period starts to run in general when the claim becomes due.

The parties may contractually waive the assertion of the statute of limitations (mostly up to a certain point in time and to the extent that the statute of limitations has not yet occurred at the time of the declaration).

The limitation period may be interrupted by an acknowledgement of the debt, the initiation of debt enforcement proceedings or by bringing a lawsuit before the justice of the peace or (if no conciliation procedure is to be conducted) before the competent court. In the case of such interruption, the applicable limitation period starts again.

The court does not consider the limitation of a claim *ex officio*. Therefore, the parties must invoke the statute of limitations if they want to argue against a claim in this respect.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

In principle, there is no specific pre-action behaviour required by Swiss law. In particular, there is no obligation to threaten or announce the filing of a lawsuit.

In practice, of course, before initiating legal action, attempts are usually made to find an amicable solution between the parties. Pretrial discovery proceedings are unknown to the Swiss system.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In principle, the procedure is initiated by a written claim and a request for a conciliation hearing with the justice of the peace. If no amicable settlement is reached at such hearing, the claiming party must file the lawsuit with the competent court within three months. If this deadline is not met (and if no specific time limit for filing an action is applicable),

the conciliation procedure can be repeated and thus the action can still be brought.

The petition to the justice of the peace can be limited to the prayers for relief and a brief explanation of the nature of the dispute.

The statement of claim is filed with the competent court (either directly or after a conciliation hearing) and must contain the prayers for relief and the reasoning of the claim (in the simplified procedure, the reasoning can also be provided at the oral hearing). The statement of claim is then served to the opposing party with a deadline to file the answer to the statement of claim. If the court summons the parties directly to an oral hearing immediately after the filing of the statement of claim, the answer to it must be given orally. However, the court usually orders the defending party to file a written statement of defence. After an initial exchange of submissions (or oral claim and response, if applicable), the parties have the opportunity for a full second presentation of their case (reply and rejoinder). In more complex proceedings, and especially in commercial disputes, the proceedings (except for questioning parties and witnesses in proceedings of taking the evidence) are generally in writing.

The service of all trial-related documents (party submissions, court orders, etc) is conducted by the court.

The judges conduct the proceedings, including the taking of evidence, and apply the law *ex officio*, while the facts (with exceptions) must be substantiated by the parties (the requirements in this regard are comparatively high in Switzerland). The courts, in particular the specialised courts and the commercial courts, are therefore in principle able to deal efficiently with very large and complex cases in any field of law.

## Timetable

### 6 | What is the typical procedure and timetable for a civil claim?

The typical procedure is an exchange of two written submissions or oral presentations, with the possibility to make further comments on new assertions of the other party, followed by either directly a judgment or the proceeding of taking the evidence followed by a judgment after the parties have had the opportunity to comment on the outcome of the evidence proceeding.

It is also possible (and quite common at the commercial courts) that the court conducts (with or without presenting its preliminary opinion to the parties) a settlement hearing after a first round of submissions before the proceeding continues.

Regarding the timetable, one must count (in regular proceedings) roughly one year per instance if no proceeding of taking the evidence (at the court of first instance) is conducted.

## Case management

### 7 | Can the parties control the procedure and the timetable?

The management of the process lies with the court. Accordingly, the parties have relatively little influence on the proceeding and the time frame.

The individual submissions must be made within certain deadlines set by the court. These time limits can in principle be extended, which the parties always make use of. The parties can also request the court to conduct a settlement hearing to accelerate the process. In principle, the court will not ignore such requests. The parties can of course terminate the proceedings at any time (especially in commercial matters) by withdrawing the claim, acknowledging the claim or reaching a settlement.

## Evidence – documents

### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no such duty in the context of legal proceedings. Such duty may, however, exist based on the substantive law (eg, preservation duties related to bookkeeping documents), which may have consequences in a court proceeding (depending on the nature of the dispute).

The parties may make document production requests. Those requests must, however, be very specific; that is, they must identify the requested document and be reasoned as to relevance and materiality to the case (no fishing expedition, no pretrial discovery). If a party does not comply with such requests (granted by the court), that behaviour may be taken into account by the court when assessing the evidence.

If it is requested that an interim measure be ordered *ex parte* and thus without hearing the opposing party, the requesting party is in principle obliged to submit the written position of the opposing party (if any), even if it does not correspond to its own position (which is usual) and may contain the arguments of the opposing party.

## Evidence – privilege

### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The correspondence and work products of a lawyer are privileged if the lawyer is acting in this capacity as legal counsel (and not, for example, as a financial adviser or board member). Accordingly, attorney-client privilege is limited to the typical professional activities of an attorney. In-house counsel cannot invoke attorney-client privilege.

## Evidence – pretrial

### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

As the Swiss system does not know pretrial discovery, such exchange is usually not made. The parties rather have to submit the evidence together with their submissions. Furthermore, witnesses are questioned by the court, and written witness statements are not admissible evidence. Expert reports submitted by a party have no more value than a party assertion. A party may, however, request the court to obtain an expert report on a specific topic, which report will then be an admissible piece of evidence.

## Evidence – trial

### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Documentary evidence must be filed by the parties together with the respective assertions that they want to have supported by that evidence. The same applies to witnesses who need to be invoked by the parties. If the court deems it necessary, it will summon and question the witnesses at a hearing during the proceeding of taking the evidence. The parties are entitled to ask additional questions.

If so invoked by the parties, experts are appointed by the court. The parties need to be heard at every step of this appointment. Experts can be heard during a hearing or provide a written report, which again can be commented on by the parties.

Both witnesses and experts are obliged to tell the truth under threat of prosecution.

## Interim remedies

### 12 | What interim remedies are available?

A party may apply for interim measures before or during a pending proceeding. For the measure to be ordered, the requesting party must demonstrate that its chances of success in the matter are intact and that, without such a measure, it faces a disadvantage that cannot easily be remedied.

The measure is usually issued in the form of an order to omit a certain action. It is principally not possible to provisionally award the actual plea because of the prejudicial nature of such a measure.

A party may request that the measure be ordered *ex parte*, that is, before hearing the opposing party. Such request, however, requires a high degree of urgency to be established by the requesting party.

If a party assumes to be addressed by an *ex parte* interim measure, it can deposit a protective brief with the court that the party deems to be competent for such interim measure in order to protect its right to be heard. The court will then take this submission into account when deciding about the party's request for *ex parte* measures.

Monetary claims must be secured by freezing orders pursuant to the Swiss debt enforcement law, which lists reasons that allow those measures (such as an enforceable judgement).

## Remedies

### 13 | What substantive remedies are available?

The action may consist of a claim for specific performance (including for a specific act or omission), for declaratory relief or of an action requesting a change of a legal right or status (eg, an action for divorce). For claims for damages, the claim is limited to the actual damage suffered. Accordingly, the assertion of punitive damages (in the sense of common law systems) is principally unknown to the Swiss system, as is the 'deep pocket' principle in general. Accordingly, if a foreign judgment grants punitive damages, the recognition and enforcement of such a judgment may be refused in Switzerland. It should, however, be mentioned that the last decade has seen a slight shift towards a more lenient approach in practice and scholarly writing regarding the recognition and enforceability of decisions granting punitive damages. Particularly in international arbitration in Switzerland, it seems to be the majority view of practitioners that an award granting punitive damages does not conflict with public policy under article 190(2)(e) of the Swiss Private International Law Act.

The claiming party can sue for default interest on monetary claims at a rate (unless otherwise provided for in the contract) of 5 per cent per year from the due date until performance.

## Enforcement

### 14 | What means of enforcement are available?

Judgments adjudicating a certain amount of money are enforced by the Swiss debt enforcement law. If the debtor raises an objection against the respective payment order, that objection may be set aside in a summary proceeding in which the debtor has only very limited defensive arguments available against the judgment. When the objection is set aside, the debtor can avoid enforcement in his or her assets only by payment of that amount adjudicated. Other judgments are enforced by the courts in summary proceedings, and the enforcement court may request assistance from other authorities.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

Civil proceedings, in particular hearings and judgments, are held in public. However, the public may be excluded when required by public interest or by the legitimate interests of an involved person, or may not be applicable at all (eg, in family law matters). Court documents are not public.

## Costs

### 16 | Does the court have power to order costs?

The court costs as well as the indemnity that the losing party has to pay to the prevailing party are calculated according to special cantonal tariffs and depend in particular on the amount in dispute. The court distributes these costs between the parties as part of the judgment, taking into account the degree of win or loss of the parties.

After filing the claim, the claiming party is generally requested by the court to submit an advance payment of the amount of the presumed court costs (calculated according to the amount in dispute and the tariff). Under certain circumstances, the plaintiff may also be required to provide security for the indemnity of the opposing party. If advance payments are not made, the court will not enter the action.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Lawyers are prohibited from entering into agreements according to which the fees of the lawyer exclusively consist of a share of the proceeds of the claim or according to which the lawyer entirely waives the fees if the case is lost.

According to the Swiss Federal Supreme Court, success fees are permissible if: the non-success-related fee component is not only high enough to cover the lawyer's prime costs but also enables a reasonable profit; the success-related fee component is not so high in relation to the fee owed in each case that the independence of the lawyer is impaired and there is a risk of unconscionability; and the agreement is concluded at the beginning of the mandate relationship or after termination of the legal dispute, and not during the current mandate.

## Insurance

### 18 | Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance is widespread in Switzerland and is particularly common in disputes relating to employment and rental law. Exactly which cases are covered by the insurance and to what extent depends on the respective policy.

## Class action

### 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Even though two or more persons may be (if all respective prerequisites are met) on the side of claimant or defendant in Swiss proceedings, class actions in the classic sense are not known in Switzerland.



## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgments of cantonal district courts (first instance) with an amount in dispute of at least 10,000 Swiss francs can be appealed to the cantonal court of appeal. The deadline for such appeal is 30 days, and the appellant may assert both an incorrect establishment of the facts and an incorrect application of law by the lower instance. Against judgments below 10,000 Swiss francs and procedural decisions, an objection can be raised for the reason of incorrect application of the law or obviously incorrect establishment of the facts.

Decisions of the courts of appeal may be appealed to the Swiss Federal Supreme Court. The deadline for such an appeal is 30 days, and the amount in dispute must in general be at least 30,000 Swiss francs. This highest instance is in general bound by the establishment of the facts by the lower instance, which is why, in general, only incorrect application of the law may be asserted.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Unless an international treaty is applicable, foreign judgments are recognised according to the provisions of the Swiss Private International Law Act (SPILA). According to this act, foreign judgments are recognised if the foreign authorities of the state where the decision was rendered had jurisdiction (according to the provisions of the SPILA), if the decision is no longer subject to any ordinary appeal or if it is a final decision, and if the judgment is enforceable.

A foreign judgment will be enforced only if the parties received proper notice of the proceedings, if the parties' fundamental due process rights were safeguarded, and if the foreign judgment does not contradict the formal or material public policy, including the fundamental principle of *res judicata*.

Regarding international treaties, Switzerland is a member state of the Lugano Convention, which is equal to the Brussels I Regulation. According to this convention, judgments rendered in a member state of the European Union or in another contracting state to the convention are recognised pursuant to the provisions of the convention.

A party seeking recognition and enforcement of a foreign decision in Switzerland may initiate specific exequatur procedures for that purpose under the respective provisions of the SPILA or the international treaty or, as an alternative, it may have the foreign decision recognised and enforced in the context of ordinary (debt) enforcement procedure.

## Foreign proceedings

22 | 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. According to this convention, the judicial authorities of another contracting state may request the competent Swiss authority to take evidence in Switzerland for a foreign proceeding. However, Switzerland made a reservation that it will not execute requests for the purpose of obtaining pretrial discovery of documents if:

- the request has no direct and necessary link with the proceedings in question;
- a person must indicate what documents relating to the case are or were in his or her possession or keeping or at his or her disposal;

- a person must produce documents other than those mentioned in the request for legal assistance, which are probably in his or her possession or keeping or at his or her disposal; or
- interests worthy of protection of the concerned persons are endangered.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

International arbitration in Switzerland is governed by the 12th chapter of the Swiss Private International Law Act (SPILA), whereas domestic arbitration is governed by the third book of the Swiss Code of Civil Procedure (SCCP).

While the SPILA is not based on the UNCITRAL Model Law, these two statutes were drafted around the same time and do not differ substantially.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Until 2020, the former text of article 178 SPILA required that the relevant declarations of intent of all parties be recorded in writing.

To align article 178 SPILA with practice, the revised text (effective as of 1 January 2021) requires that the arbitration agreement be made in writing or in any other means of communication that permits it to be evidenced by a text. Hence, in practice, neither a signature nor an exchange of documents is required for a formally valid arbitration agreement, which is in line with the standard set forth by article 7(4) UNCITRAL Model Law Option I (as amended in 2006) and, therewith, more liberal than the formal requirements of article II of the New York Convention.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the parties do not explicitly, or by reference to a set of arbitration rules, determine the number of arbitrators and the exact appointment mechanism, the local state court may be seized with the question.

In both international and domestic arbitration, the arbitral tribunal will by default consist of three members.

Unless the parties have agreed on a specific appointment mechanism, each party shall appoint one arbitrator, and the two party-appointed arbitrators elect the presiding arbitrator. Where the parties fail to choose a single arbitrator or to appoint a plurality of arbitrators, or if the arbitrators fail to agree on a chair, each party may seize the local courts at the seat of the arbitration to appoint the arbitrators or the chair, or both.

A party may challenge an arbitrator if the arbitrator does not meet the qualifications agreed upon by the parties, if a ground for challenge exists under the rules of arbitration as agreed by the parties, or if circumstances give rise to justifiable doubts as to his or her independence or impartiality.

A party may only challenge an arbitrator based on the grounds that came to that party's attention after such appointment. That challenge must be notified to the arbitral tribunal and the other party without delay.

If the challenged arbitrator disputes the challenge, the matter may be referred to the competent body designated by the parties or,

absent any designation, to the local courts at the seat of the arbitration to decide on the challenge.

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties may freely choose their arbitrator from a large community of experienced and highly qualified practitioners.

Switzerland is and remains one of the most popular hubs for international commercial arbitration, and Swiss-qualified lawyers are among those arbitration practitioners most often appointed at an international level.

Not only owing to recent initiatives, such as the Equal Representation in Arbitration Pledge and the Racial Equality for Arbitration Lawyers initiative, but also owing to intelligence on arbitrators being more readily available, the pool of potential arbitrators is growing and the diversity in appointments is ever increasing.

### Arbitral procedure

27 | 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, be it by specific agreement or by reference to a set of arbitration rules or any other procedural law.

The parties' autonomy is limited only by the mandatory principles of the right to be heard and the principle of equal treatment.

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

There are only very limited possibilities for court intervention in arbitrations seated in Switzerland. The state courts at the place of arbitration may get involved with regard to the appointment, removal or replacement of an arbitrator. Their assistance may further be sought with regard to the enforcement of interim measures and the taking of evidence.

Moreover, for very limited grounds, the parties may challenge an arbitral award before the Swiss Federal Supreme Court. In international arbitration, if all parties have their domicile or seat outside of Switzerland, they may exclude their right to challenge an arbitral award by an agreement respecting the same form as article 178 SPILA.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, the arbitral tribunal is competent to order interim measures, including preliminary measures to protect evidence as well as security for costs.

Absent an explicit agreement by the parties, however, the arbitrators' competence is not exclusive. In principle, state courts and arbitral tribunals have concurrent jurisdiction to order interim measures.

As an arbitral tribunal does not have coercive powers, the arbitral tribunal may apply to the local state court to enforce any measures ordered by the tribunal with which the party concerned does not voluntarily comply.

### Award

30 | When and in what form must the award be delivered?

In international arbitration in Switzerland, the parties have the autonomy to decide on the procedure and the form of an arbitral award. Absent any

agreement, the *lex arbitri* requires that the award will be in writing, set forth the reasons on which it is based, and be dated and signed.

Unlike many sets of arbitration rules, the *lex arbitri* does not stipulate a time period within which the tribunal must render the arbitral award.

### Appeal

31 | On what grounds can an award be appealed to the court?

In international arbitration, an arbitral award may be challenged only on very limited grounds, namely:

- if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
- if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- if the fundamental principle of equal treatment of the parties or their right to be heard was violated; and
- if the award is incompatible with public policy.

The parties may challenge the arbitral award in front of the Swiss Federal Supreme Court, as the only and final instance.

While in international arbitration the parties (if they are all domiciled or seated abroad) may exclude the right to challenge the arbitral award, the parties to a domestic arbitration (which by the definition under article 176 SPILA have their domicile or seat in Switzerland) cannot waive their right to challenge the award. However, the parties to a domestic arbitration may agree to have the challenge decided by the cantonal court having jurisdiction at the seat of arbitration.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Switzerland is a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) since 1965. Hence, arbitral awards rendered by tribunals seated abroad may be enforced pursuant to the provisions of the NYC. Moreover, Switzerland has concluded many bilateral treaties with individual countries, such as Austria, Germany, Italy, Spain and Sweden, concerning the mutual recognition and enforcement of state court decisions and arbitral awards.

Domestic arbitral awards may directly be enforced in Switzerland pursuant to the provisions of the SCCP or, concerning the enforcement of monetary claims, as per the provisions of the Debt Enforcement and Bankruptcy Act.

### Costs

33 | Can a successful party recover its costs?

Neither the SPILA nor the SCCP contains provisions on the costs of arbitration and their respective allocation. It is in the parties' autonomy to decide on rules of cost allocation and, in practice, they usually do so by reference to a set of arbitration rules. Absent any agreement by the parties, the tribunal may decide on the allocation of costs between the parties. While the tribunal enjoys wide discretion on how it intends to apportion the costs between the parties, the arbitral tribunal would usually apply the 'costs follow the event' rule, in the sense that the unsuccessful party must bear the costs of the arbitration and compensate the successful party for the respective costs incurred in proportion to its relative success.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Parties in Switzerland are generally used to conciliation proceedings, as conciliation is generally a prerequisite for subsequently filing an action with the ordinary courts.

Further, more recently, mediation has gained more attention, particularly in combination with arbitration. For instance, the parties may freely agree to open a mediation window before or during an ongoing arbitration to settle the dispute.

### Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

If the parties exclude the jurisdiction of the state courts and opt for a different dispute resolution process, they may freely choose between, for example, mediation and arbitration. The parties can also agree to combine certain ADR methods or to have different procedural steps. If the parties agree on such a multi-tiered dispute resolution mechanism, according to case law of the Swiss Federal Supreme Court, they must comply with the agreed process and cannot just skip a step. For instance, where a multi-tier clause provides, as a first step, for a negotiation period of 30 days and, as a second step, for arbitration, the parties must adhere to that process, failing which the arbitration may be stayed until the first procedural step has been complied with.

## MISCELLANEOUS

### Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The 12th chapter of the Swiss Private International Law Act, which governs international arbitration as the *lex arbitri*, was recently revised. The revision came into effect on 1 January 2021 and is particularly aimed at reinforcing Switzerland's attractiveness for international arbitration by updating the *lex arbitri*. For instance, the revised provisions bring legal certainty on certain aspects by incorporating principles developed by the Swiss Federal Supreme Court and, more generally, by aligning the text with actual arbitration practice. Moreover, it makes international arbitration in Switzerland more accessible, for example, by allowing written submissions in English before the Swiss Federal Supreme Court in challenge proceedings.

An additional feature of interest may be that, just like other cities in Europe (eg, Paris and Frankfurt), Zurich is also considering the creation of a special chamber for international commercial disputes at the Commercial Court of the Canton of Zurich. If and when this Zurich International Commercial Court may be created is yet to be seen.



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## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

Certain aspects of the Code of Civil Procedure are to be revised. In particular (among other changes), certain court jurisdictions are to be clarified with regard to labour and tenancy law proceedings, and the jurisdiction of the commercial courts for international disputes is to be made more attractive. In connection with the law of evidence, party expert opinions are to be given documentary quality and witness interviews are to be made possible by means of videoconferencing. In addition, the advance payment for court costs is to be only half of the expected costs in the future, which should make it easier for the plaintiff to initiate proceedings. All of these planned revisions are still subject to parliamentary discussions.

# Thailand

## Pisut Rakwong and Supachoke Pongdasakorngamjai

Pisut & Partners

### LITIGATION

#### Court system

##### 1 | What is the structure of the civil court system?

The Court of Justice is divided into three levels: the court of first instance, the court of appeal and the Supreme Court.

General civil courts of first instance comprise district courts and provincial courts. District courts have jurisdiction to hear small claims with value below 300,000 baht. Provincial courts have jurisdiction over claims exceeding 300,000 baht, non-monetary cases, non-contentious cases, and all other civil claims that are not subject to the jurisdiction of other civil courts. At least two judges would constitute a quorum for the purposes of hearing and determining any matter in the provincial courts, whereas only one judge is required for district courts.

The court of appeal handles an appeal against the judgment or order of the general civil courts. The Supreme Court is the final court of appeal in all cases in Thailand. At least three judges form a quorum of the court of appeal and the Supreme Court. No oral arguments and witness examination will take place at the appeal stage.

In addition to the above, there are five specialist courts in Thailand: the intellectual property and international trade court, the tax court, the labour court, the bankruptcy court, and the juvenile and family court. Quorum and types of judges for the purposes of determining any matter in the specialist courts are specified under the specific legislation regarding the disputed matter. An appeal against the judgment of the specialist court must be made to the court of appeal for specialised cases or directly to the Supreme Court, as the case may be. A further appeal, which is not an automatic right, may be made to the Supreme Court.

#### Judges and juries

##### 2 | What is the role of the judge and the jury in civil proceedings?

There is no jury system in Thailand. The accusatorial system applies for most civil cases, except in some specialist courts and specific case types. Judges must decide the issues of fact and law based on the facts presented by the parties, and judges are not empowered to request additional facts and evidence on their own accord.

#### Limitation issues

##### 3 | What are the time limits for bringing civil claims?

The statutory time limits or periods of prescription for bringing civil claims vary significantly depending on the nature of the claims as prescribed by laws. The time limit for claims for which no specific period is prescribed by law is 10 years. A claim for a wrongful act is barred one year after the day that the wrongful act and the person bound to make compensation became known to the injured person, or 10 years from

the day of commission of the wrongful act. However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, that longer prescription will apply.

The statutory time limit cannot be extended or suspended by mutual agreement of the parties. Nevertheless, for debt-recovery claims, the time limit may be interrupted if the debtor has acknowledged the debt towards the creditor by written acknowledgement, making partial payment or payment of interest, giving securities or undertaking any act implying the acknowledgement of debt. In this case, the time limit begins to run when the interruption ceases.

The statutory time limit in civil claims is not a matter of public policy. As such, if the defendant does not raise this matter in an answer, the court would not have authority to dismiss the claim on grounds of expiry of time limits.

#### Pre-action behaviour

##### 4 | Are there any pre-action considerations the parties should take into account?

In general, a plaintiff will send a demand letter to the defendant before commencing the civil proceedings. However, there are some specific pre-action requirements for certain claims as prescribed by the Civil and Commercial Code; for example, enforcement of the mortgage, claim against the guarantor and termination of the lease.

A claim for enforcement of mortgage can be filed only after the expiration of the notice period. A mortgagee must serve written notice requiring the performance of obligation within a reasonable time of not less than 60 days from the date of the debtor's receipt of such notice. Furthermore, if the mortgagor mortgages his or her property as a security for an obligation of another person, the mortgagee must serve such written notice to the mortgagor within 15 days of the date of the service of the written notice to the debtor. If the mortgagee fails to do so, the mortgagor shall be discharged from liability for interest and compensation in arrears by the debtor and charges accessory to this obligation, which arise from the date of the expiration of the 15-day period.

A claim against the guarantor can be filed after the written notice reaches the guarantor. Furthermore, if the creditor fails to serve written notice to the guarantor within 60 days of the date of the debtor's default, the guarantor shall be discharged from liability for interest, compensation and any charges accessory to this obligation, which arises after the lapse of 60 days from the date of the debtor's default.

If no period is agreed upon or presumed, either party may terminate the lease contract at the end of each period for the payment of rent, provided that notice of at least one rent period is given (but no more than two months' notice needs to be given). In the case of non-payment of rent, the lessor may terminate the contract. But, if the rent is payable at monthly or longer intervals, the lessor must first notify the tenant that payment is required within a period not less than 15 days.

## Starting proceedings

- 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A plaintiff commences civil proceedings by filing a complaint with the competent court and paying the proper court fee. If the complaint is accepted, the court officer will commence serving the summons and a copy of the complaint on the defendant at the address provided by the plaintiff. If the defendant's address is located overseas, the court shall proceed with service to the defendant through an international express mail service, an international mail service provider or the Office of the Court of Justice and the Ministry of Foreign Affairs through a diplomatic channel. In the latter case, the plaintiff is required to submit copies of the summons and the complaint to the court in the certified official language of the defendant's country or in English.

The courts occasionally extend their operating hours into the evenings and hold weekend sessions to deal with the backlog of cases.

## Timetable

- 6 | What is the typical procedure and timetable for a civil claim?

### Service of complaint

Once a summons and a copy of the complaint have been effectively served, the defendant has 15 or 30 days from the date of service, depending on the means of service, to file an answer or counterclaim. If the complaint is served on the defendant or any person who is authorised to accept service, the defendant has 15 days from the date of service to file an answer. If the complaint is served by affixing the documents to the premises of the defendant, the defendant has 30 days to file an answer. However, parties usually seek an extension to answer the complaint, and the court generally grants this extension upon reasonable request.

### Settlement of issue

Typically, 45 to 60 days after the filing of a complaint, the first hearing will be held for the purposes of determining the issues in dispute and scheduling a trial hearing. The court will examine the allegations and evidence filed by the parties, direct any party to adduce evidence first or afterwards, and schedule a date for trial. If the court views that a settlement may be reached between the parties, the court may schedule a mediation hearing and appoint a mediator to assist in mediation.

### Trial

The court will schedule the hearings for taking the evidence of each party. The number of hearings depends on the number of witnesses each party wishes to present, the amount of documentary evidence and the complexity of the case.

### Judgment

Once the trial is completed, the courts will schedule the hearing to read the judgment. Parties may request to file a closing statement with the court within the given time frame.

The length of proceedings, from filing a complaint to the judgment date, is one year or longer at the court of first instance.

### Case management

- 7 | Can the parties control the procedure and the timetable?

The parties cannot control the procedure, timetable or dates of the trial hearings. Once the preliminary hearing date has been fixed, the parties may seek to reschedule on the grounds of a scheduling conflict. If the

trial cannot be concluded within the timetable imposed by the court for reasons such as protracted examination proceedings, the court may further reschedule or fix another hearing date.

## Evidence – documents

- 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no such duty under the law. The parties have the right to determine the evidence to be presented to court in support of their case. However, any party may request the court to issue an order to subpoena a document, either from the opposing party or a third party, within the given time frame, unless there are reasonable grounds for refusal, such as confidentiality or the possibility of causing damage to third parties if documents are produced.

## Evidence – privilege

- 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Attorney–client privilege is recognised under Thai law. While the Regulations of the Lawyers Council on the Conduct of Lawyers BE 2529 (AD 1986) prohibit lawyers from disclosing confidential information about clients unless clients have consented or a court order has been obtained, those Regulations only apply to licensed lawyers who have been registered with the Lawyers Council of Thailand.

Nevertheless, it is a criminal offence under section 323 of the Thai Criminal Code for legal advisers, consultants or professionals, including their staff, to disclose confidential client information that may cause harm to the client. Any licensed or non-licensed lawyers, including in-house lawyers are, therefore, bound by this confidentiality obligation.

A court order or subpoena would override attorney–client privilege and confidentiality obligations.

## Evidence – pretrial

- 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

There is no pretrial discovery process in Thailand. However, parties may request for the submission of written statements ahead of the examination-in-chief. If that request is granted by the court, the parties are required to submit to the court and serve on the opposing party the written statement no less than seven days before the hearing for the testimony of the witness.

Under the Civil Procedural Code, parties are required to submit a list of the evidence and a copy of the documentary evidence that the parties intend to present at trial to the court and the opposing party no less than seven days before the commencement of the first trial hearing. Failure to do so would result in inadmissibility of evidence, unless the court rules otherwise, taking into account special circumstances.

## Evidence – trial

- 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Most evidence is presented through the oral testimony of witnesses who give evidence under oath. The judge may conclude and record the testimony given by the witness at his or her discretion. Often, only necessary facts related to the issues of the case are recorded. The parties generally request to submit a written statement instead of giving oral evidence for the convenience of all parties. That written statement stands as the examination-in-chief and does not bar the right of the witness to give

further oral evidence before the court. The witness is required to attend the hearing to confirm his or her written statement and to be cross-examined by the opposing party.

Once the examination-in-chief is finished, the opposing lawyer has an opportunity to cross-examine the witness. The lawyer who has called a witness may then re-examine the witness with regard to matters answered by the witness during cross-examination.

All proceedings are conducted in Thai. If a foreign witness is required, he or she would need to testify through a translator. Documents in a foreign language must be translated into Thai, and only the original documents are admissible as evidence. Copies of those documents are admissible where parties mutually agree to admission; the original document has been lost or destroyed for reasons beyond the parties' control or it is in the interest of justice to produce a copy; the original document is in official custody or control; or the opposing party does not object to that admission.

**Interim remedies**

**12 | What interim remedies are available?**

Interim remedies available upon application at any time before the court renders its judgment include seizure or attachment orders, restraining orders, orders directing government authorities to suspend or revoke any registration, and orders for provisional arrest or detention. These orders may only be granted in respect of proceedings in Thailand. Search orders are not available for civil proceedings.

Emergency injunctive remedies are available by filing a separate motion establishing the emergency with an application for the injunctive remedies. If the court is satisfied of the urgency and grounds of the application, the court will consider and make a decision on the application on the same day on an ex parte basis.

When granting orders for interim remedies, the court often requires the applicant to provide security in the amount deemed appropriate by the court, as a guarantee for any losses that may be incurred as a result of the relief.

**Remedies**

**13 | What substantive remedies are available?**

Courts are empowered to award punitive damages but rarely do so. Punitive damages have been officially prescribed in several laws such as the Trade Secret Act, the Promotion and Development of Quality of Life of Persons with Disabilities Act, the Product Liability Act, the Consumer Case Procedural Act and the Personal Data Protection Act.

Courts are empowered to render judgments ordering the payment of interest on money judgments up to the date of full payment at the contractual rate agreed between the parties, or at the statutory rate.

**Enforcement**

**14 | What means of enforcement are available?**

After the court renders a judgment, the court will issue a decree requiring a judgment debtor to perform in accordance with the court judgment within a certain period of time. If the judgment debtor fails to comply with the judgment, the judgment creditor is entitled to request the court to issue writ of execution against the judgment debtor, where an execution officer will be appointed for the purposes of seizing the property, executing attachment of claims against third parties and liquidating the seized property by auction. The judgment creditor is, however, responsible for locating the debtor's assets.

**Public access**

**15 | Are court hearings held in public? Are court documents available to the public?**

Court hearings in civil proceedings are open to the public. However, the court may proceed with a hearing behind closed doors for public interest reasons or to prevent the disclosure of all or any of the facts or circumstances of the case from the evidence taken.

Court documents such as pleadings, witness statements and court orders are not available to the public. Third parties that have a legitimate interest or a reasonable ground may request access to court documents.

**Costs**

**16 | Does the court have power to order costs?**

Courts have the power to order the losing party to pay the successful party's costs. The amount is determined at the court's discretion, taking into account the complexity of the case, the time devoted and the amount of work carried out by lawyers, subject to the statutory maximum rates tied to the value of the claim. In any event, large legal fee awards are not common in Thailand.

The plaintiff may be required to provide security for the defendant's costs upon request of the defendant, at any time before judgment, under the following special circumstances:

- if the claimant is not domiciled in Thailand or does not carry on business in Thailand and the defendant can prove that the claimant does not have property liable for execution in Thailand; or
- where there is strong reason to believe that the plaintiff will evade payment of costs when losing the case.

**Funding arrangements**

**17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?**

There are no specific rules governing contingency or conditional fee arrangements between lawyers and clients. However, according to the Supreme Court judgments, lawyers are prohibited from having any interest in the outcome of the case and such arrangements are contrary to public policy and good morals. Therefore, such arrangements are void and unenforceable in Thailand.

Third-party funding is not a recognised concept under Thai law. However, based on the Supreme Court judgments, the courts tend to view any form of third-party funding without any interest in the litigation or with intent to profit from the disputes between other parties as contrary to public policy and good morals. Third-party funding is therefore void and unenforceable in Thailand.

**Insurance**

**18 | Is insurance available to cover all or part of a party's legal costs?**

Insurance for a party's legal costs is not extensively available in Thailand. However, it is generally available overseas and may include the costs of litigation conducted in Thailand.



## Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class action lawsuits in Thailand can only be filed by the plaintiff, meaning that there is no defendant class action. The Civil Procedure Code does not specify the number of people required to file a class action claim. All courts in Thailand, except for district courts, have jurisdiction over class action claims. Cases that are eligible for class action are as follows: wrongful acts; breaches of contract; and rights claims that derive from other laws, such as environmental laws, consumer protection laws, labour laws, securities and exchange laws, and trade competition laws.

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

For general civil cases, appeal to the court of appeal must be made within one month of the date of the decision of the court of first instance. Appeals on questions of fact where the value of the property or the amount in dispute in the court of appeal does not exceed 50,000 baht are prohibited. Appeals on questions of law are permissible.

Further appeal to the Supreme Court must be made within one month of the date of the decision of the court of appeal. Appeal to the Supreme Court is not an automatic right. The parties must request permission to appeal from the Supreme Court, and permission will only be granted if the appeal is a significant matter worthy of consideration. Section 249 of the Civil Procedure Code sets out 'significant matters' as follows:

- matters relating to the public interest or public policy;
- when a judgment or an order of a court of appeal in a significant question of law is contrary to the general precedent of judgments or an order of the Supreme Court;
- when a judgment or an order of the court of appeal determines a significant question of law that does not yet have a precedent or order of the Supreme Court;
- when a judgment or an order of a court of appeal is contrary to final judgments or orders of other courts;
- those with the purpose of developing legal interpretation; and
- other significant matters as prescribed by the regulations of the president of the Supreme Court.

Other significant matters are provided by the Regulation of the President of the Supreme Court regarding the application for the request for permission to appeal to the Supreme Court in Civil Case BE 2564 (AD 2021) as follows:

- the judgment or order of the court of appeal contains dissenting opinion in the significant matter and it is deemed appropriate to consider by the Supreme Court;
- the judgment or order of the court of appeal in the significant question of law contradicts an international convention ratified by Thailand; and
- the judgments or orders of the court of first instance and the court of appeal are contradicting on a significant issue and it is deemed appropriate to consider by the Supreme Court.

If permission is not granted by the Supreme Court, there will be no further appeal in any form and the case is final.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Thailand is not a party to any conventions on recognition and enforcement of foreign judgments. There are no specific rules governing the recognition and enforcement of foreign judgments. However, Thai courts accept foreign judgments as evidence in a new trial. The only option for a judgment creditor to enforce a foreign judgment is by commencing new proceedings in Thai courts. Even if the foreign judgment is based on the merits of the case, the plaintiff must present all key witnesses and testimony in the new proceedings. The plaintiff must show that the foreign judgment is a final judgment in the relevant foreign jurisdiction where all avenues of appeal have been exhausted. The grounds of a foreign judgment would also need to be clear.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Thailand is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. However, Thai courts may issue a letter rogatory to the foreign court to examine the witness in other jurisdictions and transmit a deposition back to a Thai court on the basis of judicial cooperation or through diplomatic channels. Likewise, the court will assist in obtaining the documentary evidence required through the same diplomatic channels for use in civil proceedings in other jurisdictions.

## ARBITRATION

### UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Thai arbitration law as codified under the Thai Arbitration Act BE 2545 (AD 2002) was generally modelled upon the UNCITRAL model, which replaced the 1987 Act. Two forms of arbitration are recognised under Thai law: in-court arbitration and institutional arbitration.

In-court arbitration is governed by the Civil Procedural Code. The parties file with the court a joint application to submit a dispute in reference or all issues pending before a court of first instance to the arbitrator for settlement.

At present, there are three well-known arbitration institutions in Thailand: the Thai Commercial Arbitration Committee of the Board of Trade of Thailand, the Thai Arbitration Institute and the Thai Arbitration Centre.

In addition, arbitration has been promoted by various government authorities to solve commercial disputes governed by special laws. For example, disputes arising from insurance agreements shall be resolved by a registered arbitrator of the Office of Insurance Commission; disputes arising from intellectual property laws shall be resolved by a registered arbitrator of the Department of Intellectual Property; and disputes arising from securities and exchange laws, provident fund laws or derivative laws shall be resolved by a registered arbitrator of the Securities and Exchange Commission.

### Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be in writing and signed by the parties, which may be in the form of a clause in contract or in the form of a separate agreement. An exchange between the parties through letters,

facsimiles, telegrams, telex, data exchange with an electronic signature or other means that provide a record of the agreements. A statement of claim or defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other also constitutes an enforceable arbitration agreement.

### Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement is silent, a sole arbitrator is appointed. If the parties are unable to agree on the arbitrator, either party may file a motion with the court requesting the court to appoint an arbitrator.

The parties may challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts as to their impartiality, independence or qualification agreed by filing a statement with the arbitral tribunal. If the challenge filed with the arbitral tribunal is unsuccessful, the challenging party may request the court to challenge. Nevertheless, no party shall challenge the arbitrator appointed except where the said party is not aware of the grounds for challenge at the time of the appointment.

### Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties may choose arbitrators from the list of arbitrators of the relevant institute. The candidates are equipped with professional experiences from various professions, such as civil and commercial law, engineering, investment, international law and communication technology, to cater for various levels of complexity of arbitration. The parties are also free to choose an unlisted arbitrator, subject to the mutual agreement of both parties; however, this is rare in practice.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Arbitral procedure is subject to the rules of the arbitration institutes selected by the parties in arbitration agreements. Where an agreement stipulates that any dispute shall be settled by arbitration without referring to specific arbitration rules, the parties may follow the rules of the institute where the claim is submitted.

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

An arbitral tribunal or a party with the consent of the majority of the arbitral tribunal may request the court to issue a subpoena or order for submission of any documents or materials during an arbitration. In addition, a party to arbitration may request the court to issue an order for interim relief before or during the arbitration proceedings. If the court is satisfied that had such proceedings been in court, the court would have been able to issue a subpoena, court orders and interim relief, the court may proceed as requested. The relevant provisions under the Civil Procedure Code apply. Furthermore, the court can make a final decision on silent matters or other matters, such as the appointment, challenging and jurisdiction of arbitrators. The court's powers cannot be overridden by agreement.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

The Thai Arbitration Act does not expressly afford arbitrators the authority to order interim relief unless the rules of the arbitration institute agreed between the parties specify the arbitral tribunal's power to award interim remedies. However, there are no formal written laws and it is uncertain as to whether the interim remedies awarded by arbitrators are enforceable.

### Award

30 | When and in what form must the award be delivered?

There is no statutory time limit within which an award must be delivered unless otherwise specified in the rules of the arbitration institute. The award shall be made in writing and signed by members of the tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority shall suffice, provided that the reason for the omission of signatures for the remaining arbitrators is stated.

### Appeal

31 | On what grounds can an award be appealed to the court?

A party may file an application for setting aside the arbitral award with the competent court within 90 days of receipt of a copy of the award or of the correction or interpretation or of an additional award.

The court shall set aside the arbitral award if the applicant can prove that:

- a party to the arbitration agreement was under some incapacity under the law applicable to that party;
- the arbitration agreement is not binding under the law of the country agreed by the parties, or failing any indication thereon, under the law of Thailand;
- the party making an application was not given proper advance notice of appointment of the tribunal or the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;
- the award deals with a dispute not within the scope of the arbitration agreement (if the award on the matter that is beyond the scope thereof can be separated from the part that is within the scope, the court may set aside only the part that is beyond); or
- the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or unless otherwise agreed by the parties.

The court shall also set aside the arbitral award if the court finds that:

- the award involves a dispute not capable of settlement by arbitration; or
- the recognition or enforcement of the award would be contrary to public policy.

An appeal against the lower court judgment under the Arbitration Act must be filed with the Supreme Court or the Supreme Administrative Court, as the case may be. Decisions of the lower court can only be appealed in the following circumstances:

- the recognition or enforcement of the award is contrary to public policy;
- the order or judgment is contrary to the provisions of law concerning public policy;
- the order or judgment is not in accordance with the arbitral award;
- the judge who sat in the case gave the dissenting opinion; or
- the order concerns provisional order measures for protection under section 16 of the Arbitration Act.

## Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The award shall only be enforced if it is subject to an international convention, treaty or agreement to which Thailand is a party, and such award shall be applicable only to the extent that Thailand accedes to be bound.

The party seeking enforcement of foreign and domestic awards is required to file an application with the competent court within three years of the day that the award becomes enforceable and produce the following documents to the court:

- an original or certified copy of the arbitral award;
- an original or certified copy of the arbitration agreement; and
- a Thai translation of the award and of the arbitration agreement by a translator who has taken an oath or who was affirmed before the court or in the presence of an official or an authorised person, or who was certified by an official authorised to certify translations or by a Thai envoy or consul in the country where the award or the arbitration agreement was made.

The court may refuse enforcement of the arbitral award, regardless of where it was made, if the party facing enforcement can prove that the award has not yet become binding, that the award has been set aside or suspended by a competent court or under the law of the country where it was made, or that there are any of other grounds for setting aside of the arbitral award.

## Costs

33 | Can a successful party recover its costs?

Unless otherwise agreed by the parties, the fees and expenses of the arbitral proceedings and the remunerations for the arbitrator, excluding attorneys' fees and expenses, are paid in accordance with the terms stipulated in the award.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

ADR options available in Thailand are out-of-court arbitration, court-annexed arbitration, court-supervised mediation, out-of-court mediation and negotiation. In 2019, Thailand passed the new Mediation Act BE 2562 (AD 2019), which allows the parties to resolve the dispute by certified mediators outside the courthouse and allows mediation to be enforced by the court if the other party does not comply with it. Furthermore, in 2020, an amendment was made to the Civil Procedure Code permitting court-supervised pre-litigation mediation to take place prior to the actual filing of the case. Importantly, these meditation processes are not subject to any court fees. If mediation is unsuccessful and the prescription period has lapsed after the filing of the application or it will lapse within 60 days of the date of the mediation's conclusion, the prescription period shall be extended for 60 days from the end of the mediation. In Thailand, parties to disputes often resolve their disputes through informal negotiations.



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## Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no requirement for the parties to consider ADR before litigation or arbitration and the court or tribunal cannot compel the parties to participate in an ADR process.

However, some specialised cases in specialised courts are required by law to have a mediation session before going to trial for the purpose of a continuous relationship between the parties, such as in family and labour disputes.

## MISCELLANEOUS

### Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

## UPDATE AND TRENDS

### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

There are no proposals for dispute resolution reform.

# United Arab Emirates

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The UAE has both onshore and offshore jurisdictions, which have distinct laws and regulations. The onshore courts, where proceedings are conducted in Arabic, operate a civil law-based system. The offshore jurisdictions, which include the Dubai International Financial Centre in Dubai (DIFC) and the Abu Dhabi Global Market in Abu Dhabi (ADGM), have their own civil and commercial laws and procedures, and their own courts.

#### UAE onshore courts

The UAE onshore courts run in two systems, federal and local. The emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system. However, Abu Dhabi, Dubai and Ras Al Khaimah maintain their own local judicial departments. Both systems have three levels of courts, which are:

- the court of first instance for both federal and local cases – this has jurisdiction over all civil, commercial, administrative, labour and personal status cases;
- the court of appeal for both federal and local cases – this represents the second stage of litigation and is competent to hear court of first instance judgments where the losing party was not satisfied and appealed the court of first instance judgment; and
- the court of cassation for local cases. All decisions of the court of cassation are final and binding and are not subject to further appeal. For federal cases, this is the Federal Supreme Court.

There are four types of court: civil courts, commercial courts, labour courts and personal status courts. The courts are divided into two circuits: the minor and major circuits. The minor circuits are formed by a single judge who hears civil, commercial and labour actions, the value of which does not exceed 10 million dirhams, counterclaims of any value, personal status claims, common money division claims and labour actions related to wages and salaries of any value. The major circuits are formed of three judges, who have jurisdiction over all civil, commercial and labour actions that do not fall within the jurisdiction of the minor circuits (plus a few other matters such as real estate and bankruptcy).

For certain types of disputes, claimants have other alternatives to the court system, such as the Insurance Disputes Settlement and Resolution Committee for most insurance disputes, the Medical Liability Committee and the Rental Disputes Committee.

During 2021, the Cabinet issued a resolution amending the Civil Procedure Code to allow the Minister of Justice (or the president or chair of the local judicial authority) to establish a single-tier court (one level of a court headed by a single judge from the Supreme Court or

the court of cassation and the two other judges an appellate judge and a first instance judge). However, the law only currently provides the framework for this, and there are still questions as to the scope of its jurisdiction and how it would work in practice.

#### UAE offshore courts

The UAE hosts two judicial free zones (DIFC and ADGM), which are independent English-language common law jurisdictions, with the DIFC having its own laws modelled on English law and the ADGM largely adopting English law.

#### DIFC

The DIFC courts have jurisdiction over most civil and commercial matters occurring within the DIFC or when expressly agreed between the parties to the dispute. The DIFC courts are divided as follows:

- The Small Claims Tribunal (SCT), which is made up of a single judge who can hear cases where the amount or value of the claim does not exceed 500,000 dirhams, relating to employment law where all parties to the claim elect in writing that it be heard by the SCT and non-employment-related claims where the amount does not exceed 1 million dirhams and all parties elect in writing for the claim to be heard by the SCT.
- The Court of First Instance, which is made up of a single judge and can hear civil or commercial cases and disputes arising from or related to a contract that has been fulfilled, or a transaction that has been carried out, in whole or in part in the DIFC, or an incident that has occurred in the DIFC; objections filed against a decision made by the DIFC's bodies, which are subject to objection in accordance with the DIFC's laws and regulations; and any application over which the court has jurisdiction in accordance with the DIFC's laws and regulations.
- The Court of Appeal, which has jurisdiction over appeals filed against judgments made by the Court of First Instance and interpretation of any article of the DIFC's laws upon the request of any of the DIFC's establishments (with leave). It comprises at least three judges, with the Chief Justice or the most senior judge presiding. This court is the highest court in the DIFC courts, and no appeal shall arise from a decision of this court.

In December 2021, the DIFC courts announced the launch of the Specialised Court for the Digital Economy aimed at simplifying the process of complex civil and commercial disputes related to the digital economy (including big data, blockchain and AI).

#### ADGM

The ADGM courts have jurisdiction over most civil and commercial matters occurring within the ADGM or when expressly agreed between the parties to the dispute. The ADGM courts have the following levels:

- The Court of First Instance, which is divided into three categories: the Small Claims Division (SCD), the Employment Division and the Commercial and Civil Division. The Commercial and Civil Division can hear appeals from the SCD based on a question of law. A party requires permission to appeal from an order or judgment in the Court of First Instance to the Court of Appeal. It comprises the Chief Justice and any judge of the ADGM courts directed to sit in that court by the Chief Justice.
- The Court of Appeal consists of the Chief Justice and any judge of the ADGM courts directed to sit in that court by the Chief Justice. It is the highest court, from which there is no further appeal.

## Judges and juries

### 2 | What is the role of the judge and the jury in civil proceedings?

#### UAE onshore courts

Judges have an inquisitorial role and maintain significant discretion. Judges at first instance are tasked with determining the facts of the case (very often through court-appointed experts, who prepare reports to assist the court) and then ruling on the law. Proceedings in the UAE are based on written pleadings of the parties, which are supported with documentary evidence where there are generally no oral hearings.

The Federal Supreme Court maintains five judges appointed by the Ruler of the UAE, after approval by the Federal Supreme Council. The judges of the Federal Supreme Court cannot be removed and their services cannot be ended except in certain circumstances.

The UAE's first female judge, HE Judge Kholoud al Dhaheri, was appointed by the Abu Dhabi Judicial Department in 2008. Since then, a number of female judges and public prosecutors have been appointed in the UAE, and these numbers are increasing annually, highlighting the UAE's continued efforts to bridge the gender gap and empower women in the judiciary.

Juries are not involved in civil proceedings before the UAE courts.

#### UAE offshore courts

On the other hand, the DIFC and ADGM courts have an adversarial system, based on the English system. DIFC courts judges, including the Chief Justice, are appointed by a decree issued by the Ruler of the UAE for a period not exceeding three years, and may be reappointed until they reach the age of 75. ADGM courts judges are nominated by the Chief Justice and subsequently appointed by the ADGM Courts Board.

## Limitation issues

### 3 | What are the time limits for bringing civil claims?

Limitation periods (the time within which a party must file a claim or commence a legal action) are set out in various laws depending on the type of claim. Generally, the limitation periods for civil claims are:

Type of claim	Limitation period	UAE law
Contracts (non-commercial)	15 years	Article 473 of the UAE Civil Code
Contracts (commercial)	10 years	Article 95 of the UAE Commercial Code
Building contracts for defects	10 years	Article 880 of the UAE Civil Code
Disputes relating to cheques	1–3 years	Article 638 of the UAE Commercial Code
Insurance disputes	3 years	Article 1036 of the UAE Civil Code
Tort (causing harm)	3 years	Article 298 of the UAE Civil Code

Type of claim	Limitation period	UAE law
Sale of goods	1 year	Article 524 of the UAE Civil Code
Employment disputes	1 year	Article 6 of the UAE Labour Law
Disputes in relation to the carriage of goods by sea	1 year	Article 287(a) of the UAE Commercial Maritime Law
Civil guarantees	6 months	Article 1092 of the UAE Civil Code
Commercial guarantees	10 years	Article 95 of the UAE Commercial Code
Rental claims (renewal rights)	5 years	Article 474(1) UAE Civil Code

There is no uniform test for triggering the limitation period. It is very important in each case to check what has triggered the limitation period – for example, whether it was triggered by the harmful act itself or by the discovery of the harmful act.

Certain statutes (eg, article 481 of the UAE Civil Code) suspend the limitation period if a party can demonstrate a 'lawful excuse' for not filing a claim within the relevant time period. What will amount to a 'lawful excuse' is not entirely clear. However, one example is incapacity on the part of the claimant. The UAE courts have also noted that that the limitation period will be suspended if it appears from the surrounding facts and circumstances of the case that there was an obstacle preventing the claim from being commenced.

For civil claims commenced in the DIFC courts, the limitation periods are:

Type of claim	Limitation period	DIFC law
Breach of contract	6 years	Article 123 of DIFC Contract Law 2004
Joint liability	3 years	Article 9 of DIFC Obligations Law 2005
Negligence, occupiers' liability or misrepresentation	15 years	Article 9 of DIFC Obligations Law 2005
Fraud	No time limit or 6 years if contract-based	Article 9 of DIFC Obligations Law 2005 and article 123 of DIFC Contract Law 2004
Employment disputes	6 months	Article 10 of DIFC Employment Law 2019

For civil claims commenced in the ADGM courts, the limitation periods are as dictated by English law (eg, for breach of contract, six years and for personal injury three years).

## Pre-action behaviour

### 4 | Are there any pre-action considerations the parties should take into account?

Although onshore UAE courts encourage the parties to attempt to resolve their disputes using methods such as mediation prior to commencing court action, this was generally not a legal requirement until very recently (see below). A few exceptions to this included: where the contract required it; in the emirates outside of Dubai, Abu Dhabi and Ras Al Khaimah, where parties to commercial disputes were required to first refer their dispute to the Reconciliation and Settlement Committee; and when a party wished to commence a claim against a public entity. In the latter case, they will require permission from the legal department of that emirate. In the case of Dubai, a party will require permission from the Ruler's Court, who will attempt to reach amicable settlement

of the dispute. If it cannot be settled within two months, the claim may proceed.

However, on 31 March 2021, the Dubai Court of First Instance issued Circular No. 2 of 2021 introducing for the first time the concept of a 'pretrial conference', a concept familiar to common law jurisdictions. The Circular provides that the pretrial conference will be held between the parties under the supervision of a judge where the parties are to discuss matters that will assist in the case being disposed of without delay – giving the examples of the possibility of settlement and expediting the trial process, narrowing down the scope of disputed issues and scheduling a procedural timetable for submission of pleadings, documents, expert reports etc.

Otherwise, traditionally, parties have not undertaken as many pre-commencement steps as they would in other jurisdictions (unless expressly required by the contract). The main reasons for this include the fact that the concept of 'without prejudice' does not operate in the UAE courts (so information used in mediation, for example, can potentially be used against you) and the lack of costs consequences (ie, courts only usually order the payment of a very nominal amount of the other side's legal fees, even if a party is unsuccessful).

Some voluntary pre-action steps that a party could take could include seeking a report from an expert frequently retained by the courts to review the evidence and present his or her views. Such a report, if favourable, could be used to attempt to persuade the other party of your position, or be used as evidential support in proceedings commenced subsequently.

In the DIFC, there are also no formal pre-action protocol procedures. However, the Rules of the DIFC Courts (the DIFC Court Rules) imply the use of alternative dispute resolution as part of the overriding objective. In the ADGM courts, the Rules provide that the court will expect the parties to have considered whether mediation might enable the settlement of the dispute prior to the commencement of proceedings, and the court may, on its own initiative or upon the application of any party, make an order referring the dispute or any part of the dispute to court-annexed mediation.

## Starting proceedings

**5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?**

To commence proceedings in the UAE, a claim must be filed at the Case Management Office of the relevant court (ie, the court that has jurisdiction to hear the dispute) either in person or online via the court's electronic portal. The claim needs to set out the basis of the dispute and the remedies sought and attach any supporting documents in Arabic or translated into Arabic by an official translator. A court fee will also need to be paid. In Dubai, the court fee is 6 per cent of the value of the claim, which is capped at a maximum of 40,000 dirhams depending on the claim value (except for labour claims which is 5 per cent of the claim value, capped at 20,000 dirhams) and in Abu Dhabi, the court fee is 5 per cent of the claim amount, which is capped at a maximum of 40,000 dirhams (except for labour claims, which do not require a court fee). Note that these are subject to change. The court bailiffs' office will then serve the claim along with a court notice on the defendant and the first hearing date will be set. This is usually two to three weeks after the claim has been filed. The UAE courts are very efficient and regular dates for pleadings, and eventually judgment, are set within short and reasonable time periods.

In the DIFC courts, proceedings are commenced by filing a form under Part 7 or Part 8 of the Rules and paying the court fee. Proceedings are commenced once the court issues a claim form at the request of

the claimant. After a claim form has been issued by the court, it must be served on the defendant by the claimant within four months after the date of issue (unless the defendant is outside of the DIFC or Dubai, in which case the claimant has six months).

The ADGM has a similar process where claims must be filed electronically and proceedings are commenced when the court issues the claim form. The claimant has a similar time to serve the proceedings on the defendant (except in the case of the Small Claims Division, where it has 14 or 21 days, depending on whether the defendant is inside or outside Abu Dhabi).

## Timetable

**6 | What is the typical procedure and timetable for a civil claim?**

Generally, in the UAE onshore courts, once a claim form is served on a defendant, the court will schedule the first hearing within two to three weeks of the date of service for the defendant to file its defence. After the defence is filed, there may be several rounds of submissions and the court may appoint an expert from its panel of experts. The expert then largely takes over conduct of the case, meets with the parties, reviews the evidence and pleadings, and issues a report to the court. The court then reviews the expert's report and will often adopt the expert's findings and issue judgment. Generally, cases are usually concluded within 12 to 18 months of their commencement.

However, this may be slightly different now in the Dubai courts with the introduction of Circular No. 2 of 2021, introducing for the first time the concept of a pretrial conference, where parties can discuss (supervised by a judge) a procedural timetable for submission of pleadings, documents, expert reports, etc.

The processes in the DIFC and ADGM courts are similar. A defendant can file an acknowledgement of service within 14 days after service of the claim form. Assuming it has done so, a defendant who wishes to defend all or part of a claim must file a defence and serve a copy on the claimant within 28 days after service of the claim form (for small claims in the ADGM, a response is required within seven days). If a claimant wishes to file a reply to the defence, it must file and serve the reply on all parties within 21 days after service of the defence. At this stage, the court may issue a summary judgment, issue directions or set a date for a case management conference depending on the case. Generally, the process is quite fast-paced and efficient.

## Case management

**7 | Can the parties control the procedure and the timetable?**

The Case Management Office controls the procedure and timetable in UAE courts. However, a party can request an adjournment of a hearing for extra time to file a proceeding or document. With the introduction of Circular No. 2 of 2021 in Dubai Courts, introducing for the first time the concept of a pretrial conference, the parties in Dubai Court proceedings may have some more control over the scheduling of a procedural timetable.

The parties in the offshore courts would have slightly more flexibility to determine the timetable (eg, the parties may attempt to agree the timetable by consent, which the court can endorse). In DIFC and ADGM courts, it is possible for the parties to request the court to issue a consent order to stay the proceedings or extend a deadline.



## Evidence – documents

### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no duty to preserve documents or other evidence pending trial under UAE law. Further, the parties are not required to share documents with one another.

The ADGM Court Procedure Rules and DIFC Court Rules contain detailed provisions on disclosure of documents, but generally, a party is only required to disclose those documents on which it relies, unless ordered by the court to do otherwise. Courts also have the power to order the preservation of evidence.

## Evidence – privilege

### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The concepts of legal-professional privilege and ‘without prejudice’ privilege do not exactly exist within onshore UAE. There are no express provisions within the law covering them, so technically a party can use any document that supports their position in civil litigation. However, UAE lawyers are bound by the duty of confidentiality to their client, so communications between them and their clients would be confidential (subject to some very limited exceptions, such as where the court requires their production).

Similar duties of confidentiality exist in the DIFC and ADGM, where lawyers are required to keep information communicated to them by their client confidential unless such disclosure is authorised by the client, ordered by the ADGM courts or as required by law. The DIFC Court Rules go further to actually define the term ‘privilege’, which is stated to be the right of a party to refuse to disclose a document or produce a document or to refuse to answer questions on the ground of some special interest recognised by law.

## Evidence – pretrial

### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

In general, the parties do not exchange written evidence from factual witnesses in UAE court proceedings. It is usual practice for the court to appoint one of their panel experts to examine the factual matters and produce a report. While such reports are not binding on the courts, they are more often than not adopted by them. The parties do, however, sometimes retain informal witnesses to assist orally during the expert process, and sometimes retain their own experts on particularly technical matters whose reports are exchanged prior to judgment.

The DIFC and ADGM courts have comprehensive rules on evidence admissibility, and it is common for the court to set dates by which the parties are to exchange witness statements. A witness who has provided a statement will be expected to attend the trial to be cross-examined. The courts can also admit expert evidence both orally and through written expert reports. Those experts will also then be required to attend for cross-examination at trial.

## Evidence – trial

### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

In the UAE onshore courts, evidence is presented through written submissions and memorandums. As the parties do not exchange written evidence from witnesses and experts, it is rare that the court would hear oral evidence. However, the parties can file an application to

the court requesting permission to present oral evidence. The application is at the discretion of the court only. In addition, courts do not hear oral arguments or submissions from lawyers.

The DIFC and ADGM courts are more akin to the English courts and allow parties to present their evidence by way of both written and oral evidence for witnesses and experts, and are often required to attend for cross-examination at trial.

## Interim remedies

### 12 | What interim remedies are available?

There are a range of interim remedies available in UAE courts, such as precautionary attachment orders to prevent dissipation of assets, travel bans to prevent a defendant from leaving the country while proceedings are ongoing and arrest orders. The granting of interim remedies is a matter for the court’s discretion and it is for the applicant to prove that the relevant requirements have been satisfied.

Both the DIFC Court Rules and ADGM Court Procedure Rules provide that they are able to grant a number of interim remedies, including:

- interim injunctions;
- interim declarations;
- property preservation and inspection orders;
- orders for the sale of property;
- freezing orders;
- disclosure and search orders; and
- interim payment orders.

## Remedies

### 13 | What substantive remedies are available?

The substantive remedy available in UAE courts, if (in the case of contract law) a party is unable to give specific performance of an obligation, is monetary damages – direct damages, loss of profits, loss of opportunity, consequential damages and even moral damages. The UAE does not recognise the concept of punitive or exemplary damages. In addition, the court can also award up to 12 per cent interest; however, 9 per cent is usually awarded.

Under the DIFC Law of Damages and Remedies, the primary substantive remedy available is damages. However, a court may also make orders for restitution, specific performance of a contract, declaration as to the rights, liabilities and obligations of a person, an injunction or any other order that the court thinks fit. The measure for damages is the amount of money that would put the person in the same position as they would have been in had they not sustained the wrong to be compensated, plus any other loss caused by the breach. The ADGM courts also have similar powers to award damages as well as make orders for injunctions or specific performance.

## Enforcement

### 14 | What means of enforcement are available?

In UAE courts, enforcement of a final judgment is dealt with by the Court of Execution. A judgment creditor must file a statement of execution with the Court of Execution, which is served on the judgment debtor, who then has 15 days to pay the judgment amount. If the judgment amount is not paid within the specified time limit, the judgment creditor may file an application with the Court of Execution requesting them to file an attachment order against the judgment debtor’s assets.

In the DIFC courts, a judgment creditor may enforce a judgment for the payment of money by a charge over property, attachment of assets, execution against assets or appointment of a receiver. In the ADGM courts, enforcing a judgment or order for the payment of money may

be done by taking control of goods, attaching of earnings, obtaining a third-party debt order, charging orders and other orders for things such as possession of land and appointing receivers.

### Public access

15 | Are court hearings held in public? Are court documents available to the public?

Technically, hearings in the UAE courts should be held in public. However, in practice, there are usually no oral hearings. The court file (containing the pleadings, judgments, etc) is not available to the public to inspect – only the parties to the proceedings and their lawyers (or another party with a power of attorney from that party) can access the file.

The general rule is that DIFC and ADGM court hearings are public unless the judge determines otherwise. DIFC and ADGM court judgments and orders can be found on their websites. In addition, the ADGM courts' website contains hearing dates and recordings of virtual hearings for some cases.

### Costs

16 | Does the court have power to order costs?

The UAE courts do have the power to order costs. However, they usually only award costs to the successful party for court filing fees, court-appointed experts' fees and a minimal amount for lawyers' fees of approximately 2,000 dirhams. There is no concept of security for costs in the UAE courts.

The general rule with respect to costs in the DIFC courts is that the unsuccessful party will be responsible for settling the successful party's costs. However, the DIFC Court Rules provide that the court must take into consideration all the circumstances when making an order as to costs, including the parties conduct. The ADGM Court Procedure Rules follow a similar framework to the DIFC with respect to costs.

### Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

UAE law prohibits conditional and contingency fee arrangements between lawyers and clients. However, conditional fee arrangements (eg, where a lawyer receives an uplift in fees in the event of success, but not a share of the proceeds) are permitted in DIFC and ADGM court proceedings but should comply with certain requirements. Contingency fee arrangements are generally prohibited in DIFC court proceedings.

UAE law does not prohibit third-party funding. However, it is still not widely used in UAE court proceedings. Third-party funding is permitted in both the DIFC and ADGM courts – see, for example, the DIFC's Practice Direction on Third Party Funding in March 2017 and Part 9 of the ADGM Court Regulations.

### Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

UAE law does not prohibit after-the-event and other types of costs insurance. However, they are not commonly used in UAE litigation, whether onshore or offshore UAE.

### Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Neither UAE onshore courts nor offshore courts have any laws or procedures for class action proceedings. However, both the DIFC and ADGM courts have the power to make a group litigation order if there are a number of claims that give rise to common or related issues of fact or law.

### Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

A party has the right to appeal court of first instance judgments to the court of appeal, generally within 30 days, and it is very common to do so. Court of appeal judgments can also be appealed to the court of cassation, generally within 60 days but only if the value of the lawsuit is more than 10 million dirhams; if there was a violation of law (a mistake in its application or interpretation); if there was an issue with the procedures or jurisdiction that effected the judgment; if there were no grounds or insufficient grounds in the judgment; or it was out of scope from what was requested.

Court of cassation judgments are final and binding and cannot be appealed. Decisions of the Insurance Dispute Committee and Medical Liability Committee can be appealed to the court of first instance within 30 days.

Both the ADGM and DIFC courts provide that decisions of the court of first instance can be appealed to the court of appeal where permission to appeal has been obtained. Permission will only be granted where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Decisions of the courts of appeal are final and binding and cannot be appealed.

### Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The UAE is a party to several agreements for judicial cooperation in relation to the reciprocal enforcement of foreign judgments between the signatory countries (some of which bind the DIFC courts as well), for example, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications. In these cases, the party seeking enforcement must apply to the Execution Court to register the judgment (with a certified and legalised copy of the judgment and proof that it is enforceable under the law of the country of origin). The Execution Court's order can be appealed to the court of appeal within 30 days.

Where no treaty or agreement exists, pursuant to articles 85–88 of Cabinet Resolution No. 57 of 2018 concerning the Executive Regulations of the UAE Civil Procedure Law, judgments passed in a foreign country may be executed within the UAE courts under the same conditions provided for by the law of the foreign country, provided that certain conditions are adhered with. An application for execution must be made in accordance with article 16 and submitted to the execution judge. The execution judge can then issue his or her order within three days so long as the following are verified:

- that the courts of the UAE are not exclusively competent in the dispute in which the judgment was rendered and that the foreign court is competent in accordance with the rules of international jurisdiction established by their law;
- the judgment is delivered in accordance with the law of the country;

- the litigants in the case in which the foreign judgment was delivered were summoned and duly represented (meaning that foreign summary judgments, for example, are not enforceable in the UAE);
- the judgment has the force of *res judicata* in accordance with the law that issued it; and
- the judgment does not conflict with a judgment or order rendered by a UAE court and does not contain anything contrary to public order.

The DIFC and ADGM courts have also signed several similar agreements and have the power to ratify foreign judgments. Once the judgment has been ratified by the court it can be enforced within the DIFC or ADGM as any other judgment would, in accordance with the court rules and regulations. Often, the DIFC courts have been used as a conduit jurisdiction to enforce foreign court judgments in Dubai (especially when the subject of the judgment has assets in the DIFC).

### Foreign proceedings

#### 22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Generally, requests for evidence from foreign courts would occur through diplomatic channels through the onshore UAE courts and would often be subject to evidence of any arrangements between the UAE court and the foreign court (such as specific treaties).

However, the DIFC and ADGM have written procedures set out for the collection of evidence for use in foreign courts (see Rules 30.65–67 of DICR Court Rules; Rules 131–134 of the ADGM Court Procedure Rules of 2016; and article 82 of the ADGM Court Regulations). The procedures appear to have been used for the first time recently in the DIFC Court of First Instance where the court allowed the examination of two UAE-based witnesses based on two requests for judicial assistance from the District Court of the State of Minnesota.

## ARBITRATION

### UNCITRAL Model Law

#### 23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes. The UAE's onshore arbitration law is set out in Federal Law No. 6 of 2018 (UAE Arbitration Law) and has brought the UAE's approach to arbitration more in line with international standards. UNCITRAL includes the arbitration laws of the UAE, namely the UAE Arbitration Law, the DIFC's Arbitration Law No. 1 of 2008 (as amended in 2013), and ADGM's Arbitration Regulations of 2015 in the list of jurisdictions that have arbitration laws based on the UNCITRAL Model Law.

### Arbitration agreements

#### 24 | What are the formal requirements for an enforceable arbitration agreement?

The main requirement for an enforceable arbitration agreement is that it be in writing, otherwise it will be void (article 7(1) of the UAE Arbitration Law, article 12 of the DIFC Arbitration Law and article 14 of the ADGM Arbitration Regulations). An arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement.

However, the UAE Arbitration Law contains an additional requirement that the person or representative signing the arbitration agreement must have the authorisation or capacity to conclude the agreement, otherwise it will be null and void (article 4(1)). The courts have taken various approaches in relation to whether a legal representative has the authority to bind the party to an arbitration clause, including requiring 'special authorisation' in the signatory's power of attorney expressly

authorising them to conclude an arbitration, and a legal presumption that the signature is that of the legal representative to that entity and they have authority to agree to arbitration.

### Choice of arbitrator

#### 25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement and relevant rules are silent on the number of arbitrators and their appointment, then:

- the UAE Arbitration Law provides that there will be three arbitrators (article 9(1)). In that case, each party will nominate one arbitrator and then those two arbitrators will nominate the third arbitrator. If one of the parties fails to nominate its arbitrator within 15 days of the notice from the other party's request, or if the appointed arbitrators fail to arrive at an agreement regarding the third arbitrator, then the court shall appoint the third arbitrator (article 11(3));
- the DIFC Arbitration Law provides that there will be one arbitrator (article 16(2)). If the parties do not agree on the arbitrator within 30 days of one party's request, then the arbitrator will be appointed by the DIFC Court of First Instance (article 17(3)); and
- the ADGM Arbitration Regulations provide that there will be one arbitrator (article 18(2)). If the parties do not agree on the arbitrator within 30 days of one party's request, then the arbitrator will be appointed by the institution administering the arbitration or if there is none, then the arbitrator will be appointed by the ADGM Court of First Instance (article 19(3)(a)).

In relation to challenging the arbitrators, all three UAE arbitration laws have similar requirements – that arbitrators can only be challenged if circumstances that give rise to serious doubts regarding their impartiality or independence exist, or if it is proven that conditions agreed upon by the parties or prescribed by the law were not satisfied. A party can only challenge for reasons they become aware of after the arbitrator's appointment (article 14 of the UAE Arbitration Law, article 18 of the DIFC Arbitration Law and article 20 of the ADGM Arbitration Regulations).

### Arbitrator options

#### 26 | What are the options when choosing an arbitrator or arbitrators?

The parties are free to elect the arbitrator they deem fit (provided that they are independent) even if not registered with any of the local institutions. The UAE has a significant pool of arbitrators to choose from – both locally and internationally – sufficient to meet the needs of even the most complex arbitrations. That said, it is still common to be seeking international expertise for the larger or more complex disputes – most often among English barristers or highly qualified civil lawyers (from both the Middle Eastern region and abroad).

### Arbitral procedure

#### 27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The UAE Arbitration Law provides that the parties may agree on the procedures to be adopted in the arbitration, including to agree that a particular institution's arbitral rules will be applicable. If there is no agreement to follow certain procedures, then the Tribunal may determine the procedures it deems appropriate in a manner not inconsistent with the principles of litigation and international conventions to which

the UAE is a party (article 23 of the UAE Arbitration Law). The DIFC and ADGM laws provide similarly.

### Court intervention

#### 28 | On what grounds can the court intervene during an arbitration?

Generally, the court's ability to intervene in UAE-seated arbitrations is more limited than it used to be before the enactment of the UAE Arbitration Law. A party can approach the court in certain circumstances – for example, a party may request the court to take necessary action to complete the formation of the tribunal if there are difficulties with arbitrator appointment (article 11) or a party can request the court to rule on the tribunal's decision as to its own jurisdiction within 15 days of that decision (article 19).

The DIFC Arbitration Law and ADGM Arbitration Regulations expressly provide that the court shall not intervene in arbitration except to the extent provided in the law – and there are a number of grounds provided in the law, similarly including in relation to the appointment of arbitrators and a review of the decision on jurisdiction.

The parties cannot generally agree to limit the court's powers of intervention unless expressly set out in the law – for example, article 23(3) of the DIFC Arbitration Law provides that the court's ability to intervene is 'subject to the process agreed between the parties'.

### Interim relief

#### 29 | Do arbitrators have powers to grant interim relief?

Arbitrators have the power, at the request of a party, to grant interim or precautionary measures that the tribunal considers fit with respect to the subject matter of the dispute, unless the parties agree otherwise (article 21 of the UAE Arbitration Law, article 24 of the DIFC Arbitration Law and article 28 of the ADGM Arbitration Regulations). The court also has these same powers. These measures include to:

- preserve evidence that may be material to the dispute;
- take necessary measures to maintain goods that constitute part of the subject matter of the dispute;
- preserve assets and property out of which an award can be satisfied;
- maintain or restore the status quo pending determination of the dispute; or
- order an action to be taken to prevent current or imminent harm or prejudice to the arbitral process or refrain from taking an action that may cause harm or prejudice to the process.

The institutional rules also often provide the tribunal with these powers – for example, the new DIAC Rules of 2022 (Appendix II – Exceptional Measures) provide that a tribunal can grant any interim relief it considers appropriate in the circumstances, including preservation of assets or security for costs.

### Award

#### 30 | When and in what form must the award be delivered?

The award must be delivered in writing and signed by at least the majority of the arbitrators.

The UAE Arbitration Law states that it must be provided within the period agreed upon by the parties. If there has been no agreement, then the award must be issued within six months from the date of the first session of arbitration (extendable by six months by the Tribunal and longer, if necessary, by the court). It must contain the names and addresses of the parties, the names, nationalities and addresses of the arbitrators, a copy of the arbitration agreement, a summary of the parties' reliefs, submission and documents, the dispositive part and (if

required) the reasons of the award, and the date and place of issuance (articles 41 and 42).

The DIFC Arbitration Law and ADGM Arbitration Regulations appear to be more flexible in this respect and do not contain a time limit within which arbitrators must issue the award. They only state that the award must contain the reasons upon which it is based unless the parties agree otherwise. They also require the award to state its date and the seat it was made, together with fixing the costs of the arbitration (article 38 DIFC Arbitration Law and article 55 ADGM Arbitration Regulations).

### Appeal

#### 31 | On what grounds can an award be appealed to the court?

Arbitral awards issued in accordance with the UAE Arbitration Law are final and binding and not subject to any supervision of the court of appeal, other than on very limited grounds. The limited grounds on which an arbitral award can be challenged or annulled are set out in article 53 of the UAE Arbitration Law. The grounds are:

- absence of an arbitration agreement (or if it is void or terminated);
- one of the parties, at the time of enforcement, lacks capacity or is of diminished capacity;
- the person lacked the legal capacity to take any action regarding the right, including capacity to enter into the agreement itself;
- if one of the parties was unable to present its case as a result of not being given proper notice of the proceedings, or the arbitral tribunal's violation of the litigation principles or for other reasons beyond its control;
- the arbitral award fails to apply the law agreed upon by the parties;
- if the composition of the tribunal or the appointment of one of the arbitrators is in conflict with the provisions of the law or agreement of the parties;
- if the arbitral proceedings are invalid to the effect that impairs the award, or if the award is rendered after the due time limit; or
- if the award deals with matters not falling within the scope of the arbitration agreement. If those matters can be separated, then the nullity affects exclusively the latter parts only.

The application to annul must be made within 30 days of notification of the award by the party requesting the annulment. The decision made by the court on this action to annul is final and not subject to any appeals (articles 53 and 54 of the UAE Arbitration Law).

The DIFC and ADGM's laws provide slightly more limited grounds for challenge (articles 41 and 57 respectively) but the applications can be made within three months of receipt of the award (not the shorter 30 days required by the onshore UAE laws). The grounds are that:

- a party to the arbitration agreement was under some incapacity, or the agreement was not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings;
- the award contains decisions beyond the scope of the submission to arbitration (if that section of the award can be separated then only that section will be set aside);
- the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, unless that agreement is in conflict with the provision of a law from which the parties could not derogate;
- the subject matter of the dispute was not capable of settlement by arbitration under its laws;
- the dispute was expressly referred to a different body or tribunal for resolution (DIFC only); or
- the award was in conflict with the public policy of the UAE.

## Enforcement

### 32 | What procedures exist for enforcement of foreign and domestic awards?

For enforcement in onshore UAE, a slightly different process applies for domestic awards versus foreign awards.

- Enforcement of domestic awards is governed by articles 52–57 of the UAE Arbitration Law. An application first needs to be made to the court of appeal to request the confirmation of the award requiring the original award or certified copy, a copy of the arbitration agreement, certified Arabic translation of the award and a copy of the transcript of filing the judgment with the court. The court then confirms and can enforce the award within a period of 60 days from the submission, unless it finds that one of the grounds for annulment is satisfied (article 55). The parties then have 30 days after the court of appeal's order to appeal to the court of cassation (article 54).
- For the enforcement of foreign awards, the procedure is set out in article 85(2) of Cabinet Decision No. 57 of 2018 (On the Regulation of Federal Law No. 11/1992 on the Civil Procedure). This is the same procedure as the enforcement of foreign judgments except for the award. It must also have been issued on a matter for which arbitration is permissible in accordance with UAE law and is enforceable in the jurisdiction in which it is issued (article 86). An application for execution must be made in accordance with article 16 and submitted to the execution judge. The execution judge can then issue his or her order within three days, so long as the following are verified:
  - that the courts of the UAE are not exclusively competent in the dispute in which the award was rendered and that the foreign tribunal is competent in accordance with the rules of international jurisdiction established by their law;
  - the award is delivered in accordance with the law of the country;
  - the litigants in the case in which the foreign award was delivered were summoned and duly represented (meaning that foreign summary judgments, for example, are not enforceable in the UAE);
  - the award has the force of *res judicata* in accordance with the law that issued it; and
  - the award does not conflict with a judgment or order rendered by a UAE court and does not contain anything contrary to public order.

Further, article 88 of the Executive Regulations states that the regulations will not prejudice the provisions of treaties, which would include the New York Convention (Recognition and Enforcement of Foreign Arbitral Awards 1958) to which the UAE is a party.

For enforcement in the DIFC and the ADGM, all awards, regardless of the state or jurisdiction in which they are made, are treated the same, with the same procedure. For enforcement of an award, a party must make an application for enforcement to that court (DIFC court if a DIFC award or ADGM court if an ADGM award). Subject to any challenges to recognition and enforcement, if the court decides to recognise the award, it will issue an order in both English and Arabic. The award creditor must then serve that court order on the award debtor and the award cannot be enforced until 14 days have elapsed or until any set-aside order has been disposed of.

## Costs

### 33 | Can a successful party recover its costs?

The UAE Arbitration Law (article 46) provides the arbitral tribunal with the power to order the payment of arbitration expenses, including the

fees and expenses incurred by the tribunal and the appointment of experts by the tribunal. The difficulty with the provision is that it does not expressly provide that arbitrators can order that the unsuccessful party pay the successful party's legal costs (which are often the largest part of the fees and expenses). Some of the institutional rules selected (such as the 2022 Dubai International Arbitration Centre Rules) expressly provide the tribunal with this power. In any case, especially where the arbitral rules are silent on the matter of legal costs (such as the Abu Dhabi Commercial Conciliation & Arbitration Centre Rules), it is best practice for parties to agree for the tribunal to have this power either in the arbitration agreement or in the terms of reference once the arbitration commences. If a third-party funder is involved, it would also be best practice for the parties to consider what would happen to those funder's costs and agree this in the terms of reference.

The DIFC Arbitration Law and ADGM Arbitration Regulations expressly provide that the arbitral tribunal must fix the costs of the arbitration in its awards, with the term 'costs' including fees of the tribunal and the reasonable costs of legal representation. Provided the tribunal orders so, a successful party can recover its reasonable costs.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

#### 34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative forms of party-instigated dispute resolution (such as mediation, conciliation and negotiation) were generally not as common in the UAE as they were in jurisdictions such as the United Kingdom and Australia. This was largely due to the fact that the concept of 'without prejudice' privilege did not exist in the UAE, meaning that parties were more reluctant to engage in without prejudice discussions for fear that what they say will be used against them in later court proceedings. However, with the new Mediation Law (Federal Law No. 6 of 2021) and Mediation Centre Law (Dubai Law No. 18 of 2021) recently introduced, the UAE is demonstrating a strong intention to push parties to consider ADR. The Mediation Law addresses the issue of privilege by providing that any materials, agreements or concessions made by parties during mediation cannot be used before any court – and also provides more robust processes for both judicial and non-judicial mediation.

There are a few alternative forms of resolution set up by the courts and also for specific industries, for example:

- in the emirates outside of Abu Dhabi, Dubai or Ras Al Khaimah, all commercial disputes must first be referred to a Reconciliation and Settlement Committee to facilitate settlement and only then can proceedings be filed in court;
- the Special Judicial Committee has exclusive jurisdiction to determine all landlord and tenant disputes;
- the Centre for Amicable Settlement of Disputes in Dubai – where disputes of a certain nature (eg, claims under 100,000 dirhams) must first be referred to the centre for settlement, or parties can elect to approach the centre before commencing proceedings;
- the Insurance Disputes Committee for some insurance-related disputes;
- the Ministry of Labour's settlement process for disputes between employer and employee; and
- dispute resolution boards and other expert determination sometimes used in the construction industry.

The DIFC court, while emphasising its primary role as a form for deciding civil and commercial disputes, encourages parties to consider the use of ADR (such as mediation and conciliation) and can also adjourn the cases to encourage parties to use ADR.

The ADGM courts provide a court-annexed mediation service, which was set up in 2016 to serve the increasing demand for mediation solutions. A dispute can be referred to court-annexed mediation either voluntarily by all parties to a dispute, or by an order of the court.

**Requirements for ADR**

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Generally, no (subject to the commercial disputes in the emirates outside of Dubai, Abu Dhabi or Ras Al Khaimah). However, the new Mediation Law means courts have the power to refer disputes to mediation at any stage of a case, provided the parties consent. Also, if the contract provides that ADR (such as negotiation or mediation) is required prior to commencing proceedings (especially arbitral proceedings), then it will be necessary to engage in that process to ensure the validity of the award.

The DIFC or ADGM court judges, if they deem it appropriate, can require parties to engage in an alternative dispute resolution process, such as mediation.

**MISCELLANEOUS**

**Interesting features**

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One of the particularly unique and interesting features of litigation in the UAE is the court’s heavy use of experts to prepare reports to assist it with its decision-making. While in other jurisdictions courts are only likely to retain experts to assist in particularly technical or difficult cases and in addition to the parties’ own experts, in the UAE, courts almost always appoint experts to review the facts and evidence and produce a report containing their findings. Although the reports are not binding, often these expert findings are adopted by the courts.

**UPDATE AND TRENDS**


**Recent developments**

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The most significant change in the arbitration landscape in the UAE during the past year has been Decree No. 34 of 2021, which abolished the Dubai International Financial Centre in Dubai (DIFC) Arbitration Institute (DIFC-LCIA) and the Emirates Maritime Arbitration Centre. The Decree provided that the Dubai International Arbitration Centre (DIAC) was to substitute the abolished centres (including the DIFC-LCIA) – and one of the objectives of the Decree was to strengthen the position of the Emirate of Dubai as a reliable global centre for the settlement of disputes and enhance the position of the DIAC as one of the best choices for disputing parties to resolve their disputes efficiently and effectively.

The Decree made clear that existing DIFC-LCIA arbitrations would continue, but the DIAC would administer those arbitrations, and existing arbitration agreements referring to DIFC-LCIA arbitrations would also remain valid and effective, but they would also be administered by the DIAC.

In March 2022, the DIAC released its new arbitration rules, which apply to all arbitrations referred to the DIAC after 21 March 2022. The main changes between the new DIAC Rules and the old ones include:



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- that multiple arbitration proceedings can be consolidated into a single arbitration, and a party can also submit a single request for arbitration in respect of claims arising out of multiple arbitration agreements;
- third parties can be joined to proceedings as additional claimants or respondents, in certain circumstances;
- proceedings can be expedited (ie, an award issued within three months of filing) where either the sums claimed are less than 1 million dirhams, the parties agree or in cases of exceptional urgency;
- the DIFC is now the default seat of arbitration where the agreement does not specify a seat or venue; and
- lawyers’ fees can now be recovered.

Separately, there have also been welcome additions to Dubai’s onshore and offshore court systems to specifically deal with advancements in technology and finance – with the creation of new courts (within Dubai’s commercial court) to expedite resolution of disputes related to securities (shares, bonds, financial instruments, etc), together with a new specialist court for the ‘digital economy’ in the DIFC dealing with a variety of fields including big data, blockchain and AI. These developments show the initiative of Dubai’s government to have its judicial system keep up with the digital and financial transformation processes.

Finally, the introduction of the Mediation Law in 2021 has also brought Dubai more in line with other jurisdictions, encouraging alternative forms of dispute resolution and amicable settlements through the introduction of more robust and protective rules around mediation and conciliation.



# United States – California

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

In the United States, there are parallel state and federal court systems, consisting in each case of a trial court, an intermediate appellate court and a Supreme Court. Although there are important differences between the two systems, the focus of this chapter is the California state court system.

The trial court in the state court system is the Superior Court. Each county in the state has its own set of Superior Courts. These are the courts of primary jurisdiction for all civil disputes involving amounts in controversy in excess of US\$25,000. See the California Code of Civil Procedure (CCP), section 86.

Trials and pretrial matters are generally supervised by a single, all-purpose Superior Court judge who is assigned to the case at the inception of the proceeding. Litigants have the ability to exercise one peremptory challenge to the assignment of such a judge.

The next level up is the California Court of Appeals, which is the state's intermediate appellate court. There are six districts of the Court of Appeals, which have jurisdiction over appeals arising from the Superior Courts located within certain geographic regions of the state. Thus, for example, the Second Appellate District is the appellate district that handles appeals arising from the Los Angeles Superior Courts.

Each appellate district may be further subdivided into divisions, which are individual units of three-judge panels who hear appeals. Thus, an appeal from a judgment rendered by the Los Angeles Superior Court will mandatorily be heard by one of the divisions of the Second Appellate District.

The California Supreme Court represents the top level of appellate review in California. 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.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

The traditional distinction between the role of the judge and jury in civil matters is that, while the jury determines all issues of fact, the judge controls all issues of law. The judge exercises this function, in part, by ruling on jury instructions and on motions for directed verdict or non-suit.

During the course of the trial, the judge is permitted to ask questions of witnesses, although most judges exercise this right sparingly.

Unlike the practice in many civil law countries, the judge does not perform an inquisitorial or fact-finding role during a civil trial.

The right to a jury trial in a civil matter is guaranteed under both the US and California Constitutions. The principal exceptions are where the underlying right or claim is equitable in nature or where the parties have stipulated to arbitration or some other recognised alternative dispute resolution (ADR) procedure. Importantly, and in the absence of an enforceable arbitration provision, pre-dispute jury trial waivers are not enforceable in California. See *Grafton Partners, LP v Superior Court* 36 Cal 4th 944 (2005). Even where the parties' contract contains a choice of law providing for the application for the law of another state, and where the law of that other state permits pre-dispute jury trial waivers, California courts will still decline to enforce pre-dispute jury waivers. *Rincon EV Realty LLC v CP III Rincon Towers, Inc*, 8 Cal App 5th 1 (2017).

Judges who sit on the state court's trial bench (the Superior Court) 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.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

California's CCP sets out the limitation periods that apply to particular claims or causes of action. For example, under section 339(1) of the CCP, an action for negligence is governed by a two-year statute of limitations. By contrast, an action for breach of a written contract is governed by a four-year statute of limitations as provided by section 337 of the CCP.

Importantly, these time limitations may have different rules pertaining to the accrual of the limitations period. For example, a cause of action for breach of contract generally begins to run from the time of breach, irrespective of whether the plaintiff had actual or constructive knowledge of the breach. By contrast, some causes of action in tort do not accrue until the plaintiff either knows or should have known of the underlying injury or circumstances giving rise to the claim.

Parties may suspend, or toll, the running of particular statutes of limitation by agreement. Thus, it is not uncommon for parties who are exploring settlement to enter into a 'tolling agreement', whereby the running of the statutes of limitations is tolled during the time such an agreement remains in effect.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

Normally there are no prerequisites to filing suit. However, certain pre-action steps may be required to be undertaken by a plaintiff because of the nature of the claim or the underlying agreement.

Some kinds of civil claims, including those against government entities such as cities, counties and the state, require that the plaintiff assert an administrative claim, and have that claim denied, before bringing a civil suit. In addition, the pursuit of certain employment claims sometimes requires that the former employee obtain a 'right to sue' letter from the California Labor Commissioner.

Alternatively, there may be pre-suit requirements set out in the parties' underlying contract or agreement. For example, a loan agreement or promissory note may require that the payee or beneficiary give the borrower or obligor a written demand for payment, and an opportunity to cure, before filing suit. Other agreements may require pre-suit mediation or resort to some other form of ADR before bringing civil litigation.

As to orders at the inception of a case concerning disclosure of documents, witnesses or other information, this is an area where state and federal practice differ.

Under state court practice, the disclosure of documents, witnesses and other information is generally controlled by the discovery process – that is, the party seeking the production of documents, the identification of witnesses or other information is obliged to serve formal requests concerning same on the adverse party.

In federal court, by contrast, rule 26 of the Federal Rules of Civil Procedure requires voluntary disclosure near the inception of a case (and in any event before either side may commence formal discovery) of the documents on which a party will rely; the names and identities of key witness; and other basic information that is supportive of the underlying claim or defence. Although this disclosure under rule 26 may be supplemented, documents or witnesses not disclosed by a party through this means may be excluded at trial.

For both claimants and defendants, all litigants must maintain and preserve electronic records, including emails. The failure of a party-litigant to preserve those records, and the consequent loss of those records, could result in the court giving a jury instruction concerning spoliation of evidence, which could adversely affect that party-litigant's credibility in the eyes of the jury.

For parties who are sued in state court, an initial strategy call will be whether there are any opportunities to change the forum for the litigation. Defendants ought to evaluate whether there are any opportunities to have the case sent to arbitration; removed to a federal court; or transferred to a court in another jurisdiction. Defendants should also consider at the outset of litigation whether there are any coverage opportunities under any policies of liability insurance.

For parties initiating litigation, the selection of forum is critical at the outset. In addition, plaintiffs need to give consideration at the outset to the availability of provisional remedies, such as injunctions and prejudgment attachment, as the issuance of such provisional remedies often has an outcome-determinative impact on the course of the litigation.

## Starting proceedings

- 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A civil action is commenced by filing suit and causing the summons and complaint to be served on the defendants. Parties joined as defendants in a civil action in California generally learn of the pendency of the suit when they are formally served with the summons and complaint. Under California Rule of Court 3.110(b), service of the complaint must be accomplished within 60 days after the filing of the complaint, and proof of service attesting to same must be filed with the court within that time period.

The state court system in California has been facing chronic fiscal problems for a number of years. This has resulted in judges pushing civil cases into mediation or other forms of ADR in an effort to relieve this pressure on the court's docket. By contrast, the accepted wisdom is that the dockets of California's federal courts are not as congested. In addition, it is widely believed that federal court judges are more inclined to dispose of cases before trial by way of granting motions to dismiss or motions for summary judgment.

## Timetable

- 6 | What is the typical procedure and timetable for a civil claim?

Under the CCP, the plaintiff in a civil suit must effectuate service of the summons on the defendant within 60 days after the filing of suit. Following the effectuation of service, the plaintiff may commence discovery against the defendant after the passage of a statutory 10-day hold period, which itself can be modified by the court (see CCP section 2031.020(b)).

Early on in the proceeding, the court normally holds a case management conference (CMC) at which the trial date and various pretrial dates and deadlines may be set.

In Los Angeles Superior Court, the timeline to reach trial is approximately 16 to 18 months after the filing of a civil complaint.

## Case management

- 7 | Can the parties control the procedure and the timetable?

The parties, through their counsel, will have input at the CMC concerning the setting of trial and pretrial dates, but ultimately the judge will have the final say concerning both the setting of those dates and the pace at which the action proceeds to trial.

## Evidence – documents

- 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

In federal court cases, the parties are mandated under rule 26 of the Federal Rules of Civil Procedure to exchange documents early in the case. By contrast, there is no such requirement in state court practice for the voluntary exchange of documents at or near the inception of the case. Instead, production of documents in state court practice is generally governed by formal discovery.

There is a duty on the part of parties to preserve evidence, especially electronically stored information (ESI), when a claim is asserted or a suit is brought. Based on recent appellate precedent, most notably *Zublake v UBS Warburg* (217 FRD 309 (2003)), parties have an affirmative obligation to preserve ESI once litigation is filed (and in some circumstances even before that), and a failure to do so can have catastrophic consequences.

Even as to information or documents not consisting of ESI, a party could face a claim of spoliation of evidence if that party fails to preserve evidence pending trial. Such a claim could be asserted either by way of an affirmative cause of action or, more commonly, by the adverse party either commenting to the jury on, or obtaining a jury instruction about, that failure to preserve evidence. In either event, such failure to preserve evidence pending trial could create enormous substantive and atmospheric problems for the party who fails to preserve such evidence.

Importantly, and as regards ESI, a California lawyer's responsibility is not fully discharged by simply instructing a client to comply with e-discovery rules. The duty extends to the attorney's obligation to make sure that the client follows through thoroughly with respect to the disclosure and production of such evidence. See, for example, Formal Opinion

No. 2015-193 of the Standing Committee on Professional Responsibility of the California State Bar.

### Evidence – privilege

#### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are both common law and statutory privileges that apply to evidence in the form of documentary evidence and testimony. The most notable of these privileges is the attorney–client privilege, which is codified in California Evidence Code section 950 et seq.

Where this privilege is invoked in connection with the production of documents, the party invoking the privilege must ordinarily supply the other side with a ‘privilege log’ that identifies the documents withheld on this ground by date, author, recipient and, in some cases, subject matter. See CCP section 2031.240 and *Hernandez v Supreme Court* [112 Cal App 4th 285, 291–292 (2003)]. The furnishing of such a ‘privilege log’ is required so that the party who has propounded the document request will have the ability to test the application of the privilege in respect of particular documents. Where the parties are unable to informally resolve their disputes concerning the application of the privilege, the court or a discovery referee may sometimes conduct an in camera review of the documents. Importantly, the California Legislature in 2017 amended CCP 2016.080 to authorise the use of informal, court-supervised discovery conferences to streamline the process of enforcing rights to civil discovery.

The advice of in-house counsel is normally privileged from disclosure by the attorney–client privilege. In some cases, however, in-house counsel will serve both a legal and non-legal role. In those cases, the court will often have to ascertain the predominant role that individual was serving before determining the application of the privilege. See *Chicago Title Ins Co v Supreme Court* [174 Cal App 3d 1142, 1151–1152 (1985)].

There is another privilege that is becoming increasingly significant in California. Cal Evidence Code section 1119 bars the introduction of anything said, or anything communicated in writing, if the statement was made, or the writing was prepared ‘for the purpose of or in the course of a mediation’. The California Supreme Court has ruled in *Cassel v Superior Court*, 51 Cal 4th 113 (2011) that this privilege trumps a client’s ability to sue his or her lawyer for malpractice on account of the lawyer’s alleged conduct during the course of a mediation. In 2017, the California Law Revision Commission proposed a recommendation to the government that mediation confidentiality not be applied for purposes of supporting or defending a claim of attorney malpractice connected to the mediation.

In 2019, a new statute came into force with regard to mediations. The statute requires an attorney representing a client participating in a mediation to provide that client with a written disclosure. That disclosure, which must be signed by the client prior to the commencement of mediation, must contain the confidentiality restrictions pertaining to mediation that are contained in California’s Evidence Code.

### Evidence – pretrial

#### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Witness lists and trial exhibits (other than those for impeachment) are normally exchanged shortly before trial. The parties are not required to identify the expected subject matter of any of the anticipated trial testimonies of the witnesses.

In the case of expert witnesses, CCP section 2034 governs their identification and disclosure. In brief, any of the parties to a civil lawsuit may issue an expert witness ‘demand’ to the other parties. The issuance

of such a demand requires all parties to identify any expert witnesses they anticipate calling in the case and to specify the subject areas of each expert’s anticipated testimony. Except in very narrow circumstances, experts not properly identified in response to a party’s ‘demand’ will not be permitted to testify at trial.

In 2019, California’s Code of Civil Procedure, which governs procedures in state trial court, was amended to allow parties to stipulate to an initial disclosure requirement modelled after rule 26 of the Federal Rules of Civil Procedure.

If the parties opt in by stipulation to this requirement, they would be required to exchange information at the inception of litigation. That information will include the identity of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defences; a copy or description of all documents, including electronically stored information, that the disclosing party has in its possession, custody or control that may be used to support its claims or defences; insurance agreements; and indemnification agreements.

This new state court procedure is triggered only by agreement of the parties, whereas the disclosure requirements under rule 26 of the Federal Rules of Civil Procedure are mandatory.

### Evidence – trial

#### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence at trial is presented by oral testimony of witnesses, including experts. In addition, evidence at trial usually also includes documentary evidence.

The plaintiff normally presents its case first, which is then followed by the defendant’s case. Rebuttal evidence is then presented after the defendant’s case.

### Interim remedies

#### 12 | What interim remedies are available?

There are several prejudgment remedies available in civil cases in California.

Where the plaintiff sues in contract for a liquidated amount, the plaintiff may apply for a writ of attachment. This is a prejudgment remedy that operates to create a lien on some of the defendants’ assets pending the conclusion of trial. Thus, if a writ of attachment is levied on a defendant’s bank account, only the sums in that account over and above the amount of writ will be available for the defendant’s use pending trial.

A party seeking a writ of attachment will typically at the same time request the issuance of a temporary protective order (TPO). The TPO enjoins a defendant from transferring, hypothecating or pledging a particular piece of property (which is often also the subject of an accompanying attachment application) pending the outcome of the case.

There are various instances where the appointment of a receiver is indicated. For example, where a loan secured by real estate is in default, the lender will often bring suit for judicial foreclosure and seek the appointment of a receiver. In such instances, the appointment of a receiver will effectively divest the borrower of control over the real estate collateral pending the outcome of the suit.

Finally, various forms of injunctive relief are also available in civil lawsuits, although the *Mareva* order, or ‘freeze order’, available in UK courts is not available in California. By contrast, the attachment and TPO remedies discussed above run only against specific items of property. In addition, and again unlike a *Mareva* order, prejudgment or interim remedies issued by US courts are typically not enforced by their foreign counterparts with respect to property located in other jurisdictions.

## Remedies

### 13 | What substantive remedies are available?

The typical remedies available in civil proceedings are money damages, injunctive relief and declaratory relief.

The court's award of money damages may also include recovery of costs (which are normally recoverable as a matter of right by statute), prejudgment interest (also recoverable as a matter of right by statute where the amount of the money damages was in a liquidated amount at the time of filing) and attorneys' fees (but only where the recovery of attorneys' fees is authorised by the parties' contract or available by statute). Punitive damages are also recoverable, but only in tort actions or where otherwise available by statute. In this regard, recent decisions of the US Supreme Court have placed constitutional limits on the permissible amount of punitive damages in relation to actual damages.

## Enforcement

### 14 | What means of enforcement are available?

A distinction must be made between disobedience or non-compliance with a money judgment and disobedience or non-compliance with a court order requiring that a party does, or refrains from doing, certain things.

There is no sanction for a party's failure to satisfy a money judgment. Instead, the judgment creditor has certain rights to levy execution or otherwise enforce a money judgment, but the judgment debtor incurs no direct sanction for resisting such enforcement efforts.

The disobedience of a court order requiring that a party does, or refrains from doing, certain things, however, subjects the non-complying party to the possibility of contempt. In this regard, contempt proceedings are quasi-criminal in nature, and the non-complying party may be subjected to fines or imprisonment, or both, for its disobedience.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

Except in extraordinary circumstances, civil proceedings are open to the public, as are the pleadings or other court filings in a civil action, which are available to public view, inspection and copying. Thus, in keeping with the strong public policy favouring access to court records, judicial records may be sealed only if the court finds 'compelling reasons'; see, for example, *Pintos v Pac Creditors Ass'n*, 605 F3d 665, 677-78 (9th Cir 2010). In this regard, a litigant's desire to avoid embarrassment or annoyance caused by public disclosure of court records is not considered to be a sufficiently compelling reason to warrant the sealing of the record of legal proceedings (*Oliner v Kontrabecki*, 745 F3d 1024 (9th Cir 2014)).

In some cases, the parties will seek to 'seal' some or all of their pleadings or court filings. In some cases, this is done to shield trade secrets or other proprietary information from public disclosure. The procedure for filing pleadings under court seal is set out in the California Rules of Court.

## Costs

### 16 | Does the court have power to order costs?

Costs incurred by a prevailing party in civil litigation are recoverable as a matter of right in California (see CCP section 1032). Those costs are claimed by the prevailing party by filing a cost bill following entry of judgment. Importantly, the costs recoverable under this procedure are limited in nature (for instance, filing and motion fees), and do not

normally include attorneys' fees, which are only recoverable where specifically authorised by statute or the parties' underlying agreement.

Section 1030 of the CCP permits the superior court to order a non-resident plaintiff (including a foreign corporation) to post a bond to secure the payment of the defendant's costs and attorneys' fees. The threshold requirement for obtaining such relief is relatively low, namely that the plaintiff resides out of state or is a foreign corporation, and there is a 'reasonable possibility' that the defendant will prevail. The purpose of this provision is to enable a California resident to secure the recovery of its costs (and, where authorised, its attorneys' fees) against an out-of-state or foreign plaintiff. Although CCP section 1030 is a state statute, the federal courts have the inherent power to require plaintiffs to post security for costs and typically follow the forum state's practices in this area.

In a recent development, the California Supreme Court decided that a party who is dismissed from a lawsuit pursuant to a settlement agreement is entitled to the recovery of statutory costs under CCP section 1032(a)(4). See *DeSaulles v Community Hospital of the Monterey Peninsula*, 62 Cal 4th 1140 (2016).

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingent fee agreements are authorised in California. Those agreements typically allow counsel for a prevailing party to share in some percentage of that party's recovery.

Third-party litigation funding arrangements are also permitted. Under such an arrangement, a third party will provide financing to the plaintiff or its counsel for the prosecution of the lawsuit in exchange for a percentage interest in the recovery.

Although no appellate cases in California have directly addressed these issues, other state courts have expressly found that third-party funding arrangements are enforceable and do not violate the early common law prohibition on champerty. See, for example, *Charge Injection Technologies v DuPont*, 2016 Del Super LEXIS 118. Indeed, another Delaware case, *Carlyle Investment Management LLC v Moonmouth Company, SA*, 2015 Del Ch LEXIS 42 held that communication between a claimant and a litigation funding firm is subject to protection from discovery by reason of the work product doctrine.

Finally, a group of US Senators have introduced proposed new legislation concerning litigation funding arrangements. That proposed legislation would mandate disclosure of both the existence and terms of any litigation funding agreements in any federal class action or multi-district litigation.

## Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

There are various forms of liability insurance that may provide for both the funding of a party's defence in a lawsuit and any indemnity payment that an insured party may make – for example, a payment in settlement or a payment to satisfy a judgment.

Typical forms of such liability insurance include commercial general liability (CGL) insurance and directors' and officers' (D&O) liability insurance. Where it is triggered, CGL insurance usually obligates an insurer to defend its insured in the litigation and also to pay those amounts (within the policy limits) that its insured becomes legally obliged to pay. By contrast, D&O insurance usually provides reimbursement to an insured entity for sums advanced by that entity for the defence of its directors and officers.

Importantly, as a matter of both statute and public policy, punitive damages are not insurable under California law. Thus, even though a liability carrier may be obliged to defend its insured in respect of all causes of action (whether covered or uncovered) that are asserted against its insured (*Buss v Superior Court*, 16 Cal 4th 35 (1997)), the liability carrier will ordinarily issue a 'reservation of rights' as to those claims that include a request for punitive damages or that are otherwise not covered under the policy.

In 2014, the California Supreme Court issued an important decision that limited an insurer's duty to defend advertising injury claims (*Hartford Casualty Ins v Swift Distribution*, 59 Cal 4th 277 (2014)).

## Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions are permitted in California. Class litigation is permitted where the following are applicable:

- commonality – there must be one or more legal or factual claims common to the entire class (in some cases, it must be shown that the common issues will predominate over individual issues, such as the amount of damages due to a particular class member);
- adequacy – the representative parties must adequately protect the interests of the class;
- numerosity – the class must be so large as to make individual suits impractical (in other words, that the class action is a superior vehicle for resolution than numerous individual suits);
- typicality – the claims or defences must be typical of the plaintiffs or defendants. See *Vasquez v Superior Court* [4 Cal 3d 800 (1971)]; and
- ascertainability – there is some case authority suggesting that a class should not be certified unless its members are 'ascertainable'. See *Xavier v Phillip Morris USA, Inc*, 787 F Supp 2nd 1075, 1089 (ND Cal 2011).

In addition to the state court rules, there is a federal statute, the Class Action Fairness Act of 2005 (CAFA), which is found at United States Code (USC) sections 1332(d), 1453 and 1711–1715. This statute expands federal subject matter jurisdiction over certain large class action lawsuits. As a general matter, this statute allows removal to federal court of certain class actions that are originally filed in state court. The principal purpose of the statute is to curtail 'forum shopping' by plaintiffs in friendly state courts by expanding federal subject-matter jurisdiction.

In a recent case, CAFA's 'mass action provision' was applied where numerous individual actions were sought to be coordinated under applicable state court procedures. In the case, the Ninth Circuit held that

the action was properly subject to removal to federal court (*Corber v Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir 2014)).

## Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Under state procedural rules, there is an automatic right to appeal an appealable order or judgment. Where the underlying order is not directly appealable, such as a discovery order or an order denying a motion for summary judgment, a party may seek discretionary appellate review by way of a petition for writ of mandate. Because such petitions are rarely granted, the main avenue for obtaining appellate review is by way of a direct appeal, which is usually prosecuted at the conclusion of a civil action.

Even though parties to a civil case may have an automatic right to seek appellate review, the scope of appellate review is often quite narrow. Thus, an appellate court will not ordinarily engage in an independent weighing of the facts, evaluation of the evidence or gauging of the credibility of the witnesses. Thus, appellate review from a judgment following a jury verdict will often be limited to alleged errors of law committed by the trial court, such as errors in the jury instructions. By contrast, where the issue is one of pure law, such as an appeal following the granting of summary judgment, the standard of review will be that of de novo review – that is, the Court of Appeal will review the matter in the first instance and will not be bound by the determinations of the lower court.

## Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

As to the enforcement in the US of money judgments that have been issued by foreign courts, California has adopted the Uniform Foreign Money Judgment Recognition Act of 1962. See CCP section 1713 et seq. That statute allows a party who has been awarded a final money judgment by a foreign court to apply for recognition of that judgment in the United States. Once recognition has been obtained, the judgment may be enforced in the same manner as a judgment issued by a US court. According to its terms, this statute applies to any foreign money judgment that is final, conclusive and enforceable where rendered even though an appeal may be pending or the judgment is subject to appeal. However, there are several enumerated grounds for non-enforcement of a foreign money judgment.

## Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The controlling statute here is a federal statute 28 USC section 1782. In brief, that statute provides that a US district court may entertain a request from a litigant involved in a pending foreign proceeding to compel a person residing within the district court's jurisdiction to provide testimony or produce documents for use 'in a proceeding in a foreign or international tribunal'. As the foregoing statute is federal in nature, the applicable case law in this area derives entirely from litigation in the federal courts. Put differently, California's superior courts effectively have no role in the area of compelling the production of testimony or documentary evidence in aid of litigation pending outside the United States.



## ARBITRATION

### UNCITRAL Model Law

#### 23 | Is the arbitration law based on the UNCITRAL Model Law?

No. 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.

### Arbitration agreements

#### 24 | What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate a dispute is typically embodied in a provision in a written contract between the parties. See CCP section 1281.

In this regard, the US Supreme Court decision in *AT&T Mobility v Conception*, 563 US 321, 131 S Ct 1740 (2011) held that the Federal Arbitration Act (the FAA) pre-empts state laws that prohibit outright the arbitration of particular types of claims. Recent California appellate decisions have applied the Court's ruling in *Conception* to enforce agreements to arbitrate (*Iskanian v CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348 (2014) (FAA pre-empts prohibition of class action waivers in employment cases)). However, *McGill v Citibank, NA*, 2 Cal 5th 945 (2017), declared pre-dispute arbitration provisions that waive the right to seek public injunctive relief – namely injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public – to be unenforceable.

There is also an important decision from 2020. In *Victrola 89, LLC v Jaman Properties 8, LLC*, B295439 (Cal Ct App 2020), the court made clear that parties can provide that their agreement to arbitrate will be subject to the Federal Arbitration Act (FAA) in lieu of state court procedural rules. In that case, the pertinent agreement provided that 'enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act'. In these circumstances, the court concluded that the moving party's motion to compel arbitration would be governed by the FAA instead of state procedural rules.

This decision is important because it sanctions the use of the arbitration-friendly FAA rules in lieu of state procedural rules where the parties expressly provide for that. In view of the perceived hostility on the part of California appellate courts toward the enforcement of pre-dispute arbitration provisions, this decision provides a basis for increasing the likelihood that such provisions will in fact be enforced.

The appellate courts in California are also coming to grips with the enforceability of 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). See also *Norcia v Samsung Telecommunications*, 845 F3d 1279 (9th Cir 2017) (consumer not bound by arbitration provision contained in warranty sheet accompanying product).

Another issue that the appellate courts in California have dealt with is whether non-signatories to an agreement containing an arbitration provision are bound by, or can themselves enforce, the agreement to arbitrate. The key cases in this area included *Garcia v Pexco, LLC*, 11 Cal App 5th 782 (2017) (agent may bind principal to terms of arbitration agreement); *Hutcheson v Eskaton Fountainwood Lodge*, 17 Cal App 5th 937 (2017) (relative holding healthcare power of attorney not authorised to bind principal to arbitration agreement); and *Jensen v U-Haul Co. of California*, 18 Cal App 5th 295 (2017) (employee was not third-party beneficiary of rental contract and therefore arbitration provision contained therein could not be enforced). See also *Vasquez v San Miguel Produce*, 31 Cal App 5th 810 (2019), rehearing granted (28 February 2019) (an agency or similar relationship between a signatory and one of the parties to an arbitration agreement allows enforcement of the agreement by the non-signatory).

Finally, there have been two highly significant legislative developments in California affecting arbitration.

Assembly Bill 51, signed by California Governor Gavin Newsom in October 2019, prohibits employers from requiring mandatory arbitration agreements from employees. Although enforcement of this new law has been temporarily stayed, its enactment underscores the Californian government's hostility to mandatory arbitration, especially in employment and consumer-related disputes.

Senate Bill 707, also signed by Governor Newsom in 2019, provides that in the context of employment disputes that are governed by arbitration, employees cannot be required to bear any type of legal costs or expenses incident to the arbitration process. This new law also provides that an employer's failure to pay those arbitration costs or expenses will constitute a material breach of the arbitration agreement.

### Choice of arbitrator

#### 25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the parties' agreement is silent on this point, then the selection and number of arbitrators is ordinarily determined by reference to the arbitral organisation's procedural rules on that subject. In the absence of such rules, CCP section 1282(a) provides for the appointment of a single neutral arbitrator.

As to the parties' right to challenge the appointment of a particular arbitrator, the arbitral organisation's procedural rules will likewise typically address both removal for cause and the right of either party to exercise a peremptory challenge. In the absence of such rules, CCP section 1281.91 sets forth the grounds for the disqualification of an arbitrator.



## Arbitrator options

### 26 | What are the options when choosing an arbitrator or arbitrators?

Selection of arbitrators can be governed in a particular case by at least two sets of rules.

First, the controlling arbitration clause may itself (and typically does) specify how many arbitrators are to be selected and the manner of their selection. In addition, the rules of the particular arbitral organisation (eg, JAMS, International Chamber of Commerce (ICC)) 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.

## Arbitral procedure

### 27 | Does the domestic law contain substantive requirements for the procedure to be followed?

As noted above, both the FAA and the California Arbitration Act address such matters as the enforcement of arbitration provisions found in the contract or agreement between the parties, and also the enforcement of awards rendered after arbitration. As the procedural outcomes under these two statutes may be quite different, practitioners should exercise care in drafting the language in the underlying agreement that contains the arbitration provision.

In this regard, there continue to be unresolved conflicts between state and federal courts concerning issues such as whether state or federal procedures govern the enforcement of arbitration agreements in State Court (*Los Angeles Unified School District v Safety National Casualty Corporation*, 13 Ca App 5th 471 [2017]) and whether state substantive law that disadvantages arbitration is trumped by the FAA (*Kindred Nursing Centers Limited Partnership v Clark*, 197 L Ed 2nd 806 [2017]).

Importantly, California does not recognise or enforce pre-dispute jury trial waivers. Indeed, in a case in October 2019, the California Court of Appeal declined to enforce choice of law and choice of forum provisions in a commercial contract on the ground that such enforcement would lead to the forfeiture of a California resident's right to a jury in connection with a civil dispute *Handoush v Lease Finance Group, LLC*, 41 Cal App 5th 729 (2019). The case highlights the sanctity of the right to jury trial, which is safeguarded in both the US and California state constitutions.

## Court intervention

### 28 | On what grounds can the court intervene during an arbitration?

Normally, once a matter has been sent to arbitration the role of the court is usually limited to proceedings to confirm or vacate an arbitration award. Resort to court process is allowed where a party to an arbitration seeks interim remedies, such as injunctive relief.

## Interim relief

### 29 | Do arbitrators have powers to grant interim relief?

Depending on the rules of the arbitral organisation, interim relief can be granted in arbitration. Interim relief can be requested from an emergency arbitrator (providing the arbitral organisation allows for such), the arbitral panel itself or the national courts of the country where the arbitration is held.

The key determinant as to the availability of such relief is the language of the arbitration agreement itself, namely, whether it confers power on the tribunal to grant interim measures.

In the absence of such a provision, the CCP contains a carve-out that allows a party to an arbitration proceeding to seek provisional relief in the Superior Court, including the proviso that an application in court for such provisional relief does not waive the applicant's right of arbitration. (See CCP sections 1281.8(b) and (d).)

## Award

### 30 | When and in what form must the award be delivered?

The rules of the arbitral organisation usually specify both the form and the timing of the arbitral award.

In the absence of such rules, CCP section 1283.4 provides that the award must be in writing and include a determination of all the questions submitted to the arbitrators for determination of the controversy. In addition, CCP section 1283.3 provides that the award shall be made within the time fixed in the parties' agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration.

## Appeal

### 31 | On what grounds can an award be appealed to the court?

Appellate review of an arbitration award is extremely limited. In the first instance, an arbitration award must be 'confirmed' by the superior court. This means that following the conclusion of the arbitration proceeding, the prevailing party must petition the superior court to 'confirm' the arbitration award, that is, enter it in the form of an enforceable judgment (see CCP section 1285).

In the overwhelming number of instances, the superior court will 'confirm' the arbitration award and enter it as an enforceable judgment. This is because the grounds for vacating (or declining to 'confirm') the award are extremely limited. See CCP section 1286.2. Thus, an arbitration award will not be vacated even where an arbitrator made errors of fact or errors of law. See *Moncharsh v Heily & Blase* (3 Cal 4th 1 [1992]). Put simply, the superior court does not engage in an evaluation of the merits of the controversy when making its determination to confirm an arbitration award. But see *Aspic Engineering and Construction v EEC Centcom Constructors*, 913 F3d 1162 (9th Cir 2019) (where arbitrator's award fails to draw its essence from the parties' underlying agreement, vacation of award is proper).

By contrast where an arbitration agreement provides that the arbitrator's decision may be reviewed by the Superior Court for errors of fact or law, the scope of review will be broader than as otherwise provided under CCP 1286.2. See *Harshad & Nasir Corporation v Global Sign Systems, Inc*, 14 Cal App 5th 523 [2017].

As to whether an order granting or denying a petition to compel arbitration is appealable, the general rule in both state and federal courts is that an order compelling arbitration is not appealable (*Johnson v Consumerinfo.com, Inc*, 745 F3d 1019 (9th Cir 2014); *Bertero v Superior Court*, 216 Cal App 2d 213 [1963]), while at least in state court an order denying a petition to compel arbitration is appealable (*Smith v Superior Court*, 202 Cal App 2d 128 [1962]). In a state court, an appeal from an order denying a petition to compel arbitration will also operate to stay

the trial court proceedings as to the party who brought the petition without the appellant having to post a bond.

The role of an appellate court is even more limited. Once an arbitration award is confirmed by the superior court, the appellate court's role is limited to determining whether such confirmation was appropriate. As with the trial court's own confirmation process, the appellate court does not engage in an evaluation of the merits of the controversy when it is asked to review the appropriateness of the trial court's action in confirming or vacating the award.

## Enforcement

### 32 | What procedures exist for enforcement of foreign and domestic awards?

Once the hearing has been completed, the arbitration culminates in the arbitrator's issuance of an award in favour of one of the contracting parties.

If the loser pays the award, no further proceedings will presumably be necessary. However, in the event that the winner needs to enforce the award, it will have to file a court action to confirm the award, that is, convert it into an enforceable judgment. If the arbitration provision is governed by the Federal Arbitration Act, that provision should expressly provide that parties agree that any arbitration award shall be judicially confirmed.

At this stage of the proceedings, the loser has few options. The grounds for challenging or setting aside an arbitration award are limited and extremely narrow. A court that is asked to confirm the award will not ordinarily review the merits or overturn the award, even where there have been errors of law or fact.

Nor can the merits of the arbitration award be appealed, except where the arbitration agreement provides that the arbitrator's decision can be reviewed for errors of fact or law (*Harshad & Nasir, supra*, 4 Cal App 5th 523). Thus, ordinarily, once a judgment on the award has been entered, any appeal therefrom will normally be limited to the appropriateness of confirmation, not the underlying merits of the dispute itself.

The recent change in the political landscape in the United States has not affected the enforcement procedures for foreign or domestic awards. Inasmuch as there is a separation of powers between the executive and judicial branches of government, the enforcement of foreign and domestic awards is governed by the pertinent statutes, especially the New York Convention, and the judicial interpretations of those statutes.

## Costs

### 33 | Can a successful party recover its costs?

As a general rule, under CCP section 1284.2, each party to the arbitration is required to pay his or her pro rata share of the expenses and fees of the neutral arbitrator unless the parties' agreement otherwise provides.

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

There are no California statutes or judicial decisions that allow for the recovery of the costs incident to third-party litigation funding.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

#### 34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The main types of 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 International Chamber of Commerce, the arbitration rules of the pertinent organisation may come into play. In general, having a mediation supervised by a third-party neutral is ordinarily more productive than leaving the parties, who may already be locked into their respective positions, to their own devices.

### Reference

Trial by reference is an authorised form of ADR under California law and is described in California Code of Civil Procedure (CCP) sections 638 et seq.

Several cases hold that a valid reference to a retired judge or other referee necessarily entails an enforceable waiver of the parties' right to a jury trial, even though the particular reference provision may not expressly speak to such waiver. See, for example, *O'Donoghue v Superior Court*, 219 Cal App 4th 245 (2013); *Woodside Homes of California v Superior Court*, 142 Cal App 4th 99 (2006). CCP section 645 expressly allows for appellate review of 'the decision of the referee... in like manner as if made by the court'. See also *First Family Ltd Partnership v Cheung*, 70 Cal App 4th 1334 (1999).

### Mini-trial

This process can be either binding or non-binding. The concept is that representatives from the two parties involved in the dispute will each make a streamlined presentation of their respective cases to a small decision-making body, which is often composed of an executive from each of the two companies, together with a third-party neutral. After the conclusion of the presentation, the non-litigant executives attempt to work out a solution with the aid of the third-party neutral.

### Requirements for ADR

#### 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Under Rule 3.1380 of the California Rules of Court, the court, on its own motion or at the request of any party, may set one or more mandatory settlement conferences.

## MISCELLANEOUS

### Interesting features

#### 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One of the most significant ongoing trends in California is the move toward 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 (CAA).

Thus, several arbitral organisations have adopted rules (which may be implemented on an optional basis by the parties) that would allow for appeals from arbitration awards to be heard on their full merits. One example is American Arbitration Association Rule A-10, which allows a party to appeal from an arbitration award where the award is based on an error of law that is material and prejudicial; or determinations of fact were made by the arbitrator that were clearly erroneous. Other arbitral organisations, such as JAMS and CDR, have enacted similar optional rules.

In addition, California law now provides that parties to an arbitration agreement that is governed by the CAA may stipulate to judicial review of their arbitration award. See, for example, *Cable Connection, Inc v DirectTV, Inc*, 44 Cal 4th 1334 (2008); *Harshad & Nasir Corporation v Global Sign Systems, Inc* 14 Cal App 5th 523 (2017). By contrast, parties to an arbitration agreement that is governed by the Federal Arbitration Act (FAA) may not expand the scope of appellate review otherwise available under section 10 of the FAA. See *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576 (2008).

In 2019, the US Supreme Court in *Henry Schein, Inc v Archer and White Sales, Inc* [139 S. Ct. 524] US (2019) is also noteworthy. This decision reaffirmed the principle that parties to an arbitration agreement may properly delegate the question of arbitrability to the arbitrator, as opposed to the Court. The Court went further, clarifying that the courts may not deny a petition to compel arbitration where the party opposing arbitration asserts that the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless'. See also *Sanquist v Lebo Automotive, Inc*, 1 Cal 5th 233 (2016) (issue of who decides whether arbitration agreement provides for class arbitration is one for arbitrator, not the court).

Separate from arbitration, there are two other sets of emerging issues in California.

The first area is in connection with labour and employment disputes. In this area, the California Supreme Court issued a decision in 2018, *Dynamex Operations West, Inc v Superior Court of Los Angeles* (2018) 4 Cal 5th 903, which reversed decades of precedent concerning the classification of workers as either employees or independent contractors. Under *Dynamex*, the court ruled that workers are presumptively employees and not contractors, and it imposed the burden on the hiring entity that classifies a worker as contractor to establish that this classification is supported under the 'ABC' test that it articulated in its decision.

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This worker-friendly decision has profound implications for companies like Uber and others in the gig-economy marketplace. Indeed, companies in that marketplace have undertaken efforts to overturn *Dynamex* through the referendum and legislative processes.

In addition to *Dynamex*, there are the recent legislative initiatives Assembly Bill 51 and Senate Bill 707, which impact the ability of employers to enforce mandatory arbitration provisions in connection with labour and employment disputes in California.

Finally, the government recently passed the California Consumer Privacy Act (CCPA), which enacts a comprehensive privacy regime affecting businesses operating in California. Among other things, it requires companies to update their privacy policies and to provide specified notices about their collection of personal information, use and sharing practices. In addition, it provides for a private right of action for individuals affected by data breaches or the compromise of their personal information.

Although the CCPA is too new for there to have been any appellate cases interpreting its provisions, its enactment will undoubtedly spur the filing of privacy-related litigation in California.

### UPDATE AND TRENDS

#### Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

There are no pending reforms at this time.

\* The information contained in this chapter was accurate as at 29 April 2021.

# United States – New York

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## LITIGATION

### Court system

#### 1 | What is the structure of the civil court system?

The trial-level federal court is the district court. It may hear any civil case that is based on federal law (as opposed to state law), as well as civil cases that meet the standard of 'diversity', which requires that the plaintiffs reside in different US states than the defendants (or different nations, as long as there are not litigants on both sides of the 'v' from foreign countries), and that the amount of the claim exceeds US\$75,000. District courts are divided among 94 geographic districts. Every district court also has within it a bankruptcy court, which hears bankruptcy proceedings.

An appeal from a district court is heard in the federal court of appeals that presides over its district. There are 13 courts of appeals, which altogether have a maximum of 179 judges. Most appeals are heard by a panel of three judges.

A decision by a court of appeals may be appealed to the Supreme Court. The highest court in the United States, the nine-member Supreme Court's docket is for the most part discretionary, and the Court accepts only a small fraction of the petitions for appeal that it receives.

In addition, there are several specialised federal civil courts. The Court of Federal Claims primarily hears monetary claims against the United States. The Court of International Trade hears cases concerning import transactions. The Tax Court hears cases regarding federal taxation. The Court of Veterans Appeals reviews decisions of the Department of Veterans Affairs.

State courts typically follow a similar structure, with a trial court, an intermediate court of appeals and a state Supreme Court.

### Judges and juries

#### 2 | What is the role of the judge and the jury in civil proceedings?

Generally, the jury decides ultimate issues of fact, after being instructed on the applicable legal standard by the judge.

During the pretrial discovery process, the judge sets deadlines and resolves disputes among the parties, including those regarding production of documents and examination of witnesses. If either party makes a motion to dismiss all or part of the case before trial, or to rule on other matters, the judge will decide it. However, if either party requests a jury trial, then all disputes regarding facts in the case must be reserved for the jury at trial. The judge will therefore only decide questions of law, such as whether a particular statute applies or whether the complaint meets the minimum requirements to state a claim. (If no party requests a jury, the judge may decide questions of fact at a 'bench trial'.) During a jury trial, the judge will determine what evidence the jury is allowed to hear and will instruct the jurors regarding how to apply the law to the facts of the case.

Federal judges are nominated by the President of the United States and confirmed by the US Senate. Jurors are selected at random from the district where the trial will take place, and may be questioned by each party before being selected. Each party may choose to eliminate a certain number of potential jurors before the trial begins.

### Limitation issues

#### 3 | What are the time limits for bringing civil claims?

The time limit for bringing a claim, known as the 'statute of limitations', is generally defined by the federal statute on which the claim is based, or by reference to the law of the state where the federal district court is located. The time limits vary depending on the type of claim. For most civil claims, the statute of limitations will expire between one and six years after the events that gave rise to the claim.

Both sides of a potential lawsuit may agree to temporarily stop the clock on a statute of limitations by signing a 'tolling agreement'. Such agreements are interpreted as contracts and must therefore be drafted very carefully to avoid unintended results.

### Pre-action behaviour

#### 4 | Are there any pre-action considerations the parties should take into account?

Unless required to proceed in a particular forum by contract, a plaintiff may generally choose whether to bring an action in state or federal court. Therefore, before beginning an action, a plaintiff should consider which forum offers the most advantages.

Although some state courts allow limited pre-suit discovery, the rules in federal courts do not permit any investigative discovery until after an action has been filed.

### Starting proceedings

#### 5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced by the filing of a complaint with the court. The plaintiff must also prepare a summons, to be signed by the clerk of the court. A defendant is notified of the proceedings when the plaintiff serves him or her the signed summons and complaint.

Federal courts generally have the capacity to manage their case-loads, and cases will typically be listed on a public docket within a day of filing. However, the speed with which a case will proceed through the phases of discovery and reach trial varies significantly from district to district and judge to judge. In general, civil cases take 1–3 years from initiation to conclusion, though more complex cases may take significantly longer. According to data published by the Administrative Office

of the US Courts, as of 31 December 2021, the median time from filing to disposition in all civil actions in federal court was 8.8 months, while the median time from filing to trial in all civil actions in federal court was 31.8 months.

### Timetable

#### 6 | What is the typical procedure and timetable for a civil claim?

The summons and complaint must be served upon the defendant within 90 days of the complaint being filed. The defendant must file a response (typically an answer or a motion to dismiss) within 21 days of service of the summons and complaint. After that, most deadlines for discovery, motions and all other aspects of the case will be dictated by a scheduling order entered by the judge.

A 2011 study by the federal judiciary determined that the median time from the filing of the complaint to the issuing of a scheduling order was between 77 and 125 days, depending on the district. The median time for the conclusion of discovery set by the first scheduling order was between 143 and 240 days later.

### Case management

#### 7 | Can the parties control the procedure and the timetable?

Procedures in federal court are set by the Federal Rules of Civil Procedure. The timetable is controlled by the judge, who sets most deadlines in a scheduling order. The parties often submit a draft scheduling order with their preferred timetable, which the judge may approve with or without modifications. As the case progresses, the parties may seek extensions of deadlines, which the judge has discretion to grant or deny.

### Evidence – documents

#### 8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Federal and state laws impose a duty to preserve relevant documents and evidence from the time a party can reasonably anticipate litigation. Parties that violate this duty may be subject to serious sanctions that can determine the outcome of an action.

A party must share non-privileged relevant documents that are responsive to requests from the other parties in the case, including documents that are unhelpful to its case.

### Evidence – privilege

#### 9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Yes. There are several types of documents that are considered privileged. The 'attorney-client privilege' protects communications between a client and external counsel, as well as communications with in-house counsel located in the United States, concerning legal issues (the situation is less clear, however, with respect to in-house counsel located in foreign countries, where communications between in-house counsel and clients are not necessarily privileged). The 'work product privilege' protects documents prepared in anticipation of litigation or for trial. These privileges can be waived if the documents or communications are shared with third parties.

### Evidence – pretrial

#### 10 | Do parties exchange written evidence from witnesses and experts prior to trial?

A party may seek written responses to interrogatories from other parties prior to trial, but may not seek written evidence from lay witnesses who are not parties. However, non-party lay witnesses may be questioned at a deposition before trial. Note, however, that US court rules provide for pretrial document production from both parties and non-parties that is much more wide-ranging than other jurisdictions.

An expert witness must submit a report during discovery containing a complete statement of his or her opinions, the facts and data considered in forming them, any documents that will be used to support those opinions, and his or her qualifications, experience and compensation for work in the case.

### Evidence – trial

#### 11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence is presented primarily via the oral testimony of witnesses. Statements made by counsel at trial are not considered evidence. Documents may be offered in evidence and shown to the jury, provided sufficient foundation has been offered to demonstrate their admissibility and authenticity. If a witness was questioned during a pretrial deposition but is unable to appear at trial, portions of his or her testimony may be read to the jury or shown by video.

### Interim remedies

#### 12 | What interim remedies are available?

A court may grant a preliminary injunction or temporary restraining order, ordering a party to refrain from taking a particular action. In federal court, a party seeking an injunction must show a likelihood of success on the merits, irreparable harm, and that the public or private interests implicated by the injunction favour that party. In terms of the specific relief available, a court may issue an order of attachment, seizing specific property that may be the subject of an eventual judgment. It may appoint a receiver to oversee a party's property during the pendency of a suit. It may issue a notice of pendency, which effectively makes a parcel of real property impossible to sell. Rarely, a court may order garnishment of a party's wages in advance of trial. The requirements for obtaining such remedies – including with respect to foreign proceedings – vary by state.

Notably, federal courts do not have authority to issue injunctions temporarily freezing a defendant's assets pending the outcome of a foreign lawsuit or arbitration. However, both federal and state courts have wide discretion to grant more narrow forms of interim relief, which are governed by state law.

In New York, the standard for obtaining a preliminary injunction is similar to the federal standard: the plaintiff must generally show a probability of success on the merits, irreparable harm and that the balance of equities favours the plaintiff. A plaintiff may obtain an order of attachment as security for a potential judgment, including in support of international arbitrations subject to the New York Convention.

### Remedies

#### 13 | What substantive remedies are available?

The most common remedy in civil lawsuits is money damages, which compensate the plaintiff for a loss. Restitution – which requires the defendant to return its gains to the plaintiff – is also available on some claims, such as unjust enrichment. Specific performance is also

available as a remedy for breach of contract where damages would not provide an adequate remedy.

Punitive damages are rare in civil cases. They are not available for breach of contract. However, some federal and state-level statutory causes of action permit punitive damages in civil cases, and the party seeking such damages is generally required to establish grossly negligent or malicious conduct.

Both prejudgment and post-judgment interest are available on money judgments. Federal courts determine the rate of interest based on the laws of the states in which the federal courts are located. In New York, the Civil Practice Law and Rules (CPLR) sets the statutory rate of interest at 9 per cent per year.

## Enforcement

### 14 | What means of enforcement are available?

In civil cases, the most common sanctions are monetary fines, which may be imposed on a party or counsel for violations of rules of procedure (eg, destroying or failing to preserve evidence). In addition, adverse inferences may be applied by a judge in a bench trial or provided as jury instructions in a civil case.

Contempt orders are very rare in civil cases, but they are potentially available for egregious misconduct, such as repeatedly flouting court orders.

## Public access

### 15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are held in public, and court documents, including pleadings, witness statements and orders, are available to the public with few exceptions. Documents containing particularly sensitive or confidential information may be filed with the court 'under seal' – meaning visible only to the parties – with court permission.

## Costs

### 16 | Does the court have power to order costs?

The general 'American rule' is that each side bears its own fees and expenses, irrespective of the outcome of the case. While courts will sometimes award some modest increments of costs, such as a court filing fees, to the prevailing party, and federal courts have discretion to require a claimant to post security for the costs that the opposing party may incur, there remains a general presumption against cost-shifting, absent a contractual or statutory basis to do so.

## Funding arrangements

### 17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency fee arrangements between lawyers and clients are available in the United States. Under such agreements, lawyers agree to accept a percentage of the recovery that the client receives.

Third-party funding by professional investors seeking to invest in claims is available in the United States. At present, the industry is not regulated at the federal level, although some states have imposed limitations on the interest rates that third-party litigation funders can charge to consumers.

A third-party litigation funder may agree with a claimant that the third-party litigation funder will take a share of any proceeds on the claimant's claims. Parties to litigation are permitted to share risks with third parties, including claimants selling some proportion of any recovery to investors in return for an upfront payment. Liability insurance, in which a defendant pays a fixed sum to an insurer to offset a proportion of any liability, is also allowed.

## Insurance

### 18 | Is insurance available to cover all or part of a party's legal costs?

Litigation expense insurance is available to cover all or part of a party's own legal fees and costs, although it is not widely used in the United States. To the extent that it is available in the United States, most insurers' policies will exclude coverage for an opponent's costs.

## Class action

### 19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, class actions are available in the United States. At the federal level, class actions are permitted where a large number of plaintiffs allege that they have suffered similar injuries caused by the same defendant or defendants. Plaintiffs may generally bring class actions for any type of civil claim, but they must satisfy applicable legal and procedural requirements. For example, the Federal Rules of Civil Procedure require putative class action plaintiffs to satisfy the following factors before the class can be certified:

- the class must be so numerous that joining all members of the class would be impractical;
- there must be common questions of law or fact;
- the putative class must have representatives whose claims or defences are typical of the class;
- the putative class must have representatives who fairly and adequately protect the interests of the class;
- the common questions of law or fact must predominate over the questions affecting individual members; and
- a class action must be a superior form to all other available methods for fairly and efficiently adjudicating the dispute.

In New York, the CPLR requires putative class action plaintiffs to satisfy substantially similar procedural requirements.

On 20 October 2020, New York's Court of Appeals – the state's highest court – issued a noteworthy decision regarding cross-jurisdictional class action tolling. In *Chavez v Occidental Chemical Corp*, 35 N.Y.3d 492 (2020), the Court of Appeals held that New York law recognises cross-jurisdictional tolling of statutes of limitations for absent class members of a putative class action filed in another jurisdiction. In addition, the Court of Appeals held that tolling ends when there is a clear dismissal of a putative class action, including a dismissal for forum non conveniens or denial of class certification for any reason. This decision is significant because it is consistent with the Supreme Court's decision in *American Pipe v Constr Co v Utah*, 414 U.S. 538 (1974), in which the Supreme Court held that the same principles apply to class action tolling in federal class actions.

## Appeal

### 20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, a party in a federal action may appeal as of right from a final judgment. The same is true in state courts, but some state court



systems (like New York) also permit interlocutory appeals (that is, appeals from non-final judgments).

The most common grounds for parties to appeal decisions in civil cases are errors of law (eg, applying the wrong legal standard to the facts of a particular case) and abuse of discretion (eg, where the lower court exceeded its discretion in deciding a motion or request for a ruling).

At the federal level, the party who loses at the district court can appeal that decision to a panel of the court of appeals for the federal circuit in which that district is located. After the court of appeals issues its decision, the losing party can request that all active judges of that court of appeals rehear the case, but such rehearings – which are called rehearings en banc – are disfavoured by the Federal Rules of Civil Procedure and are only permitted where en banc consideration is necessary to secure or maintain uniformity of the court's decisions or where the proceeding involves a question of exceptional importance. The party who loses at the court of appeals may then request that the Supreme Court review the appeals court's decision by filing a petition with the Supreme Court for a writ for certiorari, but Supreme Court review is usually discretionary, and the Court only grants about 3–4 per cent of those petitions each year.

In New York, decisions of the state trial court are appealable as of right to five-judge panels of the appellate division in the judicial department in which the trial court is located. After the appellate division issues a decision, the parties can seek leave to appeal to the highest court in New York – the Court of Appeals (unless the basis for the appeal is a double dissent at the appellate division on a question of law in the appellant's favour or an appeal involving a constitutional question, in which case the appeal to the Court of Appeals is as of right).

## Foreign judgments

### 21 | What procedures exist for recognition and enforcement of foreign judgments?

Under US law, an individual seeking to enforce a foreign judgment must file a lawsuit in the United States, and that court will determine whether to recognise and enforce the judgment. The United States is not a signatory to any convention or treaty that requires recognition of foreign court judgments. Recognition of foreign judgments is therefore governed by the laws of individual states. Generally, US courts will consider recognition and enforcement of judgments for a fixed sum of money, but will not enforce judgments for taxes, fines or penalties of any kind.

## Foreign proceedings

### 22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

A federal statute, 28 U.S.C. 1782, allows an 'interested person' in a proceeding in a foreign or international tribunal to obtain evidence in the United States for use in that proceeding. The interested person must file a petition in a federal district court seeking authority to serve a subpoena on a person or business in that district. With a subpoena, the interested person can seek documents or testimony from parties and non-parties to the foreign proceeding.

## ARBITRATION

### UNCITRAL Model Law

#### 23 | Is the arbitration law based on the UNCITRAL Model Law?

The Federal Arbitration Act, the national arbitration law in the United States, is not based on the UNCITRAL Model Law. The Federal Arbitration Act was enacted in 1925 to place arbitration agreements

on the same footing as other contracts and to declare a national policy in favour of arbitration. Although the Federal Arbitration Act differs from the UNCITRAL Model Law in some respects – for example, the Federal Arbitration Act defers to parties' arbitration agreements as to the specific procedures that will be used to arbitrate the parties' dispute – the Federal Arbitration Act is typically interpreted by federal courts in a manner that is consistent with the UNCITRAL Model Law.

Some states, such as Texas and Florida, have adopted state-level arbitration laws that are based on the UNCITRAL Model Law. Those laws apply to the extent that they do not conflict with the Federal Arbitration Act. New York has a state-level arbitration law in the Civil Practice Law and Rules (CPLR), but New York has not adopted the UNCITRAL Model Law.

## Arbitration agreements

### 24 | What are the formal requirements for an enforceable arbitration agreement?

The Federal Arbitration Act requires arbitration agreements to be in writing, but there is no requirement that arbitration agreements be signed. Federal and state courts also require a knowing and voluntary waiver of the right to bring a legal claim in court.

## Choice of arbitrator

### 25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In circumstances where the arbitration agreement and any relevant institutional rules are silent on arbitrator appointment, the Federal Arbitration Act and the CPLR (which contains New York's state-level arbitration law) allow courts broad discretion to appoint an arbitrator or arbitrators. Neither the Federal Arbitration Act nor the CPLR provides specific procedures for the appointment of arbitrators where the parties' agreement and any relevant rules are silent on arbitrator appointment.

With respect to challenging the appointment of an arbitrator, neither the Federal Arbitration Act nor the CPLR provides a procedure for such challenges. Most arbitral institutions have rules that provide procedures for challenging arbitrators, which are generally based on conflicts of interest.

## Arbitrator options

### 26 | What are the options when choosing an arbitrator or arbitrators?

The options for choosing an arbitrator or arbitrators depend on the parties' agreement and any applicable institutional rules. Some arbitral institutions, such as the International Chamber of Commerce, JAMS, FINRA and the American Arbitration Association, provide parties with lists of potential arbitrators from applicable rosters (eg, commercial, employment and construction). The parties will then have the opportunity to rank and strike potential arbitrators. If this initial rank-and-strike process does not result in the required number of arbitrators, the arbitral institution will generate a new list and the parties will repeat the process until the required number of arbitrators has been selected.

The pools of candidates vary widely, depending on arbitral institution. Some arbitral institutions have well-known local practitioners (such as retired judges) on their rosters, while other arbitral institutions permit experienced industry professionals who do not necessarily have formal legal training to sit as arbitrators. Contracting parties should carefully consider potentially applicable institutional rules when drafting and negotiating arbitration clauses.

### Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Neither the Federal Arbitration Act nor the CPLR contains specific requirements as to the procedures to be followed in arbitration.

### Court intervention

28 | On what grounds can the court intervene during an arbitration?

Federal and state courts can provide preliminary injunction and attachment orders in connection with arbitration proceedings. In New York, the CPLR provides that courts can grant provisional remedies where the award may be rendered ineffectual without such provisional relief. To obtain a preliminary injunction in New York, the traditional criteria for a preliminary injunction must be satisfied, including likelihood of success on the merits, irreparable harm and the balance of equities favours the movant. New York courts generally require parties seeking attachment orders in connection with arbitration proceedings to satisfy the same criteria.

In addition, federal courts can enjoin parties from proceeding with arbitration where there is no agreement to arbitrate between the parties, although the Federal Arbitration Act does not expressly authorise anti-arbitration injunctions. In New York, the CPLR expressly provides for an application to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred. To obtain an anti-arbitration injunction, a party must satisfy the traditional criteria for injunctive relief.

Federal courts can also compel discovery in aid of public international arbitration proceedings pursuant to 28 U.S.C. 1782, although the Supreme Court is currently considering whether parties to private international commercial arbitration proceedings can also seek such assistance (courts of appeals in different circuits are currently split on this issue). In New York, courts may only order disclosure in aid of arbitration under the CPLR in exceptional circumstances. Federal and state courts can also enforce subpoenas issued by arbitral tribunals.

In recent years, federal and state courts in California have held that public injunction waivers in arbitration agreements are unenforceable under California law, but it does not appear that federal and state courts outside of California would apply a similar rule. Thus, parties in other jurisdictions can agree to waive their right to obtain injunctive relief in court. There does not appear to be any authority, however, that parties can agree to waive statutory rights to seek judicial assistance in aid of arbitration.

### Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, institutional rules generally authorise arbitrators to grant interim relief, including asset and document preservation orders. Federal and state courts have also enforced other forms of interim relief, including interim measures preventing a party from terminating an agreement or disclosing trade secrets or sensitive information.

Some institutional rules, such as those of JAMS and the American Arbitration Association, also permit the appointment of an emergency arbitrator for expedited relief in circumstances where appointment of an arbitrator or arbitrators to hear the merits of the parties' dispute has not yet occurred.

### Award

30 | When and in what form must the award be delivered?

The form and timing of delivery of the award are subject to agreement of the parties and applicable institutional rules. Thus, while the parties may agree that arbitrators must issue reasoned awards and that awards must be delivered within specific time frames, there is no legal requirement that arbitral awards must be reasoned or that they must be delivered within a particular time frame.

### Appeal

31 | On what grounds can an award be appealed to the court?

The Federal Arbitration Act only permits vacatur of an arbitration award in very limited circumstances, namely, if:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality or corruption by the arbitrators;
- the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or
- the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

State laws similarly only permit challenges to an arbitral award on specific grounds. While those state laws generally track the four grounds contained in the Federal Arbitration Act, some state courts have held that awards may be vacated on public policy grounds as well. In addition, some states, including California, Texas and New Jersey, permit parties to use their arbitration agreements to expand the scope of judicial review by agreeing that arbitrators have no authority to issue decisions based on 'reversible' errors of law or fact, thereby effectively allowing parties to transform post-award vacatur proceedings into merits appeals.

In addition, the Federal Arbitration Act allows awards to be modified or corrected on several grounds, including:

- evident material miscalculation;
- the arbitrators issued an award on a matter not submitted to them; and
- the award is imperfect in a matter of form not affecting the merits of the parties' dispute.

In New York, the CPLR also permits modification or correction of awards on similar grounds.

Although neither the Federal Arbitration Act nor the CPLR expressly authorises vacatur on the basis of an error of law, some federal courts and state courts have nevertheless permitted vacatur on the basis of 'manifest disregard of the law'.

### Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

As to foreign awards, the United States is party to both the New York Convention and the Inter-American Convention on International Commercial Arbitration. Where a foreign award is rendered in a country that has ratified either of those two conventions, a court can only refuse to enforce the award on the grounds contained in article VI of the New York Convention or article V of the Panama Convention. Unlike the Federal Arbitration Act, which contains four grounds for vacatur of an arbitration award (not including public policy), the New York and

Panama Conventions expressly permit non-recognition of a foreign award where the award violates the public policy of the state where the award was rendered.

As to domestic awards, in New York, all arbitral awards rendered in New York may be enforced by courts. After a court orders confirmation of an arbitration award as a judgment, the judgment is enforceable as any other judgment issued by the court.

## Costs

### 33 | Can a successful party recover its costs?

The Federal Arbitration Act is silent on whether a successful party can recover costs, and state laws vary by jurisdiction. In the absence of an applicable state law regarding costs, the parties' agreement and applicable institutional rules will govern. Many arbitral institutions have rules that authorise arbitrators to depart from the 'American rule', pursuant to which parties typically cover their own legal fees and costs, so that prevailing parties can recover their legal fees and costs.

There do not appear to be any cases issued by federal or state courts on the issue of whether a prevailing party in arbitration can recover third-party funding costs.

## ALTERNATIVE DISPUTE RESOLUTION

### Types of ADR

#### 34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The two most common forms of ADR in the United States are arbitration and mediation. The parties commonly use mediation, which is generally non-binding, to attempt to resolve disputes before and after the initiation of litigation or arbitration proceedings. Arbitration is commonly used in consumer, employee and business-to-business disputes. Mediation is less commonly used in consumer disputes and is more commonly used in employment and business-to-business disputes.

Other forms of ADR, such as conciliation and early neutral evaluation, are much less commonly used in the United States when compared with arbitration and mediation.

### Requirements for ADR

#### 35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no federal law or procedural rule requiring parties to litigation or arbitration to consider ADR before or during proceedings. However, certain federal and state courts require mediation before cases can proceed to trial or at other stages of the litigation.

## MISCELLANEOUS

### Interesting features

#### 36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

A key feature of the United States' legal system is the principle known as *stare decisis*, which requires lower courts to follow decisions of law rendered by higher courts in the same jurisdiction. This requirement gives the legal system a substantial amount of stability and predictability, because lower courts must apply the law to substantially similar fact patterns in the same way.

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At the federal level, one notable feature is the constitutional prohibition on advisory opinions, meaning opinions that do not relate to an actual case or controversy. To avoid issuing advisory opinions, federal courts must ensure that genuine controversies exist between the parties, and they do so by requiring parties to satisfy standing, ripeness, mootness, finality and political question doctrines. At the state level, several states have statutory or constitutional provisions that permit advisory opinions in certain circumstances, but New York is not one of those states.

## UPDATE AND TRENDS

### Recent developments

#### 37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

In recent years, the Supreme Court issued two key decisions relating to civil dispute resolution. First, in *Ford Motor Co v Montana Eighth Judicial District Court*, 141 S.Ct. 1017 (2021), the Supreme Court held in an 8–0 opinion that state courts had specific jurisdiction over a car manufacturer in two product liability actions, even though the vehicles at issue were designed, manufactured and sold outside of the forum states and subsequently resold in those states by consumers, in light of the manufacturer's substantial business activities in those states. Second, in *GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC*, 140 S.Ct. 1637 (2020), the Supreme Court unanimously held that the New York Convention does not conflict with domestic equitable estoppel principles that permit the enforcement of arbitration agreements by non-signatories.

There were no significant legislative developments at the national level or in New York relating to civil dispute resolution during the past year.

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