



ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2015

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A practical cross-border insight into litigation and dispute resolution work

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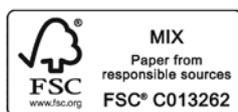
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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter titled *Freezing Injunctions in Support of Foreign Proceedings & Arbitration*.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 42 jurisdictions, with the USA being sub-divided into five separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of King & Wood Mallesons LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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Freezing Injunctions in Support of Foreign Proceedings & Arbitration

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1 Freezing Injunctions in England & Wales

1.1 Under section 37 of the Senior Courts Act 1981 (the “SCA”), the High Court in England and Wales has authority to award an injunction in all cases where it appears to the court to be just and convenient to do so. An injunction is a form of order or judgment, which requires a party to either do (mandatory), or refrain from doing (prohibitory), a particular thing. Under section 37 SCA, the court can either grant an interim (i.e. provisional) injunction or a final injunction.

1.2 A freezing injunction is a form of interim injunction that restrains the defendant from dealing with or disposing of their assets (i.e. it “freezes” their assets) and can be obtained at any stage of proceedings, including before a claim has been issued or after a judgment has been obtained.

1.3 The purpose of a freezing injunction is to ensure that a defendant is not able to dissipate their assets before an award can be enforced, therefore the order is ordinarily sought on a ‘without notice’ basis (i.e. the defendant is not aware of the application), so that the defendant cannot pre-emptively remove assets from the jurisdiction.

1.4 A freezing order is a draconian remedy, which is not easily obtained. In brief, an applicant seeking a freezing order will need to show that:

- (a) they have a cause of action against the defendant (i.e. the injunction is not a cause of action of itself, and can only be used in support of a substantive claim);
- (b) based on the underlying cause of action, there is a good arguable case;
- (c) the English court has jurisdiction;
- (d) there are assets available to freeze; and
- (e) there is a risk that the defendant will seek to dissipate the assets.

1.5 As the order will ordinarily be sought without notice to the defendant, the applicant will be under a duty of full and frank disclosure. This will require the applicant to file an affidavit providing the court with all legal and factual details relevant to the application, including any points which may be damaging to their own case. The applicant will also normally have to provide an undertaking to the court that they will compensate the defendant for any losses suffered by the defendant if the freezing order is subsequently discharged because it is found that the applicant was not entitled to the relief.

1.6 Even if an applicant is able to meet all these requirements, the award of a freezing order is still a discretionary remedy and

therefore if the court decides it would not be ‘just and convenient’ in the circumstances, a freezing injunction will not be awarded.

1.7 If an applicant is successful and obtains a freezing injunction, it is an extremely powerful tool. The injunction can be used to freeze a wide variety of assets (e.g. bank accounts, property and shares) and the order will typically require the defendant to disclose their assets, either within the jurisdiction or on a worldwide basis. The disclosure order may provide valuable information for an applicant who has not been able to identify sufficient assets to cover the full value of their claim, and may alert the applicant to other assets against which it would be easier to enforce an award.

1.8 In certain circumstances, a freezing order can also be obtained in respect of assets held in the name of a third party (but on behalf of the defendant) and on a worldwide basis (i.e. freezing assets held by the defendant in overseas jurisdictions).

1.9 Once an order is obtained, it should be served promptly on the defendant and any third parties known to hold assets of the defendant. Once a party has notice of the order, they will be under a duty to comply with it and not to permit the defendant to breach it. Most banks will have procedures in place to ensure they are able to respond swiftly to a freezing order obtained against a client, so – provided the applicant notifies the bank promptly – there should be little risk of the defendant being able to remove funds following service of the order by the applicant.

1.10 If the defendant breaches the terms of the freezing injunction – which would include failing to disclose properly the extent of their assets – this may constitute contempt of court, for which the defendant risks being committed to prison.

1.11 A freezing injunction is therefore often described as a ‘nuclear weapon’ in English litigation, however it can also be used in support of foreign proceedings and arbitrations, which will be the focus of this chapter.

2 Freezing Injunction in Support of Foreign Proceedings

2.1 Under section 25 of the Civil Jurisdiction and Judgments Act 1982, the High Court in England and Wales has authority to grant all forms of interim relief in support of foreign proceedings, but has the discretion to refuse to make such an award where:

“in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it”.

2.2 The English court's approach to this determination of expediency was recently summarised in the case of *ICICI Bank UK PLC v Diminco NV*¹. In this case, ICICI (an English subsidiary of one of the largest banks in India) and Diminco (a diamond distributor based in Antwerp) were engaged in proceedings in Belgium, arising out of ICICI's attempts to recover *circa* \$25,000,000 that it had advanced to Diminco under a Belgian law-governed loan facility agreement. In the Belgian proceedings, ICICI had obtained an attachment order for the value of the outstanding loan facility and served it on 10 banks in Belgium. The banks' responses to the attachment order revealed that Diminco only appeared to have a positive credit balance at one of the banks, for *circa* €2,600. In light of the fact that Diminco's most recent accounts reported a turnover in excess of £300,000,000, ICICI alleged that Diminco had sought to dissipate its assets, so as to frustrate enforcement of the attachment order. On this basis, ICICI brought an application before the English court, seeking a worldwide freezing injunction against Diminco, along with full disclosure of its worldwide assets exceeding £10,000 in value.

2.3 In determining whether to award an injunction in the *ICICI Bank* case, the judge, Popplewell J, reviewed the relevant case law and identified five key scenarios in which such an application might arise, and set out the principles relevant to each. These were:

- (a) *Where the defendant is resident within the jurisdiction, or is someone over whom the court has 'in personam' jurisdiction² for some other reason* – a worldwide freezing order may be granted, applying certain discretionary considerations (see 2.3 (c)(iii) below).
- (b) *Where there is reason to believe the defendant has assets within the jurisdiction, but may not be someone over whom the court would assume in personam jurisdiction (e.g. not resident within the jurisdiction)* – the English court will often be the appropriate court to grant a domestic freezing injunction (i.e. not a worldwide freezing injunction) over those domestic assets.
- (c) *Where the injunction is sought against a defendant who has no assets in the jurisdiction and where the English court has no in personam jurisdiction over them* – in this case, any protective relief should normally be left to the courts where the assets are found or where the courts can claim *in personam* jurisdiction over the defendant. However, the court may do so in exceptional circumstances, which will likely require the applicant to establish at least three things:

(i) That there is a “*real connecting link*” between the subject matter of the measure sought and the territorial jurisdiction of the English court.

(ii) That the case is one where it is appropriate within the limits of comity for the English court to act as an international policeman in relation to assets abroad. An application will not be deemed appropriate in circumstances where it would be impractical to make the order and the order could not be enforced in practice if disobeyed.

(iii) That it is just and expedient to grant a worldwide freezing order, taking into account the following discretionary factors:

(A) whether making the order will interfere with the management of the case in the primary court;

(B) whether it is the policy of the primary court not to make worldwide freezing or disclosure orders;

(C) whether there is a risk that granting the order would give rise to confusion and/or conflicting, inconsistent or overlapping orders in other jurisdictions (e.g. in another jurisdiction where the assets are located or the defendant resident);

(D) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction,

rendering it inappropriate and inexpedient to make a worldwide order; and

(E) whether the court will be making an order which it cannot enforce, particularly where jurisdiction is resisted and the court expects disobedience from the defendant.

2.4 In the *ICICI Bank* case, there was evidence that the defendant had bank accounts within England and Wales, and therefore the court was willing to grant a freezing injunction extending to all the defendant's assets within England and Wales in support of the bank's claim in the Belgian proceedings. The court was also willing to grant a disclosure order in respect of the defendant's assets within England and Wales, exceeding £10,000 in value, and all bank statements for any bank account held by the defendant at any bank within England and Wales.

2.5 However, the court was not willing to grant a freezing injunction in respect of foreign assets (a request which ICICI dropped during proceedings) or a disclosure order in respect of foreign assets. Popplewell J held that there was no ‘real connecting link’ to justify such an award. In addition, the court had no ability to enforce compliance with the order.

2.6 The case law therefore establishes that while it is possible to obtain a freezing injunction from the English courts in support of foreign proceedings and in respect of assets outside the jurisdiction, even where the court has no *in personam* jurisdiction over the defendant, the court will be unwilling to assume this ‘international policeman’ role in all but exceptional circumstances. Case law suggests this may be limited to rare cases of international fraud, where some link to England can still be established even in the absence of assets or residency within the jurisdiction.

2.7 It will, however, be easier to persuade the court to make an award where there are assets within the jurisdiction, or, ideally, where the court can claim *in personam* jurisdiction over the defendant.

3 Freezing Injunction in Support of Arbitration

3.1 Under section 44 of the Arbitration Act 1996 (the “**Act**”), the English court has the power to award a freezing injunction in support of arbitral proceedings, and generally to “*make such orders as it thinks necessary for the purpose of preserving evidence or assets*”³.

3.2 Under section 2(3) of the Act, the powers conferred on the court under section 44 of the Act apply even if the seat of the arbitration is outside England or if no seat has been designated or determined. However, the court can refuse to exercise these powers where it believes that the fact that the seat is (or is likely to be) outside England would make it inappropriate to do so.

3.3 In the recent case of *U&M v KCM*, the claimant, U&M, sought a worldwide freezing injunction in support of an award made by a London arbitration tribunal against the defendant, KCM. Both the claimant and the defendant were companies incorporated under the laws of Zambia and the defendant's assets were, almost entirely, held in Zambia.

3.4 In this case, the judge, Teare J, examined whether it would be appropriate to exercise the discretion under section 2(3) of the Act and stated:

“the inference which I draw from sections 2 and 44 of the Act is that where the seat of the arbitration is in England and Wales it will ordinarily be appropriate for this court to issue orders in support of the arbitration. However....there may be reasons why, notwithstanding that the seat of the arbitration is in England and Wales, it is not appropriate to grant the order”.

3.5 As the seat of the arbitration was London, KCM argued that there were a number of factors, particular to the circumstances of the case, which would make it inappropriate for the court to grant the injunction. Teare J broadly summarised KCM's arguments as being it would be inappropriate for the English court to grant an injunction where:

- (a) the defendant has no assets with the jurisdiction, so enforcement of an award would have to take place in Zambia; and
- (b) the Zambian courts have '*in personam*' jurisdiction over the defendant and the Zambian legal system appeared to be based on English law and allowed the claimant to seek the same relief.

3.6 With regard to the first limb of this argument, Teare J stated that case law established that an English court could grant a freezing injunction in support of a London arbitration, even when there were no assets within the jurisdiction. Teare J stated that he believed this approach to be correct as there was a conceptual distinction between the award of a freezing injunction, which operates against the defendant *in personam*, and the enforcement of an award that requires an asset to be attached. On this basis, it was held that:

"the mere fact that enforcement of an award will take place in Zambia is, by itself, insufficient to make it inappropriate for this court, being the court of the place where the arbitration has its seat, to grant a WFO".

3.7 With regard to the second limb of KCM's argument, Teare J held that the fact that it may be appropriate for another court to grant a freezing order did not necessarily mean it was inappropriate for the English court to grant one, in circumstances where the English court could claim *in personam* jurisdiction by virtue of the arbitration agreement. Even when considering the two factors together (i.e. the assets were located in Zambia and the availability of relief within that jurisdiction), Teare J still found it to be just and convenient to make the award.

3.8 Although section 2(3) of the Act permits the court to award an injunction in support of arbitration proceedings even when the seat of the arbitration is (or is likely to be) in another jurisdiction, the courts are likely to adopt a similar approach to an award in support of foreign litigation, i.e. if the courts cannot assert *in personam* jurisdiction over the defendant and there are no assets within the jurisdiction, the court is likely to reject the application in all but exceptional circumstances.

3.9 This approach was taken by the court in the case of *Mobil Cerro Negro Limited v Petroleos De Venezuela*⁴, where the court chose to discharge a freezing injunction that had been granted in support of New York arbitration proceedings. In this case, Walker J stated that:

"in the absence of any exceptional feature such as fraud, and in the absence of substantial assets of PDV located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under s 2(3) of the 1996 Act".

4 Conclusion

4.1 A freezing injunction is an extremely powerful tool available to the courts of England and Wales, which can be deployed in support of domestic or foreign litigation and arbitration, at any stage of the proceedings. Where such an order is obtained, it can prove the difference between an award that is capable of being enforced, and a Pyrrhic victory.

4.2 Although the award of a freezing injunction will be discretionary – and therefore every case will be fact-dependent – broadly it would appear that where the courts can claim to have *in personam* jurisdiction over the defendant (either by residency or some other means), a worldwide freezing injunction, ordinarily coupled with a requirement to disclose assets on a worldwide basis, may be obtained. Where the defendant is not subject to the jurisdiction of the English courts, but can be shown to have assets within the jurisdiction, a freezing injunction may still be obtained, but is more likely to be restricted in scope to domestic assets. Where the defendant is not subject to the jurisdiction of the English court and there is no evidence of assets within the jurisdiction, the courts do still have the power to award an injunction, but it will only be exercised in the most exceptional of circumstances.

Endnotes

1. [2014] EWHC 3124.
2. Broadly, '*in personam*' jurisdiction means the judicial proceedings operate on a specific person, as opposed to on a thing, such as property, which would be '*in rem*' jurisdiction. If the courts have '*in personam*' jurisdiction over an individual – perhaps because they are resident or domiciled within the jurisdiction, or have otherwise submitted to the court's jurisdiction – they can compel that person to do something, even in relation to assets held abroad.
3. Note: in the recent case of *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm) ("*U&M v KCM*"), it was argued that s44 of the Arbitration Act does not apply after an award has been published and the tribunal is *functus officio*, but accepted that, in any event, the court would have jurisdiction to make an award under section 37 of the SCA. The court did not settle this matter, so it may be wise to plead both statutory authorities when seeking a freezing injunction in aid of an arbitral award, rather than at an interim stage.
4. [2008] EWHC 532 (Comm).

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Albania

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Albania got? Are there any rules that govern civil procedure in Albania?

The legal system of Albania is based on the continental judicial system and the courts are led by the law. Civil procedure in Albania is governed by the Code of Civil Procedure (hereinafter referred to as the CCP), approved with law no. 8116, dated 29.03.1996, amended by law no. 8181, dated 23.12.1996, law no. 8431, dated 14.12.1998, law no. 8491, dated 27.05.1999, law no. 8535, dated 18.10.1999, law no. 8601, dated 10.04.2000, law no. 8812, dated 17.05.2001, law no. 9062, dated 08.03.2003, law no. 9953, dated 14.07.2008, law no. 10052, dated 29.12.2008, law no. 49/2012, law no. 122/2013 and law no. 160/2013.

1.2 How is the civil court system in Albania structured? What are the various levels of appeal and are there any specialist courts?

According to law no. 9877, dated 18.2.2008 “On Organization of the judicial system in the Republic of Albania”, as amended, the civil court system is organised in the following structures:

- (i) District Courts;
- (ii) Appeal Courts; and
- (iii) the Supreme Court.

There are two levels of appeal: (i) the Courts of Appeal; and (ii) the Supreme Court.

The District Courts are organised in specialised sections for allocation of the particular cases according to the subject of the claim, such as:

- section for civil disputes;
- section for family disputes; and
- section for commercial disputes.

With law no. 49/2012 “On Organization and Functioning of the Administrative Courts and Adjudication of the Administrative Disputes”, the specialised courts for the adjudication of administrative disputes were established. Administrative courts are organised as: (i) Administrative Courts of First Instance; (ii) the Administrative Court of Appeal; and (iii) the Administrative College of Supreme Court.

1.3 What are the main stages in civil proceedings in Albania? What is their underlying timeframe?

The main stages in civil proceedings in the District Court are:

- (i) filing of the lawsuit with the court;
- (ii) notification of the lawsuit to the defendant and other parties;
- (iii) preliminary hearing (i.e. exchange of evidences between the parties);
- (iv) judicial hearings and examination;
- (v) last conclusions; and
- (vi) final decision.

The duration of a proceeding in the District Court may last approximately 6-12 months.

In the Appeal Court cases may be examined within 6-10 months from the filing date of the appeal, while in the Supreme Court cases may be examined within three years.

1.4 What is Albania's local judiciary's approach to exclusive jurisdiction clauses?

The jurisdiction of Albanian courts is regulated by article 37 of the CCP, which provides that the jurisdiction of Albanian courts cannot be transferred to a foreign jurisdiction by agreement of the parties, except when the legal proceeding is related to an obligation among foreign parties, or among an Albanian and a foreign party (physical person or legal entity), when such exemptions have been stipulated in the agreement.

The exclusive jurisdiction of Albanian courts is also regulated by law no. 10428, dated 02.06.2011 “On Private International Law”, which provides for several cases when the Albanian courts have exclusive jurisdiction.

1.5 What are the costs of civil court proceedings in Albania? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil proceedings in Albania are: (i) the judicial tax, expenses for the acts to be carried out (i.e. notifications); (ii) the costs for the acts of expertise; and (iii) lawyers' fees and other necessary expenses incurred during the trial (i.e. expenses for witnesses, different examinations).

The judicial tax is calculated according to the value of the claim. For claims with a value up to ALL 100,000, the judicial tax is ALL 3,000, whilst for claims with a value exceeding ALL 100,000, the judicial tax is 1% of the value of the claim. Such tax is paid by the plaintiff upon filing the claim.

The CCP provides for the obligation of the unsuccessful party to pay the legal costs.

Despite the above, in cases where the claim is partially accepted or when the court finds justified reasons, it may decide for the costs to be paid by the unsuccessful party in proportion with the accepted claim, or that each party should pay its own costs.

Albanian legislation is not familiar with costs budgeting rules.

1.6 Are there any particular rules about funding litigation in Albania? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no particular rules about funding litigation in Albania. Any person that has a legal, actual and direct interest may file a lawsuit with the court.

The law does not provide specific regulation on contingency or conditional fees, but permits lawyers and their clients to define the fee in mutual agreement.

Under the provisions of law no. 9109, dated 17.07.2003, "On the Attorney profession in the Republic of Albania", as amended, the remuneration for the service rendered by lawyers is defined: (i) in agreement between the client and the lawyer; (ii) by the court and the prosecutor's office when the lawyer is nominated *ex officio*; and (iii) by law.

Albanian legislation does not provide any concrete regulation regarding security costs.

1.7 Are there any constraints to assigning a claim or cause of action in Albania? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no constraints to assigning a claim (especially monetary claims) based on general principles on the assignment of rights under the provisions of the Albanian Civil Code.

Claims arising from strictly personal rights cannot be assigned.

Albanian law does not regulate the financing of litigation proceedings by a non-party to such proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Albanian law does not provide for any mandatory pre-action procedures to be followed by the parties, other than the obligation of the creditor to serve to the debtor a notice for payment (or discharging any other contractual obligation) within at least 15 days if the contract does not provide for a term (article 463 of the Civil Code).

Nonetheless the parties must comply with the pre-action procedures to which they have agreed in the contract.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Albanian Civil Code provides various limitation terms according to the types of claims.

The limitation term to file claims deriving from the payment of contractual penalty clauses is six months; one year for claims deriving from spedition contracts; six months for claims deriving from transport contracts of either goods or travellers by railway, vehicles or airplanes; two years for claims for the payment of compensations from insurance and reinsurance contracts; three years for claims for payment deriving from rent contracts (i.e. apartments, shops and other immovable property); and three years for claims for payment arising out of contractual duty and the claims for the return of unjust profit.

The Civil Code also provides a general limitation term of 10 years for claims, the limitation terms of which are not provided differently by the law.

The limitation term for claims regarding administrative issues is 45 days.

The limitation terms cannot be changed upon agreement of the parties.

The limitation term starts from the day when the party acquires the right to file the claim.

The right of a claim that is not exercised within the limitation term defined by law extinguishes and cannot be exercised to any further extent in front of the court.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Albania? What various means of service are there? What is the deemed date of service? How is service effected outside Albania? Is there a preferred method of service of foreign proceedings in Albania?

Civil proceedings commence with the submission of the lawsuit by the plaintiff or by his legal representative.

The court should notify the parties of the date of the preliminary hearing. The notification is made by the court officer or through the mail service. The court should also provide the defendant and the third parties (if any) with the lawsuit and the evidences submitted by the plaintiff.

The notification of the acts to a foreign state is made upon ordered letter through the Ministry of Justice, which sends such acts to the respective country.

The announcement of acts of a foreign state is done through the Ministry of Justice, which passes them on to the District Court of the place where the announcement should be made.

3.2 Are any pre-action interim remedies available in Albania? How do you apply for them? What are the main criteria for obtaining these?

The plaintiff may apply for pre-action interim remedies when there are reasons to doubt that the execution of the decision for his rights shall become impossible or difficult.

The court may issue the pre-action interim remedy when:

- a. the lawsuit is based on evidence in writing; and
- b. the plaintiff gives guarantees at the amount and type set by the court for the potential damage that might be caused to the defendant by the injunction measures.

The pre-action interim remedies consist of: (i) seizure of the debtor's assets; and (ii) other appropriate measures taken by the court, including the suspension of execution.

3.3 What are the main elements of the claimant's pleadings?

The lawsuit should be written in Albanian and must indicate: the competent court; the personal data of the plaintiff, the defendant and their representatives, if there are any; the electronic addresses of the plaintiff and his representative; the cause of action of the lawsuit; the value of the lawsuit when the subject is measurable; the legal base of the lawsuit; the indication of the facts and circumstances, documents and other evidences; the requirements of the plaintiff; and a list of witnesses the plaintiff requires to summon to the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The CCP provides the right of the plaintiff to change the legal base of the lawsuit during the judicial proceedings.

The plaintiff is also entitled to add, reduce or amend the cause of action of the lawsuit without changing its legal base.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

The main elements of defence are the counterarguments and the counterclaim. The defendant is entitled to file a counterclaim when it has a related subject with the claim or when compensation can be made between the claim and the counterclaim. The counterclaim can be filed at any time prior to the conclusion of the judicial examination.

4.2 What is the time limit within which the statement of defence has to be served?

Civil proceedings in Albania are adversarial and, based on such a principle, the CCP provides that the defendant may perform his defence throughout the proceeding, after the submissions of the plaintiff.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Under article 184 of the CCP, when it emerges during a trial that the lawsuit is brought against a defendant to whom it must not have been brought, on the request of the interested party the court may allow the replacement of the defendant by the person against whom the lawsuit should have been brought. For such replacement the court must first receive the approval of both parties and of the person who comes in the place of the defendant.

4.4 What happens if the defendant does not defend the claim?

Under the CCP it is provided that the court resolves the dispute in conformity with the mandatory legal provisions and makes an accurate determination of the facts and actions related to the dispute, without being bound to any determination proposed by the parties. Even when the defendant does not defend the claim or does not take part in the proceedings, the court has the duty to perform a complete and accurate judicial examination and to base its decision only on facts submitted during the legal proceedings.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant has the right to dispute the jurisdiction of the court.

The court, also at any stage of the proceeding, can verify whether the case falls under its jurisdiction.

Decisions regarding jurisdiction can be appealed by the parties directly to the Supreme Court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Under the CCP, anyone may intervene in a judicial process taking place among other persons by filing a claim with the court against either both parties or one of them, when he claims partially or totally the right, subject of the dispute. According to article 189 of the CCP, such an action is defined as the main intervention.

The right of a third party to intervene in a legal proceeding when it has interest in supporting one of the litigant parties is defined as the secondary intervention. Such person joins the party during the proceeding to assist it.

The parties may call into the proceeding a third person they believe to have a common case with, or from whom they may request a guarantee or compensation related to the conclusion of the case. Third persons are also summoned by the court if they should be present in a proceeding of interest to them.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

It is possible to consolidate two sets of proceedings when they have connected subjects (article 57 of the CCP).

5.3 Do you have split trials/bifurcation of proceedings?

The plaintiff may present multiple claims in a lawsuit.

The court may decide to consider the claims separately if it decides their joint consideration may cause difficulties in the proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Albania? How are cases allocated?

The first level of the Albanian court is organised in specialised sections, where cases are allocated according to the subject of the claim. According to article 320 of the CCP, the sections are divided as follows:

- (i) section for civil disputes;
- (ii) section for family disputes; and
- (iii) section for commercial disputes.

Regarding the administrative disputes, please refer to Part I, question 1.2 above.

6.2 Do the courts in Albania have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court manages the judicial process through its decisions and orders.

The court rules for all requests of the parties without exceeding the limits of the claim, conducting a fair, independent and impartial trial within a reasonable time frame, and bases its decision on the evidences presented during the judicial process.

During the proceedings, the court, upon request of the parties, may rule on the following interim applications:

- interim measure;
- amendment of the subject or a change of the legal base of the claim;
- orders for specific disclosure;
- sanctions for the parties that do not comply with the procedure rules;
- unification of claims;
- bifurcation of the case; and
- suspension or dismissal without prejudice of the case.

Regarding the cost consequences, please refer to Part I, question 1.5 above.

6.3 What sanctions are the courts in Albania empowered to impose on a party that disobeys the court's orders or directions?

The court may impose fines up to ALL 30,000 to parties that disobey the court orders or directions.

6.4 Do the courts in Albania have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The court has the power to strike out part of a statement of case or dismiss it entirely of its own motion when the claim is not based in law and is not supported by evidences, or the parties are not legitimated to file the claim, or the claim has been filed beyond the legal terms.

6.5 Can the civil courts in Albania enter summary judgment?

Albania is not familiar with summary judgments of the courts. Albanian civil courts are obliged to carry out a complete judicial examination and follow all the proceeding phases before giving a final decision.

6.6 Do the courts in Albania have any powers to discontinue or stay the proceedings? If so, in what circumstances?

An Albanian court decides to stay the proceeding when:

- the case cannot be solved prior to the termination of another administrative, criminal or civil case;
- a stay of the proceeding is requested by both parties;
- one of the parties dies or the juridical person terminates its activity;
- one of the parties does not possess or has lost the juridical capacity to act and it is necessary to appoint a legal representative for this party; and
- it is required by law.

The court may discontinue the proceedings when:

- none of the parties has requested, within six months, the recommencement of the suspended proceeding, when such suspension was decided by the court upon their request;
- the plaintiff renounces from the case; and
- it is required by law.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Albania? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

The parties in a civil proceeding should disclose to each other and to the court all the evidences relevant to the dispute. They are not required to disclose evidences supporting facts widely or officially known.

7.2 What are the rules on privilege in civil proceedings in Albania?

Under article 235 of the CCP, the attorneys of the parties cannot be summoned to testify on information they have received in their capacity as legal representatives. Also, the spouses, children, parents, grandparents or cousins of the parties, until the second line, are included in the category of privilege. They cannot be summoned as witnesses in a civil proceeding, with the exception of cases when their testimony is necessary for the case resolution. The above-mentioned persons cannot be punished in case they refuse to testify.

7.3 What are the rules in Albania with respect to disclosure by third parties?

The court, upon request of an interested party in the civil proceeding, may order a third party to submit documents when deemed as necessary.

The court may also officially request the public administration authorities to provide the documentation kept on their files or information upon such documentation, if necessary for the proceeding.

When the information required constitutes a state secret, the court requests the permission of the state authorities to obtain such information.

7.4 What is the court's role in disclosure in civil proceedings in Albania?

The court supports the disclosure process in a civil proceeding.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Albania?

The evidences disclosed in a civil proceeding may be used only for this proceeding and for no other purposes.

However, in cases when disclosure of evidence has taken place in a public hearing, there are no restrictions for the publication of such evidence.

8 Evidence

8.1 What are the basic rules of evidence in Albania?

The parties are permitted to prove the facts they claim during the adjudication process by submitting to the court only evidences related and necessary for the case.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence should be submitted in accordance with the provisions and principles of the CCP.

Evidence includes: the confessions of the parties; witness testimony; documents; and the opinion of experts.

The court appoints one or more experts when, for the identification or clarification of facts related to the dispute, a certain expertise in science, technical issues or art is required.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The proof of facts through the witnesses is widely accepted by the court, with the exception of cases when the proof is specifically required through the documents. The court may summon witnesses upon request of the parties. The witnesses are questioned in the hearing, in the presence of the parties and their representatives.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The court appoints the duties to the expert, after taking the parties' opinions. The expert provides a written report. The court and the parties may address questions to the expert regarding the expert's report.

The expert bases his report on the evidences submitted by the parties. However, the expert can also request additional documents and perform verifications, as necessary for the preparation of the report. The expert cannot give legal opinion on the case. The report of the expert is not binding but is assessed by the court in conjunction with the other evidences.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Albania?

The court plays a supportive role during the disclosure process. The court issues orders for disclosure of evidences by the parties or third persons, if necessary.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Albania empowered to issue and in what circumstances?

The court issues orders, non-final decisions and the final decision. The orders are taken by the court in order to insure that the judicial process is carried out in compliance with the provisions of the CCP.

Upon the non-final decisions, the court terminates the adjudication process without solving the merits of the case.

Upon the final decision the court thoroughly resolves the case.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Albanian courts are entitled to rule on the damages, interests and costs of the litigation through their decisions.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced by the bailiff, upon request of the interested party.

A foreign judgment is recognised in Albania through Court of Appeal procedure.

The Court of Appeal does not make a new evaluation of the merits of the case but examines only if the foreign court decision complies with the following criteria:

- (i) the foreign court had jurisdiction to resolve the dispute;
- (ii) the defendant/respondent has been duly notified in case the foreign court has ruled in absence of the defendant;
- (iii) the same case among the same parties has not been judged in Albania;
- (iv) action has not been filed with an Albanian court prior to the foreign court decision becoming final and enforceable;
- (v) the foreign court decision has become final in compliance with respective country legislation; and
- (vi) the said decision complies with the basic principles of the Albanian legislation.

The procedure with the Court of Appeal begins upon filing the request for recognition of a foreign court's decision, supported by the original or certified true copy of the decision and a statement/certificate issued by the said court that the decision is final.

After recognition by the Court of Appeal, the foreign judgment can be enforced by the bailiff.

9.4 What are the rules of appeal against a judgment of a civil court of Albania?

The final decisions of the District Court can be appealed by the parties to the Appeal Court, within 15 days.

The Appeal Court's decisions can be appealed to the Supreme Court within 30 days.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Albania? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Albania disputes can also be resolved by arbitration or mediation.

The parties may agree to resolve by arbitration any potential disputes.

Mediation is applicable in resolving all civil, commercial and familiar disputes.

Mediation is also applicable in cases when it is requested and accepted by the parties, prior or after the dispute has arisen.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings in Albania are governed by the CCP.

Mediation is regulated by law no. 10385, dated 24.02.2011 "On disputes resolution through mediation", as amended.

1.3 Are there any areas of law in Albania that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Criminal law does not provide for any of the above alternative dispute resolution methods, except for certain criminal offences, disputes arising out of which may be subject to mediation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Albania in this context?

The court invites the parties to solve the dispute through mediation.

The court may issue interim measures provided by the law (pre or post the constitution of an arbitral tribunal) until the tribunal award is not final.

The court declares lack of jurisdiction/competence if the parties have agreed to arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Albania in this context?

The arbitral awards are final and enforceable, except in cases where the law provides for the right of appeal against such awards with the Appeal Court (article 434 of the CCP). According to the Mediation Law, the settlement agreements reached through mediation are binding for the parties and enforceable in the same manner as arbitration awards.

The law does not provide for any sanctions if the parties refuse to mediate. The parties can freely decide to solve the dispute through mediation.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Albania?

The CCP does not provide for consolidated institutions for dispute resolution through arbitration. The arbiters are appointed *ad hoc* by the parties pursuant to the provisions of the CCP.

On the other hand, the Mediation Law provides for the establishment of the National Chamber of Mediators and the Chambers of Mediators as consolidated institutions for performing the mediation process. The mediators are licensed and registered at the Register of Mediators with the Ministry of Justice. The parties can appoint the mediators for resolution of their dispute from the Register of Mediators.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Dispute resolution through arbitration proceedings or mediation is not a commonly used method in Albania. For dispute resolution, the parties usually address the courts.

However, being that the use of mediation results in savings in cost and time, promoting communication between the parties by offering a wide variety of settlement options and assuring confidentiality, this dispute resolution method is increasing in consideration.

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She is also involved in legal due diligences regarding real estate development issues and property disputes.

Elona graduated in Law at the Law Faculty, University of Tirana, Albania (2007) and earned a Master Degree in "Comparative Constitutional Law and European Law" from the University of Tirana, Albania (2011).

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BOGA & ASSOCIATES

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Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality legal, tax and accounting services to its clients. The firm also operates in Kosovo (Pristina), offering a full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga, was also Senior Partner/Managing Partner of KPMG Albania.

The firm's particularity is linked to the multidisciplinary services it provides to its clients. Apart from the widely consolidated legal practice, the firm also offers significant expertise in tax and accounting services, with a keen sensitivity to the rapid changes in the Albanian and Kosovar business environment.

With its diverse capabilities and experience, the firm services leading clients in most major industries, banks and financial institutions, and companies engaged in insurance, construction, energy and utilities, entertainment and media, mining, oil and gas, professional services, real estate, technology, telecommunications, tourism, transport, infrastructure and consumer goods. The firm also has an outstanding litigation practice, representing clients at all levels of Albanian courts. This same know-how and experience has been drawn upon by the Legislature in the drafting of new laws and regulations.

The firm is continuously ranked by Chambers and Partners as a "top tier firm" for Corporate/Commercial, Dispute Resolution, Projects, Intellectual Property and Real Estate, as well as by IFLR in Financial and Corporate Law. The firm is praised by clients and peers as a "law firm with high-calibre expertise" and "accessible, responsive and wise", and is distinguished "among the elite in Albania".

Argentina

M. & M. Bomchil

María Inés Corrá



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Argentina got? Are there any rules that govern civil procedure in Argentina?

Argentine Private Law is based on the Civil Law tradition. Nevertheless, it is worth mentioning that the main source for the Argentine Constitution has been the US Constitution.

Argentina is a federal country, with both federal and provincial levels of legal organisation. At the federal level and within the city of Buenos Aires, civil procedure is governed by the National Civil and Commercial Procedural Code (“NCCPC”). Each province has its own procedural rules.

The answers to the questions below will be based on the NCCPC.

1.2 How is the civil court system in Argentina structured? What are the various levels of appeal and are there any specialist courts?

Argentina has a federal and a provincial judiciary structure. The Argentine Constitution provides that the federal judicial power is vested in one Supreme Court of Justice and in such lower courts as Congress may establish.

At the federal level, most claims should be filed before the first instance courts (district courts). The decisions adopted by these courts may be appealed before courts of appeal (circuit courts), which are divided – as well as first instance courts – according to their subject matter and territorial jurisdiction. Federal court of appeal decisions and rulings by provincial superior courts involving a federal question may be brought before the Federal Supreme Court through an extraordinary appeal (restrictive review). Decisions directly or indirectly involving the Federal Government which exceed a certain amount may be appealed by the Federal Supreme Court through an ordinary appeal (broad review). Each province maintains its own provincial court system with a similar structure.

1.3 What are the main stages in civil proceedings in Argentina? What is their underlying timeframe?

Under the NCCPC, there are mainly two kinds of proceedings: fast track proceedings; and ordinary proceedings (longer). In both cases, the time frames are established in working days.

Pursuant to the ordinary proceedings rules, having filed the claimant’s claim before the first instance courts, and having served it to the other party, the defendant has 15 days to submit an answer and, eventually, a counterclaim. If a counterclaim is filed, the claimant may provide an answer to it within 15 days counting from the date on which it receives formal notification thereof. Thereafter, the court calls the parties to a preliminary hearing in which, among other issues, it shall invite the parties to reach an amicable settlement of the dispute, and if no agreement is reached on the matter, the court shall decide on the evidence that could be produced by the parties and, eventually, shall declare the evidentiary period opened for a term that cannot exceed 40 days. Once the evidentiary period is declared closed, both parties may submit a brief on the evidence in a common term of six days for each party. Judgment should be issued within a 40-day term. Any party may file an appeal (without providing grounds) within five days as from having received notice of the judgment. A further pleading providing the grounds of the appeal should be filed within 10 days as from when the dossier is received by the court of appeals.

In fast track proceedings time limits are shorter and some of the above-mentioned stages are omitted (i.e. the preliminary hearing, etc.).

In practice, civil proceedings in Argentina tend to last several years.

1.4 What is Argentina’s local judiciary’s approach to exclusive jurisdiction clauses?

Except as otherwise provided in treaties, exclusive jurisdiction clauses in contracts are admitted by the judiciary only if they modify the court’s territorial jurisdiction and if the matter in dispute is exclusively pecuniary. In international cases, jurisdiction can be extended to foreign courts or arbitral tribunals, except in cases where Argentine courts hold exclusive jurisdiction or the extension of jurisdiction is forbidden by law.

1.5 What are the costs of civil court proceedings in Argentina? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil court proceedings are, mainly, the judiciary fee (generally 3% of the amount claimed) and the attorneys’ and other professionals’ fees (i.e. legal and expert fees), which range within the percentages established by law. The general principle provides that the losing party shall bear all costs. The court may depart from the general principle based on the particular circumstances of the

case. For example, if the court considers that the unsuccessful party had a reasonable cause to start the procedure, the court can apportion the costs between the parties.

1.6 Are there any particular rules about funding litigation in Argentina? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no broadly developed rules on funding litigation. The NCCPC establishes a summary proceeding through which any person who intends to file a claim but could not afford the underlying litigation costs could be totally or partially exempted from bearing judicial costs under certain conditions and limitations. In addition, some law firms and institutions provide *pro bono* litigation. However, private funding is the most widely available method to which such persons resort.

Conditional fee arrangements are allowed, provided that they do not exceed 40% of the amounts awarded to the client (Law No. 21,839).

Rules on security for costs are limited to those cases in which the claimant has neither domicile nor real estate in the country. In that case, the defendant may apply to the court for an order that the claimant provides security for costs (the so-called “*arraigo*”, NCCPC, section 348).

1.7 Are there any constraints to assigning a claim or cause of action in Argentina? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The Civil Code allows the assignment of credits. Section 1446 of the Civil Code states that conditional credits, eventual credits, fortuitous credits, credits that are subject to a due date, or contentious credits can be assigned. Regarding the costs of the litigation proceedings, only the parties shall bear those costs. See the answer to Part I, question 1.5. A non-party to the litigation proceedings cannot formally finance them.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In the federal district, mediation is a mandatory procedure that should be followed prior to initiating almost any kind of civil and commercial proceedings in order for the parties to a dispute to explore the possibility of reaching a settlement (some exceptions apply, such as family law cases or cases involving the State). The proceeding is confidential and is conducted by a mediator authorised by law. See Law No. 26,589. This mechanism has been established in several provinces, such as Buenos Aires and Mendoza, among others.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Statutes of limitation are ruled by substantive law, namely the Argentine Civil Code, the Commercial Law Code and the Criminal Code.

Under the Civil Code and the Commercial Code rules in force until now, there are many different limitation periods according to the classes of claim. For instance, claims for payment of debts or claims seeking annulment of legal acts are subjected to the general statute of limitation of 10 years as from the triggering event taking place or being known by the claimant. However, exceptions apply.

Torts claims are generally subject to a two-year statute of limitations as of the date of the injury taking place or being known to the claimant.

Nevertheless, a new Civil and Commercial (unified) Code will enter into force in August 2015. According to the new Civil and Commercial Code, the general limitation period will be five years, except otherwise provided for.

As per exceptions, tort (civil) claims will be subject to a three-year statute of limitation. Claims involving periodical debts will be subject to a two-year limitation period. As a general rule, under the new Code the limitation periods are calculated as from the date the related obligation becomes enforceable (see Section 2554 of the new Code).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Argentina? What various means of service are there? What is the deemed date of service? How is service effected outside Argentina? Is there a preferred method of service of foreign proceedings in Argentina?

A civil proceeding commences with the filing of the claim with the clerk's general office of the competent court of appeals, which allots the case to a first instance court. The claim is generally served to the defendant through a judicial notice delivered by a judicial officer. However, the NCCPC allows for other means such as spontaneous appearance by the defendant before the court attesting on the record that it receives notice of the claim, a certified telegram, a certified letter, or through a notary public. Service through publication in newspapers is only allowed in those cases in which the defendant has not been identified or its domicile is ignored.

The deemed date of service is the day in which notice is received by the defendant or the day after the last publication in the newspaper.

Service outside the court jurisdiction, but within Argentina, is made through a judicial request to the competent court in the jurisdiction in which the defendant resides. Service outside the country is effected through Letters Rogatory.

In Argentina, the existence of foreign proceedings is generally served through Letters Rogatory. If applicable, treaties concerning judicial assistance prevail over domestic procedural law.

3.2 Are any pre-action interim remedies available in Argentina? How do you apply for them? What are the main criteria for obtaining these?

A claimant could seek precautionary injunctions even before filing its claim. The request should be made through a submission before the court, specifying the particular injunction order requested, the right it seeks to secure and the legal provisions upon which its petition is grounded. The claimant should further evidence that an irreparable injury may result if the injunction is not granted (*periculum in mora*), show that his claim on the merits is *prima facie* well-grounded

under the applicable law (*fumus bonis iuris*), and provide a security for costs and damages that the injunction may eventually cause to the other party under certain circumstances. Each kind of injunction (i.e. attachment of assets, judicial intervention on companies, etc.) establishes additional particular requirements to be met.

Generally, once the pre-action injunction is granted, the claimant must file its claim within a 10-day term under penalty of the injunction automatically being lifted.

3.3 What are the main elements of the claimant's pleadings?

A claimant's pleading shall contain the following information: the claimant's and the defendant's name and address; the object of its claim; the facts and legal provisions upon which its claim is grounded; and the relief sought (indicating, if possible, the amounts claimed). Documentary evidence available to the claimant shall be attached to the claim, while any other evidence that the claimant intends to produce shall be indicated in its pleading (i.e. expert and factual witness evidence, etc.).

3.4 Can the pleadings be amended? If so, are there any restrictions?

A claim can be amended only prior to the defendant being served with it. From such date on, the claim cannot be amended. However, facts that take place or come to the claimant's knowledge after the claim was served can be invoked up to five working days after the parties have received notice of the preliminary hearing, referred to in question 1.3 above. (Nevertheless, and although not explicitly ruled, as a matter of practice the new fact is usually invoked within five working days after the party is aware of it.) Exceptionally, new facts can be brought up before the court of appeals.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The statement of defence shall contain any and all of the defendant's preliminary objections and defences on the merits. In particular, the defendant should:

- (i) state its full name and address;
- (ii) acknowledge or deny (a) the facts alleged in the claimant's claim in a one-by-one basis, (b) the authenticity of the documents filed by the claimant and allegedly produced by the defendant, and (c) reception of letters and telegrams addressed to it whose copies were submitted by the claimant (silence on the matter or an answer in general terms could be implied as acknowledgment of the facts, of the documents' authenticity and of having received the letters and telegrams);
- (iii) clearly state the facts alleged as grounds of its defence;
- (iv) specify the legal provisions upon which its defence is based;
- (v) indicate the relief sought; and
- (vi) attach any documentary evidence available to it and indicate any other evidence it intends to produce.

Counterclaims are admitted and should be included in the same brief as the statement of defence. In order to be admissible, the counterclaim shall bear some connection with the claims brought by the claimant.

A defence of set-off is admitted and will be sustained if it complies with the requirements under Argentina's Civil Code.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed within 15 working days (ordinary proceedings) and 10 working days (fast track proceedings) as of the claim being served to the defendant (domiciled within the court's territorial jurisdiction). Time limits are extended according to the distance. For States and State agencies the time limit for this purpose is 60 working days.

See also question 6.6 below.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

In its statement of defence, the defendant may request the court to summon a third party. If the petition is sustained, proceedings will move forward against both the defendant and the third party. Under the NCCPC, the court may allocate liability to any or both of them.

4.4 What happens if the defendant does not defend the claim?

In that case, the proceeding moves forward without the defendant's participation. If the defendant's failure to act is expressly declared by the court, in case of doubt it is assumed that the licit facts alleged by the claimant are true. However, the court shall decide the case according to its merits and evidence can be produced at a party's request.

4.5 Can the defendant dispute the court's jurisdiction?

It can do so in its statement of defence. The court is also empowered to decide on its own jurisdiction *ex officio*.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may request to be joined to an ongoing proceeding if (i) the judgment could affect the third party's interest (voluntary joinder), or (ii) according to substantive law, it could have acted as the claimant or defendant in the proceeding. The claimant or defendant may request the joining of a third party in their claim and statement of defence respectively by showing that the dispute involves such third party (mandatory joinder).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Consolidation is allowed in the case the underlying claims are related by their cause of action or object and, in general, if the judgment to be issued in one of the proceedings could produce *res judicata* effects in the other one. In addition: (i) both proceedings should be at the same stage (i.e. first instance); (ii) the court must be competent to hear both claims, which should be able to be subjected to the same kind of proceeding as well, i.e. ordinary proceedings; and (iii) no unjustified delay should be caused to the more advanced proceeding.

5.3 Do you have split trials/bifurcation of proceedings?

The NCCPC does not provide for split trials/bifurcation of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Argentina? How are cases allocated?

The clerk's general office of the court of appeals competent to hear the case randomly allots the case to a first instance court. On appeal proceedings, the same office selects the court of appeals' courtroom at random as well.

6.2 Do the courts in Argentina have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Although our civil procedure is based on the dispositive principle, courts are empowered to conduct proceedings, and in the exercise of their duties are able to, among other measures, require the parties to attend the court, request the submission of documents, move the case forward on its own initiative, summon factual and expert witnesses, provide for measures in order to establish the facts of the case, and propose a settlement among the parties.

During the proceeding, parties may file, at the appropriate time, several kinds of applications related to the main subject matter of the case. The issues thus raised are dealt with in an incidental proceeding and the losing party in it should bear the underlying legal costs (i.e. professional fees).

6.3 What sanctions are the courts in Argentina empowered to impose on a party that disobeys the court's orders or directions?

Courts may impose pecuniary sanctions in favour of the other party. They may also impose disciplinary sanctions (such as the exclusion of a party from a hearing, the application of fines, etc.).

6.4 Do the courts in Argentina have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Courts can strike out slanderous allegations from a statement of

case. They can also strike out any statement put forward in breach of the procedural law (i.e. untimely allegations, etc.).

6.5 Can the civil courts in Argentina enter summary judgment?

Yes, although it does not operate in the same manner as in the United States. If facts are undisputed among the parties, or the parties have produced all their evidence in their statement of claim and defence, the court shall declare the proceedings closed after the preliminary hearing takes place (see question 1.3 above) and proceed with the elaboration of its judgment.

6.6 Do the courts in Argentina have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes. Courts may stay proceedings: (i) upon joint request by the parties (no more than 20 working days); (ii) when they consider it appropriate during prosecution of an incidental proceeding; and (iii) due to *force majeure*. In addition, civil courts must stay proceedings prior to entering judgment until a related criminal case is decided.

Courts should discontinue proceedings if the claimant does not move its motion forward in the period of time set forth by the procedural code (e.g. six months in ordinary proceedings before first instance courts).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Argentina? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There are no discovery proceedings in Argentina as known in the common law system, and specifically in the United States procedural system.

The parties to a civil proceeding and any third party should submit or show documents, duly identified, that are deemed essential to the case upon a court order. The party's refusal is regarded as an assumption against its own interests. A third party may refuse to abide by the court order if, being of its exclusive property, the exhibition of the document could impair him.

7.2 What are the rules on privilege in civil proceedings in Argentina?

Privilege matters – such as client-attorney privilege – are protected by law and are not subject to disclosure.

In general, civil proceedings are public, except for those concerning family matters or expressly declared confidential by the court. In addition, the parties can request courts to keep certain documentation confidential.

7.3 What are the rules in Argentina with respect to disclosure by third parties?

See question 7.1 above.

7.4 What is the court's role in disclosure in civil proceedings in Argentina?

See question 7.1 above.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Argentina?

Documents cannot be used if the disclosure took place under a confidentiality order or agreement.

8 Evidence

8.1 What are the basic rules of evidence in Argentina?

Documentary evidence shall be attached to the claim or statement of defence, while any other evidence the parties intend to produce shall be offered in those main pleadings. At the preliminary hearing, the court decides which evidence offered by the parties could be produced and helps to resolve the case. The court also declares the evidentiary period opened for a term that should not exceed 40 working days in the ordinary proceedings.

The court decides on the probative value of the evidence produced according to logical and reasonable rules of evaluation and procedure.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Any type of evidence is admissible provided that it is moral, it does not affect the parties' or any third party's personal freedom or it is not expressly forbidden by law in the case at hand.

Types of evidence specifically provided under the NCCPC are: documentary evidence; factual witness; expert evidence; judicial requests for information from private and public entities; judicial confession; and judicial examination of sites or assets.

Expert evidence is admissible in case evaluation of the disputed facts requires particular expertise in a certain field (i.e. accountability). The expert is appointed by the court and should submit a report according to the terms of reference filed by the parties. The parties are entitled to appoint expert consultants to assist them.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witnesses of fact must be at least 14 years old, and cannot hold lineal consanguinity, lineal affinity or be married to any of the parties. Under ordinary proceedings, each party shall call no more than eight witnesses, which should be identified in its statement of claim or defence.

The NCCPC does not provide for written witness statements. Witnesses provide oral depositions at a hearing specifically called by the court, in which they should answer the questions posed by both parties and the court.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are no particular rules regarding the instruction of expert witnesses.

The general principle established in the NCCPC is that the expert evidence shall be the charge of only one expert appointed by the judge. Nevertheless, each party has the power to appoint a technical consultant.

The party who proposes the appointment of the expert witness (the interested party) shall also propose the issues or queries to be answered by him. The other party has the opportunity to add new items or dismiss the ones offered by the interested party. Once the evidence stage is opened, in absence of the parties' agreement, the judge shall appoint the expert and shall determine the issues that will be the subject matter of the expert opinion.

The expert testimony shall be in charge of the appointed expert, and the parties, as well as their counsel and the technical consultants, may attend the technical operations and draw up relevant observations. Unlike the case of the factual witnesses, the expert shall file a written report with a detailed explanation of the technical operations carried out and the technical principles on which he has based his report. The parties' technical consultants can file their own reports.

The expert report shall be notified to the parties; and the judge, pursuant to law or upon the parties' request, can order the expert to provide the additional explanations which he deems necessary, either in written form or in a hearing. The parties or their technical consultants can raise objections to the expert report until the final pleadings. See section 473 NCCPC. The expert report is not binding for the judge and, according to Section 477, the judge shall analyse the value of said report according to the rules of reasoned judgment (*sana crítica*).

Expert witnesses owe their duties to the court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Argentina?

The court decides on the admissibility of evidence, follows up its production and rules on its probative value.

See also question 6.2 above.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Argentina empowered to issue and in what circumstances?

Courts are empowered to issue: (i) simple procedural decisions aimed at moving forward or conducting the case; (ii) interlocutory judgments which decide ancillary matters dealt within incidental proceedings (see question 6.2 above); and (iii) final judgments. In addition, courts are empowered, among other measures, to issue injunction orders (see question 3.2 above) and enforcement orders.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts are empowered to decide on all three issues (the amount of compensation owed, the applicable rate of interest and the date as from when it should accrue, and also how the parties should bear litigation costs – see question 1.5 above). In doing so, courts resort to the applicable law and case law.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Final domestic judgments can be enforced through court enforcement proceedings, set out in the NCCPC.

Foreign judgments should be first recognised by a court in order to be regarded as a local judgment (that is, the court shall verify their compliance with the formal, substantive and procedural conditions for recognition as established in the NCCPC except otherwise provided in treaties) prior to being submitted to enforcement proceedings – if applicable.

9.4 What are the rules of appeal against a judgment of a civil court of Argentina?

Judgments on the merits, interlocutory judgments and even simple procedural decisions that cause irreparable harm to any party are subject to appeal within a five-day term (see question 1.3 above). If the court of appeals grants leave to appeal, the appellant must submit the grounds for its appeal within 10 (definitive judgment) or five (interlocutory judgment) business days of receiving the notice of the leave. In some special proceedings (such as the “*amparo*”, a fast track proceeding provided for protection of constitutional and legal rights), the appeal pleading should be grounded.

As a general principle, the decision against which a party files an appeal is provisionally stayed until the court of appeals delivers its judgment.

The appellant must refer to all parts of the judgment (points of law or fact) which it considers erroneous (*section 260, CP*).

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Argentina? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequent alternative methods of dispute resolution are mediation and arbitration in law or in equity. The ombudsman is not a dispute resolution method under Argentine law, but a Government officer that is entitled to represent collective interests at court. Concerning mediation, see Part I, question 2.1 above.

Absent any agreement by the parties on the applicable procedural rules, arbitration at federal level is governed by the NCCPC.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Under federal regulations, mediation is governed by Law No. 26.589 and Decree 1467/2011 and arbitration is governed by the NCCPC (arbitration in law, sections 736 to 765, and arbitration in equity, sections 766 to 772). See Part I, question 2.1 above. With the entry into force in 2015 of the new National Civil and Commercial Code, arbitration involving private parties will be ruled by its Chapter 29 (Arbitration Agreement) of Book III, Title IV (Law No. 26,994 published in the Official Bulletin, 8 October 2014).

1.3 Are there any areas of law in Argentina that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Issues that cannot be subjected to out-of-court settlement (such as family law issues in general and any other issues involving the public order) cannot be submitted to arbitration or mediation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Argentina in this context?

Local courts provide assistance to parties in the development of arbitral and mediation proceedings.

Regarding arbitration proceedings, the NCCPC empowers the judge to: (i) fix the date in which the arbitrators shall issue the award in the event the parties omit to do it; (ii) appoint the arbitrators when the parties do not agree on the appointment; (iii) grant compulsory or injunction measures upon the request of the arbitrators; (iv) define the items of the arbitration agreement in the event the parties do not agree with them; and (v) decide on the challenge of arbitrators.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Argentina in this context?

Settlements reached through mediation proceedings and further approved by the court are enforceable through court enforcement proceedings.

Arbitration awards are subject to the same remedies available to court judgments (i.e. appeal), except otherwise provided by the parties. The parties are free to waive them all in advance, except the remedies set forth for award clarifications and annulments. Final domestic arbitration awards (not annulled or revoked by courts) are enforceable as any local judgment without having to go through any confirmation proceedings.

As regards foreign awards, recognition and enforcement proceedings set forth in the NCCPC apply, except otherwise provided in treaties. Argentina is a party to the 1958 New York Convention. The country is also a party to the ICSID Convention.

Finally, according to the Supreme Court precedent *Cartellone* (2004), final awards may be challenged before the judiciary if held unconstitutional, illegal, unreasonable or arbitrary, even in those cases where the parties have waived all remedies (except annulment, which is mandatory) before the judicial courts.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Argentina?

The major dispute resolution institutions are the *Tribunal de Arbitraje de la Bolsa de Comercio de Buenos Aires*, the *Cámara Arbitral de Bolsa de Cereales*, the *Mercado Abierto Electrónico S.A.*, and the *Centro Empresarial de Mediación y Arbitraje*, among others.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration is increasingly being used in Argentina as an alternative dispute settlement method since it is regarded as a fast and flexible means of dispute resolution. Despite the fact that Argentina has not yet issued a modern law on arbitration (i.e. based on the UNCITRAL Model Law), commercial contracts increasingly include an arbitration agreement within their clauses.

It is worth noting that on October 1, 2014, the Argentine Congress passed a new Civil and Commercial Code (unified) by Law No. 26,994. This Code will enter into force on August 1, 2015 (see Law No. 27,077). The new text introduces many reforms in different areas, also affecting litigation, for instance on matters of family law, corporate law and State responsibility. In regard to arbitration, the new Code provides for the “arbitration contract” and incorporates a provision that prohibits the waiver of judicial remedies against awards that are rendered “against the law”. As per matters that can be submitted to arbitration, the new Code excludes any matter that may involve the public order, and particularly family matters and matters dealing with a person’s civil status, consumer protection, labour relationships and any adhesion contract. The new text only applies to persons under private law and not to federal or local State law.



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Ms. Corrá has recently been distinguished among the 50 most inspiring women in the practice of law in Latin America by Latin Lawyer Magazine and with the "Lawyer Monthly Magazine" Women in Law Awards 2014.

MIMIB

M. & M. BOMCHIL ABOGADOS

M. & M. Bomchil was founded in 1923. It is one of the major law firms in the Argentine Republic, providing comprehensive legal services to local and foreign clients in the different branches of law, with specialisation in commercial, financial, administrative and regulatory law, tax, anti-trust, arbitration and domestic litigation.

The firm regularly represents foreign and national companies at public procurement procedures for supply, works and service contracts. As a milestone, the firm has successfully represented bidders during the concession and privatisation processes of most of the public utilities in Argentina – telecommunications, electricity and gas generation, transportation and distribution, postal services, water and sewage services, public works, and airports, among others – and continues to advise several companies supplying such services in all matters related to economic regulation, court and administrative processes, and contractual negotiations.

The firm's clientele, mainly formed by multinational companies that invest in Argentina and by medium and large local companies, involves diverse sectors of the economy: commercial and industrial companies; public utilities' and public works' concessionaires; banks and financial institutions; insurance companies; entertainment enterprises; and service companies, as well as foreign governments and embassies, foundations and non-profit organisations.

Australia

Clayton Utz

Colin Loveday



Scott Grahame



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Australia got? Are there any rules that govern civil procedure in Australia?

Australia has a common law system.

Australia has a Federal system of government. Legislative power is divided between the Commonwealth and the six constituent States and two self-governing Territories. Each State and Territory is a separate jurisdiction and has its own hierarchy of courts and tribunals. In addition, there is a hierarchy of courts and tribunals which have jurisdiction over laws made by the Commonwealth Government (“Federal Government”). The High Court of Australia unites these court hierarchies and is the ultimate court of appeal for all court systems.

Civil procedure is governed both at a Federal and State/Territory level by the civil procedure acts and rules of the respective jurisdiction.

1.2 How is the civil court system in Australia structured? What are the various levels of appeal and are there any specialist courts?

The High Court of Australia is Australia’s highest court and exercises both original and appellate jurisdiction. The majority of the High Court’s matters are appeals from the appellate divisions of the State and Territory Supreme Courts and the Federal Court of Australia after special leave to appeal is granted. Matters heard by the High Court in its original jurisdiction include challenges to the constitutional validity of laws. High Court decisions are binding on all lower courts in Australia.

Each of Australia’s six States and two Territories has a Supreme Court which is the highest court in that State’s court system, subject only to the High Court. Each has unlimited civil jurisdiction. The Supreme Court hears, at first instance, monetary claims above a certain threshold based on the amount claimed in the proceedings, or claims for equitable relief. Monetary claims below that threshold are heard by a lower court in the State court hierarchy. The appellate division of State courts 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 Court of Appeal has both appellate and supervisory jurisdiction in respect of all other courts in the State system.

Most States have two further levels of inferior courts. The District Court (in some States called County Court) is the ‘middle court’ and has jurisdiction for most civil matters within a monetary threshold. There is then the Local Court (in some States called the Magistrates’ Court) which handles smaller, summary matters.

In keeping with the hierarchy of courts established under the laws of each State, there is also a hierarchy of courts which deal with disputes relating to Federal law.

The Federal Court of Australia (Federal Court) has jurisdiction covering almost all civil matters arising under Australian Federal law. Most notably, the Federal Court has jurisdiction to hear disputes on issues including trade practices laws, bankruptcy, corporations, industrial relations, intellectual property, native title and taxation.

The Federal Circuit Court hears less complex disputes relating to family law, administrative law, bankruptcy, industrial relations, migration and trade practices laws.

In addition, some States have established specialist courts and tribunals of limited statutory jurisdiction, designed to hear specific categories of disputes.

There are also a range of tribunals created under Federal law. For example, the Administrative Appeals Tribunal reviews a broad range of administrative decisions made by Australian Government ministers and officials, authorities and other tribunals.

1.3 What are the main stages in civil proceedings in Australia? What is their underlying timeframe?

While there are minor differences between the processes to be followed in the various Australian courts, the course of litigation is broadly the same throughout Australia.

In the first stage of the proceedings, the parties exchange pleadings (such as a statement of claim and defence), which serve to define the issues in dispute between the parties.

Once the parties have finalised their pleadings, the parties will give discovery (sometimes referred to as ‘disclosure’) which involves disclosing their relevant documents and inspecting their opponent’s relevant documents [see question 7]. Parties may also issue subpoenas to obtain documents from third parties.

Each party will then prepare its evidence for use at the final hearing. In the Federal and some Supreme Courts, witnesses will not generally give their evidence-in-chief orally. Instead, written witness statements or affidavits are prepared by lawyers and served on the other side. Parties may also elect to engage expert witnesses, where required, to give evidence concerning fields of specialised knowledge [see question 8.4].

Throughout the proceedings, the parties will attend court at regular intervals for case management. At directions hearings, orders will be made to govern the conduct of the matter up to its final hearing.

Once all the parties' evidence has been prepared and all the interlocutory disputes resolved, the case proceeds to a final hearing.

The timeframes for each of the stages discussed above will vary depending on the complexity of the subject matter, case management objectives and the civil procedure rules of the relevant jurisdiction.

1.4 What is Australia's local judiciary's approach to exclusive jurisdiction clauses?

Australian courts will generally respect an exclusive jurisdiction clause if it is consistent with the construction of the relevant contract. However, an exclusive jurisdiction clause does not necessarily prevent an Australian court from exercising jurisdiction where there is a strong case for the court to do so, namely, where the party would be deprived of a legitimate juridical advantage available in an Australian court.

1.5 What are the costs of civil court proceedings in Australia? Who bears these costs? Are there any rules on costs budgeting?

The costs of conducting civil proceedings in Australia differ depending on the size and complexity of the case. Generally, the cost of proceedings increases with the superiority of the court in which it is heard. In Australia, the victor in litigation is entitled to claim costs from their opponent. There are two main classes of costs:

- those that arise by virtue of the retainer with the client and are governed by contract ("solicitor-client" costs); and
- those that arise by order of the court, which may either be on an ordinary basis ("party/party" costs) or an indemnity basis ("solicitor/client" costs). Indemnity costs are usually awarded against a party in circumstances where that party has engaged in unreasonable behaviour in connection with the conduct of the proceedings.

Following the conclusion of proceedings, costs are assessed by the courts. It is unusual that a party will ever recover all of its costs, as a discount is often applied by the costs assessor to ensure costs are "proportional". Costs are closely prescribed in some jurisdictions. Special and particular costs orders are not unusual where there have been formal (without prejudice) offers of compromise.

1.6 Are there any particular rules about funding litigation in Australia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

While initially a matter of some debate, the validity of litigation funding was established by the High Court in 2006 and subsequently reaffirmed in 2012, when it unanimously held that litigation funders were not required to hold an Australian Financial Services Licence.

In 2012, the Federal Government passed legislation which exempted a person providing financial services for litigation and proof of debt schemes from certain requirements of the corporations law if that person meets certain conditions.

The flourishing litigation funding industry that has emerged as a result of the light-touch legislative scheme in Australia has been active particularly in class actions and in an insolvency context. In the insolvency context, such funding agreements require the approval of the court, which requires that the commission to be paid to a litigation funder be "reasonable".

A well-known feature of plaintiff firms in class actions in Australia is the "no win, no fee" retainer its solicitors often enter into with group members in a class action, who otherwise could not afford to fund the litigation. In the result of a win, the retainer agreement often contains provision for the payment of an "uplift" fee, in addition to professional costs. Subject to the court supervision inherent in the class action regime in Australia, this arrangement is permissible.

Usually in litigation in Australia, where a respondent does not expect to be able to recover costs from a plaintiff, it has an option to make an application for security for costs. The court has the power to award security for costs to restore the balance, as having to put up money upfront to potentially cover the respondent's costs forces an applicant to consider whether there is merit in pursuing the action, and avoids frivolous litigation. The involvement of third-party funders with no pre-existing interest in the proceedings, but who stand to benefit substantially from any recovery from the proceedings is a material consideration in the courts considering whether to grant security for costs. The courts proceed on the basis that funders who seek to benefit from litigation should bear the risks and burdens that the process entails.

1.7 Are there any constraints to assigning a claim or cause of action in Australia? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Generally, a claim or cause of action may be assigned except where the cause of action relates to a personal right, such as an action in tort for personal injury. Contractual rights, including the ability to enforce those rights, are *prima facie* assignable, however this position is not entirely settled at law.

It is permissible for a non-party to litigation to finance proceedings [see question 1.6].

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In the Federal and several State jurisdictions, legislation has been enacted to impose pre-litigation requirements on persons involved in civil disputes prior to commencing proceedings. While generally a failure to comply with pre-litigation requirements will not invalidate the proceedings, the court may take this into consideration when awarding costs associated with the proceedings.

In the Federal Court, 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.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In Australia, limitation periods are governed by State and Territory legislation and are treated as substantive rather than procedural.

In New South Wales, the Limitation Act 1969 (NSW) outlines the periods of limitations relating to specific causes of action. For example, section 14 of the Limitation Act states that a cause of action founded on contract or tort will not be maintainable if brought after the expiration of a limitation period of six years from the date the cause of action accrued.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Australia? What various means of service are there? What is the deemed date of service? How is service effected outside Australia? Is there a preferred method of service of foreign proceedings in Australia?

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.

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, however 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).

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

For service of an originating process outside Australia, the relevant court rules will generally provide a power to serve an originating process outside Australia where there is a connection between the jurisdiction and the person's acts or the consequences of those acts.

Australia is a signatory to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Convention is designed to simplify the process for serving court documents on international litigants and receiving court documents relating to foreign litigation. It applies in all civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.

3.2 Are any pre-action interim remedies available in Australia? How do you apply for them? What are the main criteria for obtaining these?

Generally speaking, Australian courts have a wide discretion in determining whether to grant injunctive relief to a party. An injunction is a court order that restrains a person from performing a particular act (prohibitory injunction) or requires a person to perform a specified act (mandatory injunction). Injunctions may have an effect for a limited time, or permanently, and may be granted before proceedings are commenced, during a proceeding, or as final relief.

When seeking an interlocutory injunction, an applicant is required to prove that there is a serious question of law to be tried, and that the balance of convenience favours the granting of the injunction sought. The court will have regard to factors including whether damages would otherwise be an adequate remedy and whether the grant of an injunction would preserve the *status quo*. Typically, such applications are made on *ex parte* basis and without notice to the other party.

Australian courts may also grant other interim orders including freezing orders (sometimes referred to as "*Mareva orders*"), and search orders (known as "*Anton Piller orders*").

Another pre-action interim remedy which may be granted by Australian courts is preliminary (documentary) discovery. Orders for preliminary discovery are generally made where the applicant has made reasonable inquiries but still has insufficient information for the purpose of determining a prospective defendant's liability or whereabouts for the purpose of commencing proceedings, or

deciding whether or not to commence proceedings against the prospective defendant.

3.3 What are the main elements of the claimant's pleadings?

The plaintiff's primary pleading is the statement of claim. The relevant court rules for each jurisdiction outline the required format and generally require the statement of claim to contain the following elements:

- a summary of all the material facts on which the party relies, however this should not include evidence by which the facts are to be proven;
- adequate particulars of the claim as are necessary for the defendant to know the case it has to meet;
- the relief or remedy sought;
- a statement by a legal practitioner certifying that there are reasonable prospects of success; and
- often, an affidavit verifying that the allegations in the pleadings are true.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended, however any amendments must be made in accordance with the civil procedure rules in the relevant jurisdiction. In some instances, there may be cost sanctions associated with a late amendment to the pleadings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defence must address the following:

- the allegations pleaded in the statement of claim that the defendant admits, does not admit, or denies; and
- any alternative versions of the facts underlying the dispute.

The form of the defence must be in accordance with the court rules and format of the relevant jurisdiction.

A defendant may counterclaim against the plaintiff. The plaintiff's claim and the counterclaim will generally be heard together unless the court orders otherwise.

Where the defendant has a claim against the plaintiff for money, the defendant may set it off against the plaintiff's claim for money by way of a defence.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit within which the defence has to be served is set out in the civil procedure rules of the relevant jurisdiction. In New South Wales, the statement of defence must be filed within 28 days after service of the statement of claim, unless otherwise ordered by the court. This timeframe does not take into account the fact that in some circumstances it may be necessary to seek further and better particulars of the matters pleaded in the statement of claim in order to better understand the claim.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Third parties may be joined to the proceedings where contribution or indemnity is sought from the third party in respect to all or part of the claim made against the defendant. This obviates the need to commence new proceedings against the third party and ensures that all common issues are dealt with in one set of proceedings.

In each Australian jurisdiction, legislation provides that liability may be apportioned to a concurrent wrongdoer to limit the extent of a defendant's responsibility for the plaintiff's loss.

4.4 What happens if the defendant does not defend the claim?

Where a defendant fails to file a defence within the time limit provided in the court rules, the plaintiff is generally able to apply to the court to enter a judgment in default.

In New South Wales, the *Uniform Civil Procedure Rules 2005* ("UCPR") provide that judgment may be given for the plaintiff against the defendant on a liquidated claim for a sum not greater than the amount claimed, interest up to judgment, and costs. On an unliquidated claim, judgment may be given for the plaintiff for damages to be assessed and for costs.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. To dispute the court's jurisdiction, the defendant must file an application with an affidavit in support. The application would generally seek orders that the court lacks jurisdiction and therefore the originating process or its service should be set aside, or an order that the proceedings should be stayed.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may be joined to existing proceedings. The relevant court rules in each jurisdiction set out the circumstances in which a party may be joined to the proceedings. In New South Wales, the UCPR provides that the court may order a person be joined as a party where it considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings. A third party may also apply to the court to be joined as a party, either as a plaintiff or a defendant.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The courts will generally allow for the consolidation or joint hearing of proceedings where the proceedings give rise to a common question of law or fact and where all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction.

5.3 Do you have split trials/bifurcation of proceedings?

In Australia, the court has power to order that a question arising in a proceeding be heard separately from another question in the proceeding where it is convenient for the just, quick and cheap disposal of the issues in dispute.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Australia? How are cases allocated?

Each Australian court has its own case allocation system.

The Federal Court has adopted the individual docket system where cases are randomly allocated to judges and the case will ordinarily stay with the same judge from commencement until it is finalised. Cases requiring particular expertise are allocated to a judge who is a member of a specialist panel.

In many State and Territory courts, cases are allocated to judges in particular divisions according to the subject matter of the claim.

6.2 Do the courts in Australia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes. Australian courts have broad case management powers which are generally defined by the relevant court rules. Judges have a wide discretion to manage cases as they see fit to ensure that the real issues in dispute are identified and the matter is progressed to trial as soon as possible.

Parties may apply to the court for a wide range of interim orders including orders for evidence, discovery, the issue of subpoenas and the referral of the matter to mediation.

Australian courts have wide jurisdiction in relation to costs and can make interim costs orders against a party. Where a party has failed to comply with case management orders and the other party has incurred costs as a result, the non-complying party will usually be required to pay the costs incurred by the innocent party.

6.3 What sanctions are the courts in Australia empowered to impose on a party that disobeys the court's orders or directions?

The Australian courts have a wide discretion to impose sanctions on a party that has not complied with court orders or directions. Sanctions may include adverse costs orders imposed against a party and or against the party's solicitor, the striking out or dismissal of matters and the rejection of evidence.

6.4 Do the courts in Australia have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Yes. Australian courts have the power to strike out the whole or part of a statement of case in the following circumstances:

- where the pleading discloses no reasonable cause of action;
- where the pleading has a tendency to cause prejudice, embarrassment or delay in the proceeding; or
- where the pleading is otherwise an abuse of process of the court which may arise on a number of bases.

6.5 Can the civil courts in Australia enter summary judgment?

Yes, civil courts in Australia have the power to enter summary judgment. Courts may enter summary judgment where there is reasonable evidence that the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed.

6.6 Do the courts in Australia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes. A discontinuance of proceedings typically occurs once a settlement of the proceedings has been reached between the parties. Australian courts have the power to order proceedings be stayed in certain circumstances. For example, the court may stay the proceedings until such time as a plaintiff (who has been ordered to provide security) does so.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Australia? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

In Australia, the disclosure process is referred to as “discovery”. Discovery is an interlocutory procedure whereby a party is able to obtain from an opponent the disclosure and subsequent production of documents which are relevant to a fact in issue in the proceedings. Disclosure must be made of the existence of all documents which the party has in its possession, custody or power.

While in many jurisdictions an application may 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 may be ordered by the court or obtained by filing a notice to produce for inspection 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. While most jurisdictions permit an order for general discovery to be made, the 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, the *Federal Court Rules 2011* (Cth) provide that a party must not apply for an order for discovery unless it will facilitate the just 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 are required to 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 the lists have been exchanged, the documents will be produced for inspection by the other party.

7.2 What are the rules on privilege in civil proceedings in Australia?

At common law, legal privilege is known as “legal professional privilege”. The introduction of the uniform *Evidence Acts* in the Federal jurisdiction and some States, including New South Wales, renamed privilege “client legal privilege”. This has created a situation where two sets of laws operate in the area of privilege in *Evidence Act* jurisdictions. In broad terms, the uniform *Evidence Acts* govern privilege issues on occasions when evidence is adduced at trial, while the common law governs questions concerning privilege which arise pre-trial, except to the extent otherwise provided by statute or rules of the court.

The uniform *Evidence Acts* create a privilege for confidential communications made, and/or prepared, for the dominant purpose of a lawyer providing legal advice or legal services relating to actual or anticipated litigation.

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.

A third stream of privilege exists in the form of “without prejudice privilege”. This involves communications between parties which are generally aimed at settlement. These communications cannot be put into evidence without the consent of parties in the event that negotiations are unsuccessful.

7.3 What are the rules in Australia with respect to disclosure by third parties?

The relevant court rules in each jurisdiction provide that a party to proceedings can apply for an order for discovery against a non-party. In New South Wales, the UCPR provides that, where it appears to the court that a person who is not a party to the proceedings may have or have had possession of a document that relates to any question in the proceedings, the court may order such person to give discovery to the applicant of all documents that are, or have been, in the person’s possession and which relate to that question.

In the alternative, a party may choose to seek discovery from a non-party by way of subpoena. While a party cannot seek general disclosure from a non-party through a subpoena, it can request documents that relate to narrowly defined categories.

7.4 What is the court’s role in disclosure in civil proceedings in Australia?

Australian courts are involved in making orders for discovery to direct a party to produce or deliver up requested information. The courts are sometimes required to determine the scope of discovery upon application to the court.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Australia?

Documents obtained on discovery are not able to be used for any purpose other than the proceedings in which they were disclosed.

The “Harman Undertaking” is the implied undertaking given to the court by any party obtaining documents on discovery (or by virtue of some other compulsory process) that it will not use such documents (or any other information gained from them) for any collateral purpose.

The Harman Undertaking is a common law doctrine which has been enshrined or referred to in the rules of the courts of various jurisdictions (although varied in the breadth of its application).

8 Evidence

8.1 What are the basic rules of evidence in Australia?

The *Evidence Act 1995* (Cth) applies to all proceedings in Federal courts. Rules of evidence in State/Territory courts are established by legislation enacted by the respective State or Territory. The *Evidence Acts* are based largely on the common law, but also expand upon it and represent the most comprehensive codification of the law to date. The Acts include rules of evidence in areas including:

- hearsay evidence;
- opinion evidence;
- admissions;
- credibility evidence;
- character evidence;
- privilege; and
- proof and burden.

In some speciality tribunals, such as the Administrative Appeals Tribunal at the Federal level, or the Independent Commission Against Corruption in New South Wales, judge equivalents in those tribunals are generally guided by considerations of probity and prejudice. Given the general “fact finding” mission of such tribunals, they are not bound by the strict rules of evidence that may otherwise apply to the courts.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence is admissible if it is relevant and not otherwise excluded either by the common law or the relevant Evidence Act in the State/Territory or Federal jurisdiction. For example, hearsay is generally inadmissible.

Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion is expressed, unless that opinion is given by a person with specialised knowledge based on that person’s training, study or experience. These persons are known as “expert witnesses”. There are several conditions for expert evidence to be admissible, namely that:

- there must be a field of specialised knowledge;
- there must be an identified aspect of that field in which the witness demonstrates that he/she has become an expert; and
- the opinion proffered must be wholly or substantially based on the witness’s expert knowledge.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

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

under oath or affirmed. These documents are then “read” onto the record in court, and serve as evidence-in-chief for that witness. Witnesses are then usually cross-examined and re-examined in court by Counsel.

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

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are two possible expert reports that may be admitted in proceedings: a joint report, arising out of a conference of experts; and an individual expert’s report. While specific requirements differ between jurisdictions, generally an expert’s report must include:

- the expert’s qualifications on the subject of the report;
- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instruction may be annexed);
- the expert’s reasons for each opinion expressed;
- any literature or materials utilised in support of the opinions;
- any examinations, tests or investigations on which the expert has relied; and
- the qualifications of persons who conducted such examinations/tests/investigations.

Unless otherwise ordered, an expert’s evidence-in-chief must be given by the tender of one or more expert’s reports.

The expert’s paramount duty is to the court, not the engaging party. An expert is not an advocate for a party, but has an overriding duty to provide impartial assistance to the court on matters within the expert’s area of expertise. Generally, unless the court orders otherwise, an expert will not be permitted to give oral evidence unless the court is satisfied that the expert has acknowledged that they have read the appropriate guidelines or code of conduct which pertains to experts, and agree to be bound by it.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Australia?

The parties themselves decide which evidence they will rely upon to prove their case. However, Australian courts retain the discretion to make orders regarding the admissibility of certain evidence. Courts also have the discretion to exclude or limit evidence if its probative value is substantially outweighed by the prejudice it may cause to a party.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Australia empowered to issue and in what circumstances?

A judgment is a formal order by a court which concludes the proceedings before it. The judgment may relate to the substantive question in the proceedings, or it may be a question in an interlocutory application such as an application for an injunction or a notice of motion seeking orders for discovery. Courts in Australia are also empowered to make consent, summary and default judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

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

While costs orders are generally discretionary, the Australian courts will usually make orders in accordance with the principle that "costs follow the event", whereby the unsuccessful party in the litigation pays the costs of the successful party on a party/party basis [see question 1.5].

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

9.3 How can a domestic/foreign judgment be recognised and enforced?

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 by common law principles. Within the statutory regime, the *Foreign Judgments Act 1991* (Cth) provides for the procedure and scope of judgments that can be enforceable within the statutory regime. 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 may be enforced at common law.

9.4 What are the rules of appeal against a judgment of a civil court of Australia?

Judgments of a civil court in Australia may be appealed to a superior court. Leave may be required in order to appeal. The relevant court legislation or procedural provisions set out the relevant rules of appeal.

The appellate division of most States is the Court of Appeal or Full Court, which hears appeals from single judges of the Supreme Court and from certain other State courts and tribunals. The High Court of Australia is the ultimate court of appeal in Australia [see question 1.2].

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Australia? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

There are a number of dispute resolution mechanisms in use in Australia, including arbitration and mediation.

Arbitration is widely used in commercial disputes. In its most common form, parties select their arbitrator/s and are bound by that person or panel's decision, either by prior agreement or by statute.

Mediation is a structured negotiation process in which a neutral third party, the mediator, assists the parties to agree on their own solution to their dispute. The process usually involves isolating the issues in dispute (typically, by use of a position paper which outlines the issues), developing options for resolution and reaching an agreement which accommodates the interests of the parties as much as possible.

In some instances, the parties will have agreed to refer any disputes arising for expert determination. The independent expert is appointed by the parties to investigate and deliver a binding opinion on the issues in dispute. This may be appropriate in circumstances where the dispute involves a highly technical subject matter, such as, for example, construction disputes.

In addition, there are a number of tribunals in each jurisdiction which have been established to deal with disputes in a specific area and provide affordable alternative dispute resolution mechanisms.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

In Australia, there are no laws or rules that govern the conduct of alternative dispute resolution mechanisms such as mediation or expert determination.

Commercial arbitration, however, is governed by both State and Federal legislation. The *International Arbitration Act 1974* (Cth) governs international arbitrations, while domestic arbitrations are governed by legislation enacted in each State or Territory.

1.3 Are there any areas of law in Australia that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration and mediation are commonly utilised in commercial matters in Australia. Similarly, in some jurisdictions, such as the Family Court of Australia, parties are required to mediate prior to the matter proceeding to trial. Generally, however, criminal and family law matters are considered non-arbitral.

The alternative dispute resolution methods exercised by a tribunal or ombudsman are generally restricted to resolving disputes regarding a specific industry or area to which the tribunal or ombudsman relates.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Australia in this context?

Generally speaking, Australian courts are supportive of the different methods of alternative dispute resolution. For example, 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.

Australian courts will, where appropriate, enforce binding arbitration clauses. An Australian court will stay litigation proceedings in favour of arbitration if the arbitration agreement is valid and where the dispute falls within the terms of the agreement and is capable of arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Australia in this context?

There are limited rights available to a party to challenge an arbitral award. The only recourse available is an application to set aside an award in certain prescribed circumstances (Article 34(1), UNCITRAL Model Law).

It is necessary to consider the particular terms of the alternative dispute resolution clause in question to determine whether an expert determination is binding.

Settlement agreements reached at mediation do not require court sanction and will be binding and enforceable upon the parties if a valid contract has been formed.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Australia?

The major dispute resolution institutions in Australia are the Australian Centre for International Commercial Arbitration and the Australian Commercial Disputes Centre.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Alternative dispute resolution is increasingly popular 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 the Federal Court, 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.

International arbitration has become a common way of resolving cross-border disputes in Australia.

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Austria

Oblin Melichar

Dr. Klaus Oblin



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Austria got? Are there any rules that govern civil procedure in Austria?

Austria is a civil law country; thus, laws are codified into collections. Civil procedural rules are contained in various acts such as:

- the Austrian Jurisdiction Act (“*Jurisdiktionsnorm*”, AJA), regulating the organisation and jurisdiction of courts;
- the Austrian Code of Civil Procedure (“*Zivilprozessordnung*”, ACCP), governing the contentious proceedings in civil courts; and
- the Austrian Enforcement Code (“*Exekutionsordnung*”, AEC), determining the enforcement of judgments (as well as arbitral awards and preliminary remedies).

In addition, Austria is *inter alia* party to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”) and the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

1.2 How is the civil court system in Austria structured? What are the various levels of appeal and are there any specialist courts?

On the first level, civil proceedings are initiated either before the district court (“*Bezirksgerichte*”) or regional courts (“*Landesgerichte*”).

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 €10,000 (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 with the Supreme Court (“*Oberster Gerichtshof*”); see below.

Regional courts have monetary jurisdiction in matters involving an amount in dispute exceeding €10,000 and subject matter jurisdiction in IP and competition matters, as well as various specific statutes (Public Liability Act, Data Protection Act, Austrian Nuclear Liability Act). Appeals are to be directed to the Higher Regional Courts (“*Oberlandesgerichte*”). The third and final appeal goes to the Supreme Court.

As a general rule, a matter may only be appealed to the Supreme Court if the subject matter involves the resolution of a legal issue of general interest, i.e. 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.

With respect to commercial matters, special Commercial Courts (“*Handelsgericht und Bezirksgericht für Handelssachen*”) only exist in Vienna. Apart from that, the above-mentioned ordinary courts decide as Commercial Courts. Commercial matters are, for example, actions against businessmen or companies in connection with commercial transactions, unfair competition matters, etc. Other special courts are the Labour Courts (“*Arbeits- und Sozialgericht*”), 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, respectively, lay judges and professional judges decide together. The Court of Appeal in Vienna decides as the Cartel Court (“*Kartellgericht*”) on the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court as the Appellate Cartel Court (“*Kartellobergericht*”). In cartel matters, as well, lay judges sit on the bench with professional judges.

1.3 What are the main stages in civil proceedings in Austria? What is their underlying timeframe?

The statement of claim (“*Klage*”) is filed with the court and passed on to the defendant, along with an order to file a statement of defence (“*Klagebeantwortung*”). If the defendant replies in time, 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, experts, etc.). In addition, settlement options might be discussed. After an exchange of briefs, the main hearing(s) follow. The average duration of first instance litigation is one year. However, complex litigations may take significantly longer. At the appellate stage, a decision is handed down after approx. six months.

1.4 What is Austria’s local judiciary’s approach to exclusive jurisdiction clauses?

Mutual agreements on jurisdiction are permitted unless expressly prohibited by law. If a valid jurisdiction clause is applicable, courts (if their jurisdiction is not agreed upon) have to dismiss the case.

1.5 What are the costs of civil court proceedings in Austria? Who bears these costs? Are there any rules on costs budgeting?

Legal costs comprise court fees and – if necessary – fees for experts, interpreters and witnesses. According to the Austrian Court Fees Act (“*Gerichtsgebührengesetz*”), 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 (“*Rechtsanwaltstarifgesetz*”). There are no rules on costs budgets, therefore there are no requirements to provide a detailed breakdown for each stage of the litigation, or to identify costs and disbursements incurred already together with those estimated.

1.6 Are there any particular rules about funding litigation in Austria? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

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 (“*Verfahrenshilfe*”) 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.

If a foreigner files a lawsuit, upon a defendant’s request, a security deposit for legal costs must be made unless an international agreement provides otherwise. This 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.

1.7 Are there any constraints to assigning a claim or cause of action in Austria? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

One single action containing several claims is permitted if the claims get assigned to another legal entity; such legal entity acts as the sole claimant if the claims rely on the same or similar legal and factual basis. The concept has been approved by the Supreme Court.

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

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No, there is not.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

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 a long and a short limitation period. The long limitation period is 30 years and applies whenever special provisions do not provide otherwise. The short limitation period is three years and applies, e.g. 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*”).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Austria? What various means of service are there? What is the deemed date of service? How is service effected outside Austria? Is there a preferred method of service of foreign proceedings in Austria?

The proceedings are initiated by submitting a statement of claim (“*Klage*”) 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, i.e. 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 EU, the Service Regulation (Council Regulation (EC) No 1348/2000) 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 Convention on Civil Procedure).

3.2 Are any pre-action interim remedies available in Austria? How do you apply for them? What are the main criteria for obtaining these?

Discovery proceedings do not exist.

However, 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.

Interim relief by injunctions is granted by various measures such as freezing orders on bank accounts or the seizure of assets including plots of land. In addition, third parties may be ordered not to pay accounts receivables.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim must state the facts which build the basis of the claim, declare the supporting evidence and specify the relief sought. If no payment order is requested, the amount in dispute has to be determined.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Amendments to the pleadings are generally admissible.

As to the statement of the claim itself, once it has been served, it can only be amended with the consent of the other party. However, courts may grant an amendment even without the defendant's consent if the court's competence remains and a risk of major delays does not exist.

Concerning additional submissions, there are procedural limits. In principle, the facts shall be presented before the first hearing; e.g. additional requests for evidence and statements on legal questions are accepted until the proceedings of first instance are closed.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The statement of defence must present the facts, declare the evidence and contain a specified request (in principle, the dismissal in whole or in part).

The defendant may either raise a counterclaim ("*Widerklage*") or claim a set-off ("*Aufrechnungseinrede*").

A counterclaim represents an independent claim which is yet closely connected to the main claim.

A set-off aims to receive the court's dismissal of the main claim, based on the argument that it can be set-off against an existing claim against the claimant.

While a set-off does not require that the court has jurisdiction over the defendant's claim, a counterclaim is only admissible if the court does have jurisdiction for the claim.

In addition, a set-off does not trigger court fees.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit is four weeks. If the defendant fails to submit its statement of defence in time, a default judgment can be obtained (upon request).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There is no such mechanism. Even if the object in dispute is transferred to a third party during the litigation, the transferee (e.g. buyer) may not join the proceedings without the opponent's consent.

4.4 What happens if the defendant does not defend the claim?

The claimant will request from the court that it issues a default judgment.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction but they must do so as soon as possible, i.e. before stating their defence at the district court level or along with their statement of defence at the regional court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, third party intervention is admissible if the prospective judgment might affect the third party's legal position.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, in order to save time and costs, courts may consolidate two (or more) proceedings involving the same parties even if the final judgment will have to be announced separately for the parties.

5.3 Do you have split trials/bifurcation of proceedings?

Yes, courts may split proceedings and separately hear claims which have been raised in one submission.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Austria? How are cases allocated?

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

6.2 Do the courts in Austria have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Proceedings are primarily controlled by the judge who is 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 (e.g. for time extension), yet also agree on the stay of the proceedings.

6.3 What sanctions are the courts in Austria empowered to impose on a party that disobeys the court's orders or directions?

The powers to impose sanctions on parties are limited. If briefs are not filed in time, they may be disregarded; however, the parties are permitted to give their statements orally until the end of the (final) hearing anyway.

If a witness fails to show at the hearing or to testify at all without valid excuse, an administrative penalty is imposed. Such refusals are also considered when weighing the evidence. Courts also have the power to take witnesses under oath.

6.4 Do the courts in Austria have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Courts only deal with those parts of the submissions which they consider relevant for the decision. A full dismissal can only be made by a reasoned final written decision.

6.5 Can the civil courts in Austria enter summary judgment?

Upon request, default judgments are rendered if the defendant fails to submit a statement of defence in time or fails to show at the first hearing.

If the claim calls for a payment order and the amount in dispute is below €75,000, instead of the invitation to submit a statement of defence, a payment order is issued (based on the statement of claim). If the defendant does not respond within the time set, the claimant receives an enforceable title and may proceed to the enforcement stage. If the defendant replies, a regular litigation follows.

6.6 Do the courts in Austria have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Proceedings are stayed if the parties so agree or (both) fail to show at the hearing.

Proceedings are discontinued either by law e.g. if a party gets insolvent or ceases to exist, or by a court order, depending on various reasons to be considered by the judge.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Austria? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

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

Rules on pre-action disclosure do not exist.

A party is not bound to present documents which concern family life if the opposing party violates obligations of honour by the delivery of documents, if the disclosure of documents leads 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 a business secret (or for any other reason similar to the above).

7.2 What are the rules on privilege in civil proceedings in Austria?

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.

7.3 What are the rules in Austria with respect to disclosure by third parties?

The court may order third parties to disclose if (i) the third party is under a legal obligation to hand over a particular document to the requesting party, or (ii) either the document was established in the legal interest of both the third and the requesting party, it certifies a legal relationship between them, or it contains written statements which were made between them during the negotiation of a legal act.

7.4 What is the court's role in disclosure in civil proceedings in Austria?

See question 7.1 above. The evidentiary proceedings are mainly shaped by the judge.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Austria?

No, there are no restrictions of this kind.

8 Evidence

8.1 What are the basic rules of evidence in Austria?

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.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The main types of evidence are documents, party and witness testimony, expert testimony and judicial inspection.

Written witness statements are not admissible.

Although experts render their reports in written form they are often invited to attend the hearing to further explain and answer additional questions orally.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

There are no depositions and no written witness statements.

Witnesses are obliged to show at the hearing and testify. Regarding sanctions, see question 6.3 above.

Restrictions to this obligation exist, e.g. privileges for lawyers, doctors, priests or in connection with possible incrimination of close relatives.

Witnesses are examined by the judge followed by (additional) questions by the legal representatives of the parties.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

An expert witness assists the court. While the (ordinary) witness gives testimony concerning facts, the expert witness provides the court with knowledge which 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 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 ACCP; they have the status of a private document.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Austria?

The judge takes any evidence which he considers relevant, i.e. by examining parties and witnesses, ordering the production of documents (see question 7 above), arranging for a local inspection and nominating an expert.

Documents and witnesses must have been introduced by the party/ies. Experts are appointed if at least one party's allegation has made it necessary.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Austria empowered to issue and in what circumstances?

Court decisions on the merits are referred to as judgments ("*Urteil*"). In general, they are handed down in writing a couple of months after the final hearing.

Concerning default judgments, see question 6.5 above.

Decisions of a procedural nature are referred to as orders ("*Beschluss*").

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The decision on costs is part of any court's final decision. It can be challenged separately. The prevailing party has to get reimbursed

for all the costs including lawyers' fees, calculated on the basis of the Austrian Lawyers' Fees Act to the extent it has prevailed ("*pro rata*").

Decisions on damages and interest are rendered if substantiated, requested and provided for under the applicable substantive law.

9.3 How can a domestic/foreign judgment be recognised and enforced?

If the defendant does not satisfy the claims awarded by the judgment, the claimant may obtain compulsory enforcement.

Judgments are enforceable once they have become final and binding (e.g. if no appeal has been raised within the respective time limit).

The enforcement procedural rules are contained in the AEC.

The European ("Brussels") Convention and the Lugano Convention are the most relevant multilateral treaties on the recognition and enforcement of foreign judgments. In addition, a couple of bilateral treaties exist.

The enforcement of a domestic court decision requires a court order warranting enforcement which will be granted if the general requirements (admissibility of proceedings, capacity to be a party or to bring proceedings, etc.) are met.

In order to be enforceable, foreign judgments require a formal declaration of enforceability which is to be granted if the title is enforceable in accordance with the provisions of the country of issuance and if reciprocity is guaranteed in state treaties or by way of regulation. District courts are competent to decide *ex parte*. However, the decision is appealable.

As far as European Union decisions are concerned, recognition proceeds automatically according to the above mentioned Conventions.

9.4 What are the rules of appeal against a judgment of a civil court of Austria?

There are ordinary appeals against the judgment of a trial court ("*Berufung*") and appeals against the judgment of an appellate court ("*Revision*"); see question 1.2 above.

Procedural court orders can be challenged as well ("*Rekurs*"); the procedure in principle follows the same rules as appeals (yet is a bit less informal).

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.

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.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Austria? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

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, civil engineers) provide for dispute resolution mechanisms concerning disputes between their members or between members and clients.

The Austrian arbitration law (contained in the ACCP) substantially reflects the UNCITRAL Model Law on International Commercial Arbitration, while granting a great degree of independence and autonomy to the arbitral tribunal.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Arbitration Law is regulated in sections 577-618 ACCP. They provide the general framework for arbitration proceedings, both for domestic and international arbitrations. Specific rules apply to consumers and employees.

Mediation is governed by the Civil Law Mediation Act ("*Zivilrechts-Mediations-Gesetz*").

Mediators are qualified experts using approved methods. The solution reached with the assistance of the mediator is not enforceable by the court.

1.3 Are there any areas of law in Austria that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

All pecuniary claims are generally arbitrable except for claims relating to family law and disputes between landlord and tenant. Further exemptions concern labour-law related disputes and the Cartel Act.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Austria in this context?

Austrian courts may only intervene in arbitration matters when they are expressly permitted to do so under sections 577-618 ACCP. 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.

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

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Austria in this context?

The only available recourse to a court against an arbitral award is an application to set the award aside. This also applies to arbitral awards on jurisdiction. Such application to set aside is to be filed within three months from the date on which the claimant has received the 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, if a party was incapable of concluding a valid arbitration agreement, if 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, if 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, if the constitution or composition of the arbitral tribunal was in violation of the respective rules and if 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), numbers 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 and, finally, if the arbitral award violates Austrian public policy.

As to mediation, see question 1.2 above.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Austria?

The Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) is Austria's most relevant (international commercial) arbitration institution. The framework for the conduct of arbitration proceedings is referred to as "Rules of Arbitration and Conciliation of the VIAC" ("Vienna Rules").

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The Vienna International Arbitral Centre has performed a review process aimed at modernising and streamlining its rules, which had been first enacted in 1975. Provisions have been simplified and several new provisions have been added. The new rules have been in force since 1 July 2013. The main changes to the rules can be summarised as follows:

Joinder of third parties

The arbitral tribunal has the authority to order the joinder of third parties upon the request of either party or the third party itself. The

tribunal has wide discretion provided that all parties (including the joining one) have been heard. A cross-claim against the party to be joined is permissible, which also results in that party's right to participate in the formation of the arbitral tribunal.

Consolidation of proceedings

The consolidation of two or more proceedings is possible. The decision on consolidation is made by the Arbitral Centre's executive board (after having heard the parties and members of the tribunal).

Confirmation of arbitrators

All arbitrators must be confirmed by the Arbitral Centre's Secretary General.

Multi-party proceedings

If one party (group) fails to agree on a nominee to be confirmed as arbitrator, the failure will not automatically invalidate the other side's nomination.

Remission

The new rules also address cases in which a court refers proceedings to an arbitral tribunal, thereby already anticipating the expected change to the Austrian arbitration law providing for annulment proceedings to be directly lodged with the Supreme Court.

Expedited proceedings

The new rules contain specific speedy-trial regulations. They must be explicitly agreed upon ("opt-in"). The final award must be rendered within six months (unless extended).

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 Mergers and acquisitions.
 Directors' and officers' liability.

Publications:

Regular contributions to the litigation-newsletter at the "International Law Office".
 Austrian chapter to "The Willis Worldwide Directory of Directors and Officers Liability" (Willis, 2005).
 Lectures on International Supply Contracts (ICC Austria).

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Belarus

Timour Sysouev



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Belarus got? Are there any rules that govern civil procedure in Belarus?

Belarus is a civil law country that belongs to a continental law system. The main sources of law are the legislative acts adopted by the President and the National Assembly, and also by central and local authorities. Judicial precedent is not formally a source of law, however resolutions and explanations of the Supreme Court and the Supreme Economic Court (which does not exist at present) are mandatory for application by the courts when adjudicating. The Constitutional Court reviews the cases on the constitutionality of legislative acts.

Civil procedure in Belarus is governed by two codes: the Civil Procedure Code (CPC) and the Code of Economic Procedure (CEP). The CPC regulates the proceedings in the courts of general jurisdiction; the CEP regulates the proceeding of commercial disputes by the economic courts.

The CPC and CEP have a lot in common, however they also have quite significant differences.

1.2 How is the civil court system in Belarus structured? What are the various levels of appeal and are there any specialist courts?

Since January 1, 2014 two preliminary existing branches of courts have been unified into a single justice system. The two sub-systems of the new justice system can be differentiated on the basis of specialisation (economic courts and courts of general jurisdiction). Both sub-systems are headed by the Supreme Court of Belarus.

Courts of general jurisdiction consider non-commercial civil cases where, as a rule, one of the parties is an individual. Thus, courts of general jurisdiction consider cases on disputes relating to personal property, family matters, housing and labour disputes. In addition, the Judicial Division on Intellectual Property Cases of the Supreme Court considers the cases at first instance arising from the creation and usage of the objects of intellectual and industrial property rights (inventions, trademarks, etc.) regardless of the type of the party.

The sub-system of courts of general jurisdiction consists of three levels: district courts; regional courts/Minsk city courts; and the Supreme Court.

Economic courts adjudicate commercial disputes arising from economic activity, such as disputes based on commercial contracts, corporate and tax disputes and cases on economic insolvency (bankruptcy). As a rule, the parties involved in the proceedings in economic courts are legal entities or individual entrepreneurs.

The sub-system of economic courts consists of two levels: regional economic courts/Minsk city economic court; and the Supreme Court (the Judicial Division on Economic Matters was formed on January 1, 2014 instead of the Supreme Economic Court).

Usually, a sole judge considers cases at first instance both in economic courts and courts of general jurisdiction.

Decisions of the courts of general jurisdiction can be appealed in cassation. Cassation instance for decisions of district courts is the Judicial divisions on civil cases of the regional courts/Minsk city courts. Cassation instance for decisions rendered by the regional courts/Minsk city courts as the courts of first instance is the Judicial division on civil cases of the Supreme Court. Decisions rendered at the first instance by the Supreme Court cannot be appealed in cassation.

In addition, decisions of courts of general jurisdiction can be appealed in supervisory reviews. Supervisory authorities are Presidium of the regional courts/Minsk city courts, Judicial division on civil cases, Presidium and the Plenum of the Supreme Court.

The decisions of economic courts can be appealed in the appellate instance. Appellate instance consists of three judges of the same court who render the decision. The decisions of the Judicial Division on Economic Matters of the Supreme Court rendered at first instance cannot be appealed in the appellate instance.

Decisions that pass the appeal review as well as decisions of the Judicial Division on Economic Matters of the Supreme Court rendered at first instance can be appealed in cassation to the Judicial Division on Economic Matters of the Supreme Court.

Decisions that pass the cassation can be reviewed in the supervisory procedure by the Presidium and Plenum of the Supreme Court.

Both the courts of general jurisdiction and economic courts can revise their own decisions in cases of disclosure of new circumstances that were not, and could not be, known to the court when rendering the decision (e.g., in cases when the contract upon which the decision was based was declared invalid).

1.3 What are the main stages in civil proceedings in Belarus? What is their underlying timeframe?

The main stages of civil proceedings in courts of general jurisdiction are:

- proceeding in the court of the first instance;

- proceeding in the cassation instance;
- proceeding in the supervising instance;
- retrial on the basis of newly discovered circumstances; and
- the enforcement proceeding.

There is also a stage of the proceedings in the appellate instance in the economic courts. The enforcement proceeding is considered to be part of civil procedure and is regulated by the CPC and CEP.

Proceedings in courts of each instance include the initiation of court proceedings, preparing for the trial, the actual trial and the rendering of the court decision.

As a rule, courts of general jurisdiction should consider the case in the first instance within two months from the date of the receipt of the claim, including the preparation of the case for the trial. The economic court, acting as a court of the first instance, should complete the preparation for the case within 15 working days upon the receipt of the claim; it also should consider the case on merits within two months after the preparation is finished. The legislation also stipulates shorter periods of consideration for certain categories of cases, as well as longer ones.

Cases arising from public legal relations should be considered by the courts of general jurisdiction and economic courts within one month from the date of receipt of the application (including preparation of the case for trial).

The appeal instance of the economic court must consider the case within a maximum of 30 days.

The cassation instance is obliged to consider the case within a maximum of three months (in courts of general jurisdiction) and one month (in economic courts).

The supervisory court must consider the case within a maximum period of three months.

1.4 What is Belarus's local judiciary's approach to exclusive jurisdiction clauses?

Belarusian courts recognise the validity of jurisdiction clauses, which provide the jurisdiction of the Belarusian courts, except in cases which are under the exclusive jurisdiction of a foreign court.

Jurisdiction clauses on the competence of the Belarusian court can be concluded between two foreign parties, despite the fact that the parties have no subject of the dispute connected to the territory of the Republic of Belarus. Belarusian courts do not apply *forum non conveniens* doctrine.

1.5 What are the costs of civil court proceedings in Belarus? Who bears these costs? Are there any rules on costs budgeting?

Court costs in civil cases consist of court fees and case-related charges.

Rules of calculation and payment of the court fee are regulated by the Tax Code of the Republic of Belarus.

The minimum court fee on non-pecuniary demands is as follows: in courts of general jurisdiction – BYR 300,000 (USD 28); in economic courts – BYR 750,000 (USD 70). The minimum court fee on pecuniary claims in economic courts is BYR 2,250,000 (USD 210); in courts of general jurisdiction – not specified.

The ratio of court fee is 5% of the value of the claim in courts of general jurisdiction, and from 1% to 5% of the value of the claim in economic courts. The maximum value on pecuniary demands is not specified.

The maximum court fee rate is BYR 750,000 (USD 70) regardless of the value of claim for claims which must be considered in simplified writ proceedings in economic court.

Case-related charges consist of attorneys' fees or other representatives' fees, remuneration of experts, witnesses and interpreters, etc. Formally, restrictions on the minimum and maximum value of case-related charges are not established.

Initially the court fee should be paid by the person applying to the court (the plaintiff, appellant, etc.). A person who engages attorneys, experts, witnesses, etc., advances case-related charges.

Following the results of the proceeding, costs are allocated between the parties depending on the result of the case. The court can order the losing party to pay the winning party's incurred expenses, including the court fee and other case-related charges, fully or partially.

Belarusian legislation does not contain any specific rules related to costs budgeting.

1.6 Are there any particular rules about funding litigation in Belarus? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Particular rules about funding litigation are not established in Belarus.

For information about the maximum and minimum court fees and case-related charges, see question 1.5.

Attorneys' fees can be determined on a different basis by agreement with the client, including hourly rates, successful fees, etc. The minimum and maximum limits of attorneys' fees are not specified in legislation. Attorneys are obliged to represent the interests of individual persons without charge in certain categories of civil cases (e.g., in cases on the recovery of alimony payments).

The winning party has the right to seek the recovery of the fee paid to attorneys as case-related charges from the losing party only if the money was actually paid. The court assesses the reasonability of these costs and can recover them only if it finds the ratio as reasonable and justified. The court shall recover these costs when it renders a final decision (judgment) or later in the form of an additional judgment.

Belarusian legislation does not contain special rules on the security for costs. Foreign entities participating in the process do not incur the obligation on security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Belarus? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The issue of the admissibility of assignment in Belarus is regulated by the substantive laws rather than procedural laws, even if a related lawsuit is pending in court.

Substantive law, as a general rule, does not limit the possibility of assignment of demand, except in cases when contract between the parties is prohibited or if the obligation is closely connected with the creditor's personality (e.g., the obligations on alimony payments). However, some laws have restrictions on assignment for certain types of obligations.

In the case of assignment (while the case is pending in court), the court shall substitute the party-assignor with the assignee, after that

the trial continues. This substitution is possible at any stage of the proceeding, in any instance. Such a substitution is not possible in the time period after the court judgment but is possible before the initiation of proceedings in the higher courts.

Belarusian legislation does not contain provisions that prohibit a non-party to litigation proceedings to finance those proceedings. Non-parties may pay a court fee instead of the party or incur case-related charges. The court is indifferent to the reasons of a non-party to finance court costs, however the court reimburses the incurred court costs in favour of the party only.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For commercial disputes where the parties are legal entities and/or individual entrepreneurs, it is necessary to observe pre-trial procedure before applying to a court. It is the responsibility of the plaintiff to execute the pre-trial procedure, which involves sending a written request to the defendant for voluntary performance of obligations with the enclosure of confirming evidence. The defendant is to examine the request and give an answer within one month from the date of receipt. If, within that period, the defendant does not give a reply to the request or replies in the negative, the plaintiff has the right to apply to a court.

In the contract, the parties may exclude the obligation of pre-trial procedure. In addition, the pre-trial procedure is not necessary in cases which, by their legal nature, cannot be settled out of court (e.g., in cases about the invalidity of contracts, in cases of shareholders' exclusion from a limited liability company, etc.).

In certain cases the participation of individuals in pre-trial procedure is obligatory (e.g., complaints about public authorities' actions, claims about modification or termination of contracts or labour disputes, if the employer established a special non-judicial jurisdictional body – the Commission on Labour Disputes).

Belarusian legislation does not provide for mandatory pre-trial mediation or conciliation for any kind of cases.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

As with most civil law countries, Belarusian law considers the limitation period as an issue of substantive law.

The general limitation period is three years and starts, as a general rule, from the date when the person knew or should have known about the violation of the rights. For some types of claims longer or shorter periods of limitation are established, for example: the limitation period for claims declaring a transaction as void is 10 years from the date when the execution of the transaction was started; on bank claims to the borrower, arising from loan agreement, the limitation period is five years; for claims against the carrier for damages arising out of the contract of carriage the limitation period is one year; and for a suit of a dismissed employee for reinstatement the limitation period is one month. The limitation period is not applicable for a number of specific claims.

The limitation period can be suspended (e.g., during the period while the debtor examines the pre-trial request of the creditor). The limitation period can be interrupted (e.g., if the debtor has acknowledged the debt), after which it can be estimated anew.

The parties' agreement to change the established period of limitation is not allowed.

The expiration of the limitation period does not prohibit submission of the claim and the beginning of the trial in the court. The limitation period is applicable by motion of the party, which can be submitted in the court of first instance only and before the judgment is to be rendered. If the judge recognises that the limitation period has been missed he renders a judgment to dismiss the claim. If the limitation period was missed by an individual for a reasonable ground it can be revived by the court.

The above-mentioned limitation periods are not applicable to the requirements arising from public legal relations and particularly to complaints on the unlawfulness of public authorities' acts. For these claims the 'term for filing an administrative claim' is a range from 10 days to one month and it is applied by the court *ex officio*.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Belarus? What various means of service are there? What is the deemed date of service? How is service effected outside Belarus? Is there a preferred method of service of foreign proceedings in Belarus?

The process in a civil case begins with the filing of a claim statement with the enclosure of evidence supporting the claim by the plaintiff. The statement of claim may be sent by post or delivered to the court in person or by courier. In cases of sending the statement of claim by post the deemed date of service shall be the date of mailing. In cases when the claim is delivered to the court personally, the date of the statement of claim shall be the date of its actual delivery. The economic court allows the filing of claim materials electronically. If the court accepts the statement of claim, its copy should be sent to the defendant.

Judicial notices are sent to addressees by post, telephoned telegram, a telegram or with the use of other communication facilities which provide a recording of the fact of notification. Notifications are sent to the registered address of legal entities, and to the place of residence or place of work of individual persons. For some categories the notification shall be carried out by publication of a notice in the press.

Judicial notices are served in such a way that the participants of the procedure shall have the time required to prepare for the case and a timely appearance at the court.

The service outside Belarus is performed in accordance with the provisions of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965). The main method that is used on the basis of the Convention is the notification via Central Authority, which is the Ministry of Justice of the Republic of Belarus. In addition, when notifying the parties that are in the CIS, the Kiev Agreement on the settlement of disputes related to the performing economic activity (1992), the Minsk Convention on legal assistance and legal relations in civil, family and criminal cases (1993) and the Chisinau Convention on legal assistance and legal relations in civil, family and criminal cases (2003) shall be applied.

3.2 Are any pre-action interim remedies available in Belarus? How do you apply for them? What are the main criteria for obtaining these?

By the motion of the parties (in the court of general jurisdiction

– also by its own initiative) the court may apply interim measures if their non-application can make the enforcement of the delivered judgment difficult or impossible. It is possible from the date of initiation of proceedings. These measures could be: seizure of the respondent's assets (including monetary funds); or seizure of the subject of the dispute, etc. It is impossible to apply interim measures prior to the initiation of proceedings.

However, prior to the initiation of proceedings a party may submit the request for evidence (if this evidence cannot be examined later). If the court satisfies the application, the court may examine a witness, inspect the property or website, etc. These actions should be documented in minutes, which will be examined as evidence later in court proceedings.

3.3 What are the main elements of the claimant's pleadings?

The plaintiff must specify in the statement of claim:

- the name of the court in which the plaintiff is filing a claim;
- the names, addresses and representatives' bank details of the parties;
- the facts on which the claim is based;
- reference to the evidence supporting the claim;
- the price of the claim and its calculation;
- the legal basis of the claim (in the economic court);
- information on performance of pre-trial procedure, if it is obligatory;
- requests for relief; and
- a list of the attached documents.

The statement of claim shall be accompanied by written evidence, a request, submitted in pre-trial procedure and the response to it (if the pre-trial procedure is mandatory), and a document on the payment of court fees.

3.4 Can the pleadings be amended? If so, are there any restrictions?

In the period between the date of the initiation of proceedings and the date of the rendering of judgment the plaintiff may change the subject or cause of action (but not both), and increase or decrease the amount of the claim. The plaintiff may also file additional claims if they are related by facts or evidence. These changes and additions are possible only in the court of first instance. The court cannot prohibit modification of or addition to the claim, even if the court considers that these actions complicate the process.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of a statement of defence include:

- the name of a court;
- the names, addresses, bank details and other contact details of the parties;
- counter-arguments;
- supporting evidence;
- the legal grounds (in economic court); and
- a list of documents attached.

The defendant may also include procedural motions in a statement of defence. The evidence shall be attached thereto.

The defendant may file a counterclaim from the moment of initiation of proceedings in a court of first instance and before judgment of a court of first instance. A counterclaim shall contain a claim of set-off or satisfaction of a counterclaim should exclude satisfaction of an original claim either in part or in whole. It is also permissible to file a counterclaim if it is related to an original claim by majority of evidence, i.e., joint consideration of an original claim and a counterclaim would lead to a more rapid and proper consideration of the case.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant may submit a statement of defence to the court from the moment it is notified of the initiation of proceedings and before rendering the judgment of a court of first instance.

The court may oblige the defendant to present a statement of defence by a certain date prior to the hearing. In practice, Belarusian courts ubiquitously permit defendants to submit the statement of defence directly in the hearings.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There is no legal mechanism in Belarus for the defendant to pass on or to share liability by bringing an action against a third party. If the defendant is not liable to be sued it may raise an objection and the court is entitled at the request, or with consent, of the plaintiff to replace the improper defendant to a person liable to be sued. The third party can be involved in the dispute as a codefendant at the request of both parties or with the consent of the plaintiff, or by the court's initiative if the following conditions are observed:

- the rights and obligations being the subject-matter of a dispute are the same for a defendant and other person;
- the rights and obligations of a defendant and other person have the same legal and factual grounds; and
- the rights and obligations of a defendant and other person being the subject-matter of a dispute are homogeneous and have the same legal and factual grounds.

This person becomes the defendant and the hearings start again within the same proceedings. The defendant may also file an independent claim against such third party.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim the proceedings continue and a judgment is rendered based on the available evidence. The fact that the defendant does not defend *per se* is not considered an admission of a claim. The courts of general jurisdiction are also empowered to render a judgment by default in cases of absence of the defendant in the hearings and non-defence of a claim.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may challenge the court's lack of jurisdiction during the whole proceedings in the court of first instance and in appeal, cassation and supervisory instances. Lack of jurisdiction entails termination of the proceedings.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In civil process there are two types of third parties which enter into ongoing proceeding:

- third parties with independent claims on the subject-matter; and
- third parties without independent claims on the subject-matter.

Third parties with independent claims can file independent claims against both the plaintiff and the defendant, or against one of the parties (e.g., on recognition that the ownership title of the property is a subject of a dispute between the original parties). These third parties actually hold the procedural position of the plaintiff and shall bear all the rights and obligations thereof. If a court finds that a third party's claim is not connected to an ongoing case, such a claim may be considered in separate proceedings.

Third parties without independent claims on the subject-matter may enter into proceedings to assist one of the parties if an oncoming judgment may affect its rights and obligations to this party (e.g., if a claim is satisfied, the party will be entitled for regress suit). Such third parties may enter into proceedings upon their own motion, a motion of one of the parties or at the initiative of the court. They bear rights and obligations of a party with some exceptions (e.g., they are not entitled to admit a claim or conclude an amicable agreement).

Third parties may enter into proceedings from the moment of the initiation of proceedings in a court and before the rendering judgment.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The plaintiff may consolidate in a statement several claims to one or more defendants if the claims are connected by the same grounds of occurrence (e.g., arise out of a certain contract) or by the evidence. Several plaintiffs also may consolidate the claims to one or more defendants if they have the same legal and factual grounds. The court is also empowered on its own initiative to consolidate several claims between the same parties into one proceeding if it considers that joint consideration of the claims will entail a more rapid and proper consideration of the case.

A civil lawsuit and an administrative complaint cannot be consolidated into one proceeding.

5.3 Do you have split trials/bifurcation of proceedings?

The court may, on its own initiative or at the motion of a party, split one or more claims into independent proceedings, if the court considers that the split will entail more rapid and proper consideration of some or all claims filed.

Belarusian procedural legislation does not provide for the possibility of bifurcation of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Belarus? How are cases allocated?

As a general rule, a claim shall be filed to a court at the place of location or residence of the defendant.

Some of the claims shall be filed to a strictly determined court (exclusive jurisdiction). For example, a claim of real estate title shall be filed to a court at the location of the real estate.

In certain cases the plaintiff may choose a court from several courts while filing a claim. E.g., a claim against several defendants may be filed in a court of the place of location or residence of one of them. The parties have a right to agree the competent court by concluding a dispute resolution agreement (except for cases of exclusive jurisdiction).

Within a court the cases are allocated among the judges based on their specialisation and workload.

6.2 Do the courts in Belarus have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

A court fully controls the progress of a case (initiates proceedings, prepares for examination of case, delays or suspends a case, etc.), manages the hearings and takes necessary measures to resolve a case.

The parties may file various interim applications such as for appointment of examination, interim measures, engagement of third parties, local inspection of material evidence, examination of witnesses, delay of a case, etc. In certain cases, the parties must cover the costs related to their interim applications in advance (e.g., for examination).

In case of settlement by amicable or conciliation agreement of the parties, from 25% to 50% of the court fee paid may be returned to the plaintiff.

6.3 What sanctions are the courts in Belarus empowered to impose on a party that disobeys the court's orders or directions?

According to Belarusian legislation, the courts are entitled to impose various types of sanctions for non-fulfilment of the court's orders or directions depending on the nature of the violation.

For example, non-fulfilment of the court's interim measures and non-notification of the court for a change of address during the proceedings entails the application of an administrative penalty (fine). Contempt of court due to non-appearance in court or due to disobedience to the requirements of the judges during the hearings could also entail an administrative liability in the form of a fine or administrative arrest. Disorder during the hearings may entail the warning or removal of a person from the courtroom. Wilful disobedience of the final judgment under certain circumstances may entail administrative or criminal penalties.

6.4 Do the courts in Belarus have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

According to Belarusian legislation, the court is not entitled to strike out part of a statement of case, nevertheless under some circumstances the court is entitled to terminate the proceedings or dismiss a claim. See question 6.6.

6.5 Can the civil courts in Belarus enter summary judgment?

In some cases Belarusian courts are entitled to use summary judgments in the form of writ proceedings. The courts of general jurisdictions may apply the writ proceeding if a claim is based on a notarised transaction or requesting alimony for children.

Economic courts of general jurisdictions may apply the writ proceeding as follows:

- in cases of small sums – no more than BYR 15,000,000 or about USD 1,400;
- in cases where a claim was admitted by the defendant out of court but has not been enforced; and
- in cases of an uncontested claim (e.g., a claim for tax collection).

6.6 Do the courts in Belarus have any powers to discontinue or stay the proceedings? If so, in what circumstances?

According to Belarusian legislation, the court may suspend the proceedings in cases of: appointment of examination; reorganisation of the party – legal entity, death of the party – individual person (if the latter has no heirs); starting of conciliation procedure; and the inability to decide the case before making a judgment on another related court case, etc.

The court may terminate the proceedings in cases of: conclusion of amicable or conciliation agreement by the parties; withdrawal of the claim; and liquidation of the party – legal person, or death of the party – individual person (if the latter has no heirs), etc.

The court may also dismiss a claim (stay a claim without consideration) in cases of consideration of an identical claim by another court, the plaintiff's double failure to appear in court without a valid excuse and non-representation of application for hearings in its absence, non-compliance of mandatory pre-trial procedure by the plaintiff, etc.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Belarus? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Belarusian legislation does not establish general basic rules of disclosure procedure.

Each party must present evidence confirming their claims and objections. Evidence may be presented during the entire process to the court of the first instance and in some cases to the appellate and cassation instances.

According to the party's application, the court can demand and obtain the evidence from the other party or a person who is not involved in the process if the claiming party is able to prove that it is impossible to obtain the evidence without outside assistance. In certain cases, the court may also order the disclosure of evidence on its own initiative (e.g., to schedule an examination).

7.2 What are the rules on privilege in civil proceedings in Belarus?

According to Art. 27 of the Constitution of the Republic of Belarus, no one shall be compelled to give testimony against themselves, their family members or close relatives.

Attorneys cannot be examined as witnesses about the circumstances that constitute attorney-client privilege and information that has become known while executing professional duties. Priests cannot be examined as witnesses about the circumstances that have become known during confession.

In an economic proceeding the representatives of the parties of the conciliation and conciliator cannot be questioned as witnesses about the facts that have become known in connection with participation in the conciliation except in cases where the parties give their written consent.

Experts have the right to refuse to give an opinion in cases when stated questions are beyond the scope of their special knowledge or where an expert was not provided with sufficient materials.

7.3 What are the rules in Belarus with respect to disclosure by third parties?

According to the party's application, the court can demand and obtain the evidence from the other party or a person who is not involved in the proceedings if the claiming party is able to prove that it is impossible to obtain the evidence without outside assistance. In certain cases, the court may also order the disclosure of evidence on its own initiative (e.g., to schedule an examination).

In such cases the third party has to produce the available evidence to the court or inform on the reasons why it is impossible to produce the evidence.

7.4 What is the court's role in disclosure in civil proceedings in Belarus?

On the basis of the court order the party or third parties have to provide the evidence that they have. Such an order may be given by the court on application by the party and on its own initiative. The court sets the date to which the evidence must be provided to the court.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Belarus?

There are no special restrictions related to the use of documents obtained by disclosure in Belarus. However, personal correspondence and personal records of individuals can be announced in public court proceedings only with the consent of the individuals between whom this correspondence and telegraphic communications has taken place. Otherwise such correspondence and records can be announced at a closed judicial session.

8 Evidence

8.1 What are the basic rules of evidence in Belarus?

In general, under procedural legislation each party shall prove the facts to which they appeal in support of their claims and objections.

Evidence must be relevant and admissible. The list of evidence, procedure of submission and research are prescribed by the law. The court defines the subject of proof based on the claims and objections of the parties as well as on the law applicable to the case (scope of facts which have to be determined during the process).

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In civil proceedings in Belarus the following are considered as admissible evidence: explanation of the parties; the testimony of witnesses; documentary and material evidence; expert and professional evidence; audio and video recordings; other data storage media; and minutes of proceedings.

Evidence obtained in violation of the statutory order has no legal force.

The evidence must be relevant – to confirm or negate the facts which are relevant to the case. The facts, established by adjudication or recognised by the court as commonly known, are not the subject of proof. Some facts (e.g., the fact of good faith) are considered to be established until proved otherwise. Belarusian procedural legislation allows only experts appointed by the court and does not allow party-appointed experts.

Expert examination shall be imposed by the court on motion of a party or on its own initiative, if the establishment of the facts requires any special non-legal knowledge. The court appoints an expert and determines the issues to which the expert must give a response. Parties have the right to propose the experts and the issues to the court that should be raised to the expert, but the final decision of these issues is the competence of the court.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A witness summoned to the court is bound to appear at the established time and to give a testimony. A party files an application to the court on calling for the witness, with indication of his/her name, place of residence and the facts about which he/she may inform. A witness may refuse to testify against himself, his family members or close relatives. Some individuals cannot be examined as witnesses (see question 7.2). The witness has administrative responsibility for failing to appear without reasonable grounds, for refusing to testify or for perjury – criminal liability.

The witness testifies orally, in a court session, and such testimonial evidence shall be entered in the minutes. Production of witness statements or depositions is not provided for by legislation. If an exceptional circumstance occurs (e.g., due to a serious illness or senility) and the witness cannot appear in court, he may be examined by the judge in his location with entry of testimony in the minutes.

Similarly, in exceptional cases, a witness may be examined before the trial on the basis of request for evidence, if in the future the examination will not be possible. See also question 3.2.

Cross-examination (in the form known in common law countries) is not known in Belarusian civil process. At the beginning of examination the witness is offered to tell about the known facts in free form. Then he/she is questioned by both the judge and the parties. Unquestioned witnesses must be outside the courtroom, and witnesses, as a general rule, stay in the courtroom after examination.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert witnesses are not known in Belarusian civil procedure. Witnesses of fact and experts appointed by the court are allowed.

When an expert is appointed by the court, the court asks him/her the questions. Accordingly, the expert owes all duties to the court. The expert is a person who has special permission issued by the State Committee of forensic expertise of the Republic of Belarus. The examination can be entrusted to an expert organisation. The appointment of several experts is allowed. The expert's report shall be made in written form and submitted to the court.

An expert report shall contain the following basic information:

- the name of the expert, the venue and the date of the statement;
- information on the expert (legal experts);
- the research methods and technical conditions of application, and the obtained results;
- reference to the materials by which the expert was guided when resolution on raised issues was made, including the literary sources; and
- conclusions in the form of answers to the questions raised by the court.

Taking into account the opinions of the parties and the circumstances of the case, the court may call the experts to appear in the hearing for giving expert evidence in court, or examine the written expert report. In the latter case, the court and the parties have the right to ask questions of the expert. In case of ambiguity or incompleteness of the expert's findings, the court may appoint an additional examination; in the case of inconsistency re-examination is allowed, which shall be carried out by another expert. See also question 8.1.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Belarus?

In civil proceedings in Belarus the court determines the subject of proof, gives instructions to present evidence, calls witnesses and appoints experts. The court conducts the examination of evidence in the court hearing, directly hears oral evidence and examines written material and other evidence. The court has the right to ask questions of witnesses and experts. See also questions 7.1, 7.3, 7.4 and 8.1 to 8.4.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Belarus empowered to issue and in what circumstances?

Belarusian courts deliver several kinds of judgments and orders.

A judgment is the court decision by which the court of the first instance adjudges the case on its merits. Depending on the claim, judgments can be declaratory, injunctive and transformative. The courts of general jurisdiction may also adjudge default judgment if the respondent fails to appear at the hearing. It is also allowed to adjudge the additional judgment on certain issues.

The decision becomes valid and obtains *res judicata* after the expiration of the time to appeal to the court of the second instance, and if the complaint was filed – after affirming it by a court of the second instance.

The court order is the decision, which is rendered according to various matters of procedure (on the commencement, stay of proceedings, by results of consideration of motions, etc.).

In addition, in courts of general jurisdiction court orders are the acts adopted by the courts of the cassation instance on results of consideration of the cassation complaint, and also the acts of courts of supervising instance.

Decrees are the acts of the courts of appeal, cassation and supervising instances of economic courts and also the acts of some supervising instances in the courts of general jurisdiction.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The prevailing party has the right to demand from the non-prevailing party the recovery of all court costs incurred by the case, including court fees and case-related charges, also attorneys' fees. At the recovery of attorneys' fees, the court assesses their reasonability and may recover only part of the fee. See also question 1.6.

However, the courts may impose the costs to the party that abused the process of the court, or to the party that the court recognises as taking unfair actions, for example hiding or late submission of evidence, late referral to the court of objections against the claim or commitment of other fraud. The economic court may impose the court costs to the party that avoided participating in pre-trial or pre-litigation settlement.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgment is performed on the basis of the issuing of the court enforcement document. This document is called a writ of enforcement and is issued after the decision becomes valid and obtains *res judicata*.

The execution of the judgment is carried out by bailiffs, who are officials of the Ministry of Justice.

For the execution of foreign judgments the recognition by Belarusian courts is needed (as a result of a single simplified trial, which begins at the initiative of the plaintiff). Belarusian courts do not check foreign judgment on the merits. As a rule, Belarusian courts recognise foreign judgments in cases of existence of interstate agreement on legal assistance, providing for the mutual recognition of judgments between Belarus and the state in which the judgment was rendered (Belarus has such agreements with Bulgaria, Latvia, Lithuania, Poland and other countries – a total of about 30 states). On the basis of the act on the recognition the Belarusian court issues the enforcement document, which is executed in the usual manner.

The exceptions are established for the judgment of arbitrage courts of the Russian Federation, which are executed "automatically" without the procedure of recognition in Belarus.

9.4 What are the rules of appeal against a judgment of a civil court of Belarus?

Judgments of the courts of general jurisdiction can be appealed in cassation. Decisions rendered at the first instance by the Supreme Court cannot be appealed in cassation. A cassation appeal can be lodged within 10 days from the date of the decision or appellant receipt on the application of the reasoning part of the court's decision. Also see question 1.2.

The court of cassation instance checks the correctness of the substantive and procedural law application of the lower court instances (that is the issues of facts as well as issues of law). Under certain circumstances, the court of cassation instance may take into consideration new evidence which has not been the subject of research in the lower courts.

In addition, acts of courts of general jurisdiction can be appealed in review procedures (supervisory review). Also see question 1.2.

Cases to the reviewing authority are brought on the appeal of a chairman/deputy chairman of the Supreme Court, chairman of the regional courts/Minsk city courts or the relevant prosecutors. The parties and other interested persons can make complaints on submitting protests in review procedures to the chairman of the courts and relevant prosecutors. Appealing an exercise of supervisory power can be lodged within three years after the date of the decision of the cassation court. Supervisory review proceedings can be initiated against the decision if it has not been the subject of appellate review.

The reviewing authority checks the lower court instances for the presence of significant violations of law, including violations of substantive and procedural law.

The decisions of economic courts can be appealed in the appellate order within 15 working days from the date of decision. Appeal instance consists of three other judges of the same court who retry the case on the basis of existing and new evidences. The decisions of the Supreme Court of the Republic of Belarus made at first instance cannot be appealed in appellate order.

Decisions that passed the appeal verification as well as decisions made by the Supreme Court of the Republic of Belarus as the court of first instance can be appealed within one month to the Cassation Division of the Supreme Court, in which three judges examine the case. The cassation court verifies observance of the substantive and procedural law, and the validity of decisions based on the existing evidence in the case.

Decisions that passed the cassation examination can be retried in review procedures by the Presidium and Plenum of the Supreme Economic Court on the protest of the chairman of the court, his or her deputies, and the general public prosecutor or his or her deputies. Parties and other interested persons can, within one year, lodge a complaint to the officials with a request to bring the case into the reviewing authority.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Belarus? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The following methods of alternative dispute resolution are used in Belarus: international and domestic arbitration; conciliation; and mediation.

With rare exceptions, any civil or commercial dispute can be considered by arbitration. Institutional arbitration is more developed than *ad hoc* arbitration in Belarus. Belarus is a member state of the main international conventions on commercial arbitration such as: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); the European Convention on

International Commercial Arbitration (1961); and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965). Both domestic and international arbitral awards can be enforced.

The conciliation is a procedure that is introduced by the economic courts of general jurisdiction in connection to the case. This procedure is dedicated to the production of the terms of the settlement. The conciliation may be introduced at any stage of the proceedings (including appellate and cassation instances) – even without the consent of the parties; however each party has the right to terminate the conciliation at any moment. The court appoints a conciliator, who may be an employee of the court (not a judge) or another person. The parties may propose to the court candidacy of the conciliator or choose him/her under the agreement. If the parties enter into an agreement on reconciliation, the court approves it by its decision.

The mediation is conducted by a mediator, who has the appropriate certificate issued by the Ministry of Justice. Mediation can be carried out only after the agreement of the parties. The mediator shall be elected by the agreement of the parties. Herewith the parties may or may not already have a dispute under the resolution of the court. If a dispute is considered by the court, the court may pass it on settlement in mediation and stay proceeding in this case. When in the mediation, if the parties reach a settlement it is issued as a mediation agreement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Law “On international arbitration court” was enacted on 9 July, 1999. It regulates international arbitration and is based on the UNCITRAL Model Law on international commercial arbitration 1985 r. in the original version (without taking the amendments of 2006 into consideration). However, the present law allows international and domestic disputes for consideration in arbitration, therefore the arbitration courts established and operating on the basis of this law (e.g., The International Arbitration Court at the BelTPP) also adjudicate domestic disputes.

The Law “On arbitration courts” was enacted on 18 July, 2011 and formally does not apply to international arbitration. But the arbitration courts that were established and operate on the basis of this law adjudge both domestic and international disputes.

Thereby, the sphere of application of the Law “On international arbitration court” and the Law “On arbitration courts” are not sharply defined, which creates difficulties in applying them in practice.

The conciliation is regulated by Chapter 17 of the CEP.

Mediation is regulated by the Law “On the mediation”, which was enacted on 12 July, 2013 and became effective on 24 January, 2014. This law takes into account the several provisions of UNCITRAL Model Law on International Commercial Conciliation (2002), however it contains many provisions that are not specified by Model Law.

1.3 Are there any areas of law in Belarus that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Due to the Law “On international arbitration court”, only commercial disputes may be considered in arbitration, and in accordance with the Law “On arbitration courts” any dispute, including non-commercial, labour, family, etc., may be considered in arbitration.

There is no single list of non-arbitral issues in the legislation; it is elaborated by law enforcement practice based on various provisions of the laws and statutory interpretation of judges. For example, bankruptcy cases, property claims against persons in respect of whom initiated bankruptcy proceedings, cases related to registration, reorganisation and liquidation of legal entities and cases with public legal nature are non-arbitral. In certain cases the court established as non-arbitral cases related to state property and some types of corporate disputes based on the courts’ statutory interpretation.

Any dispute which can be resolved by the economic courts of general jurisdiction, except for disputes of a public legal nature, can be a subject of conciliation (e.g., cases on review of legality of public authority acts are non-arbitral, etc.).

Subject to mediation are only civil disputes (both commercial and non-commercial), as well as labour and family disputes.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Belarus in this context?

The Law “On international arbitration court” provides that an arbitral tribunal or a party with its consent may apply to the court for assistance and application of interim measures in respect of a subject of a claim or evidence. The court fulfils this request in accordance with the order provided by the procedural legislation. Nevertheless, the CPC and the CEP do not contain rules of the court’s procedure in this case.

The Law “On arbitration tribunals” prescribes that application of interim measures in respect of a subject of a claim (seizure of property, monetary funds, etc.) is directly related to competence of the state court considering this matter at the request of a party. The court may resolve this matter only if arbitration has been already started.

The court may initiate conciliation procedures and appoint a conciliator or refer a case to mediation settlement.

The court respects an arbitration agreement concluded by the parties. If there is an arbitration agreement and a party initiates legal proceedings in the court, then the court is entitled to terminate or stay proceedings with an offer to the parties to refer a case to arbitration. An arbitration award made by an arbitral tribunal is considered as *res judicata* and an identical claim cannot be considered by the court.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Belarus in this context?

In respect of an arbitration award, application of setting aside may be submitted, which is an exclusive remedy (recourse) against arbitral awards. This application is considered by the court.

An arbitral award is not examined on the merits by the court. It may be set aside by the court only on certain grounds, an exhaustive list of which is given in the laws and generally corresponds to that provided in Article 34 of UNCITRAL Model Law on international commercial arbitration.

An arbitral award may be set aside by the court if the party making the application furnishes proof that:

- a party to the arbitration agreement was under some sort of incapacity or the arbitration agreement is not valid under the applicable law;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; and
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

These grounds for setting aside may be applied only if the party refers to them and provides relevant evidence.

An arbitral award may also be set aside if the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of Belarus; and
- the award is in conflict with the public policy of Belarus.

An application for setting aside may not be made after three months have elapsed from the date on which the party making the application had received the award.

If an arbitral award is made on a commercial dispute, the economic courts of general jurisdiction have competence in setting aside. Application for recognition and enforcement of a foreign arbitral award is filed by the claimer in the economic courts of general jurisdiction in Belarus at the location or place of residence of the debtor or the location of the debtor's property, if the location or place of residence are unknown.

The court's decision on setting aside may be appealed in cassation.

The agreement reached by the parties in a conciliation procedure and mediation agreement shall be approved by the court's decision. The court is entitled not to approve them if it finds non-conformity to the law or infringement of a third parties' rights. Parties are not obliged to participate in conciliation or mediation.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Belarus?

The major alternative dispute resolution institution in Belarus is the International Arbitration Court at the BelTPP, which resolves more than 100 international and domestic disputes per year, as well as provides conciliation by agreement of the parties.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration and conciliation are the most popular methods of alternative dispute resolution. Basically, arbitration considers international disputes, however the adoption of the law "On arbitration courts" allows the use of arbitration courts for consideration of domestic disputes, including with the participation of citizens.

Conciliation is still widely used, primarily due to the fact that it is actively appointed by economic courts of general jurisdiction which seek to provide additional opportunities for the voluntary settlement of disputes.

The adoption of the law "On mediation" created a legal basis for the use of mediation outside the judicial process and for non-commercial disputes.

According to the adoption of the law "On arbitration courts", more than 20 institutional arbitration courts have been established. In our opinion, the number of cases submitted to arbitration (especially domestic disputes) is unlikely to increase because state justice in Belarus is relatively effective, terms of consideration of cases are brief, court costs are low and the simplified procedure of consideration of disputes is actively used (summary judgment).

The adoption of the law "On mediation" is likely to result in an increase in the number of mediations used primarily for non-commercial disputes.

Belarusian courts have begun to take a more pro-arbitration position when considering specific cases. For example, previously Belarusian courts proceeded from the fact that the arbitration agreement must be the exact name chosen by the parties of the Arbitration Institute or regulations, and if inaccuracies took place then an arbitration agreement was considered to be pathological. Last year Belarusian courts rendered a number of precedent-setting decisions, by those decisions the courts recognised arbitration agreements as binding if inaccuracies in the name of the Arbitration Institute or regulations took place. And on the basis of the doctrine "competence of competence", Belarusian courts offered the plaintiffs to apply to arbitration for arbitrators to estimate the legal effect of the arbitration agreement.

Practically there are no cases of refusal of confession and enforcement of foreign arbitral decisions, including by motive of contradiction to public order. In one case the Supreme Economic Court rejected the arguments of the respondent, who asked to refuse the confession of a foreign arbitral decision with reference to the contradiction of public order. The respondent thought that penalties collected by the arbitration court were clearly disproportionate debt and the consequence of non-performance of an obligation. The court considered that the arguments of the respondent were focused on the review of the foreign arbitral decision on the merits, and that is unacceptable.



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Languages: Belarusian; Russian; and English.



"Sysouev, Bondar, Khrapoutski SBH" Law Office was established with the aim of providing legal services in the spheres of litigation and arbitration. The law firm also specialises in providing legal assistance to legal entities and private entrepreneurs in the Republic of Belarus and abroad in various fields of business and commercial activities, including those in the spheres of: international business transactions; investments; corporate relations; tax, currency and customs regulations; enforcement and protection of intellectual property rights, media and advertisement regulation; and bankruptcy, etc.

The lawyers of the Law Office have successfully represented their clients both in Belarusian economic and international arbitration courts (including international arbitrations) in some of the most significant precedent cases (the latest one being consulting on the collection of insurance compensation of bonds).

Partners and advocates of the Law Office have taken part in the largest and most unique projects and court cases in Belarus, such as: one of the first bankruptcy procedures in Belarus; representing the interests of an investment company with a first (precedent) claim to the client of a company who refused to pay the success fee after successfully selling a retail company with premises for the store to one of the biggest retail chains in Belarus; representing in a dispute on protecting the intellectual property rights of the trademark PARIS ELYSEES belonging to the client; and representing a number of clients against state-owned companies and governmental authorities.

The partners of the Law Office have very good reputations, experience and professional skills; as well as being mature practitioners, they are well-known as professors of the Law Faculty of the Belarusian State University (more than 15 are Senior Lecturers of law disciplines at the Law Faculty of the Belarusian State University; others are the authors of textbooks, manuals, specialised books and monographs), arbitrators of local and foreign arbitration institutions, members of professional organisations and members of social, cultural and sport organisations.

Belgium



Koen Van den Broeck



Thales Mertens

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Belgium got? Are there any rules that govern civil procedure in Belgium?

Belgium has a civil law-based system, with (national and international) statutes, as interpreted by case-law, governing both substantive and procedural issues.

Civil procedure is for the most part governed by the codified rules of civil procedure, set out in the Belgian Judicial Code. Additional rules governing civil procedure are set out in separate statutes (such as, for instance, the Act on the use of language dated 15 June 1935), treaties and European regulations (most notably the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

1.2 How is the civil court system in Belgium structured? What are the various levels of appeal and are there any specialist courts?

The Belgian civil court system is split into several “first instance” courts (including the civil court of first instance and the commercial court). Decisions of “first instance” courts can in most cases be appealed to the appellate courts. Finally, decisions of the appellate courts can be overturned by the Belgian Supreme Court.

Specialist courts exist for various matters, such as commercial matters, employment matters, and attachment proceedings. In addition, within the various courts, the presidents of the courts have jurisdiction to hear summary proceedings.

1.3 What are the main stages in civil proceedings in Belgium? What is their underlying timeframe?

Proceedings start either by the issuance of a writ of summons or by request (for unilateral proceedings). An introductory hearing takes place thereafter, during which usually the further procedural steps are agreed. In exceptional circumstances, the case will be heard at the introductory hearing or shortly thereafter. Normally, the parties will agree a calendar for the filing of written submissions. Following submissions of the written submissions, the case is heard. A judgment is issued thereafter (formally within one month following the hearing, although in practice this period is usually longer).

Normal proceedings in first instance take approximately 1.5 years. Proceedings on appeal take approximately two to three years.

1.4 What is Belgium’s local judiciary’s approach to exclusive jurisdiction clauses?

To the extent these clauses comply with the applicable national and international rules, these clauses are accepted.

1.5 What are the costs of civil court proceedings in Belgium? Who bears these costs? Are there any rules on costs budgeting?

Costs for civil proceedings in Belgian proceedings are split into formal costs (for filing and administrative steps) and a (limited) compensation for legal costs. For the latter costs, a fixed indemnity (set by the Belgian legislator) can be claimed, the amount of which varies in relation to the complexity of the dispute and the amounts in dispute.

Costs (within the limits described above) are in principle borne by the losing party.

There are no rules on cost budgeting (mainly as costs are only partially recoverable in Belgium).

1.6 Are there any particular rules about funding litigation in Belgium? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are currently no set rules about funding litigation in Belgium. Deontological rules do prevent Belgian lawyers from accepting work on a “no win, no fee” basis, but arrangements whereby additional fees are paid in the event of a positive outcome are permitted.

Belgian civil procedure does not contain rules in relation to security for costs – for the most part because the costs awarded are fixed, limited, and set by the Belgian legislator.

1.7 Are there any constraints to assigning a claim or cause of action in Belgium? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Contested claims can be assigned.

There is, however, an important limitation: the Belgian Civil Code contains a rule that entitles the debtor of an assigned contested claim

to discharge its obligations under the contested claim by paying an amount equal to the price paid by the assignee for the contested claim, increased with interest and cost.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In most cases, proceedings are started by the serving of a formal writ of summons (served by an official court bailiff) on the defendant.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Various time limitations apply to various types of claims. For instance, most contractual claims become time-barred within a period of 10 years.

Most tortious claims become time-barred within a period of five years following discovery (by the victim of the tort) of the damage incurred.

Various possibilities exist to either interrupt or suspend the limitation period (for instance, the filing of a writ of summons commencing proceedings).

These time limits are, on the whole, treated as substantive issues.

As far as procedural time limits are concerned (for instance, the time limit within which a decision of a first instance court needs to be appealed, or opposition proceedings filed), these vary depending on the type of proceedings concerned, and are viewed as procedural issues.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Belgium? What various means of service are there? What is the deemed date of service? How is service effected outside Belgium? Is there a preferred method of service of foreign proceedings in Belgium?

Civil proceedings are for the most part commenced by the serving of a writ of summons. This writ is served by a court bailiff, who can serve the writ in person or by letter. Service is deemed to have occurred on the date listed by the bailiff on the writ (the date on which the document was served in person, or the letter issued).

Service of a writ commencing Belgian proceedings over foreign entities is also done through the office of the (official) court bailiff, usually following the rules set out in The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

3.2 Are any pre-action interim remedies available in Belgium? How do you apply for them? What are the main criteria for obtaining these?

Provisional attachment, securing assets and awaiting the outcome of legal proceedings can be obtained. Depending on the type of asset (provisionally) attached, the party seeking such attachment must seek prior authorisation from the (attachment) court, or can proceed without prior court intervention (assisted by a court bailiff).

3.3 What are the main elements of the claimant's pleadings?

The claimants' pleadings will normally contain an overview of the facts underlying the claim, followed by a legal analysis of these facts, in support of the claim filed. Finally, the pleadings will set out the relief requested from the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes. In normal civil proceedings, several sets of pleadings are filed, in accordance with a previously agreed filing calendar (in the absence of agreement between the parties, the court can set this filing calendar). The pleadings can be amended within the framework of the set filing dates.

Some limitations do apply however; most importantly that no new claims can be filed, to the extent these are not based on elements which were set out in the initial writ of summons.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence will usually set out the defendant's factual and legal defence against the main claim. The structure of the statement of defence will in most cases mirror the structure of the claimant's pleadings.

Counterclaims can be filed, to the extent such counterclaims are not frivolous or filed with the sole intent to delay the main claim.

4.2 What is the time limit within which the statement of defence has to be served?

The calendar for the filing of pleadings (including the statement of defence) is normally agreed upfront, and confirmed by the court. The parties are accordingly free to agree these time limits – once agreed, however, they become binding. In the absence of an agreement between the parties, the court will set the filing calendar.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant can file a claim against third parties compelling them to intervene in the ongoing proceedings, and hold the defendant (partially) harmless against the main claim. Such claim is allowed, to the extent it is not frivolous, or filed with the sole intent of delaying the main claim.

4.4 What happens if the defendant does not defend the claim?

A judgment in default will be issued. Opposition proceedings are, however, possible against a judgment in default.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the defendant can dispute the court's jurisdiction.

5 Joinder & Consolidation**5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?**

A party to the proceedings can file a claim against third parties compelling them to intervene in the ongoing proceedings. Also, a third party can opt to voluntarily intervene in ongoing proceedings, to the extent this third party can show that it has the requisite standing to intervene.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes. Two (or more) sets of proceedings can be consolidated, to the extent there is a risk of contradictory judgments in the absence of such consolidation.

5.3 Do you have split trials/bifurcation of proceedings?

Although not common, a request can be made to split the trial into a decision on jurisdiction, followed by a decision on the merits. The court will, however, finally decide on whether or not to allow such bifurcation.

6 Duties & Powers of the Courts**6.1 Is there any particular case allocation system before the civil courts in Belgium? How are cases allocated?**

In principle, cases are allocated on a "first come, first served" basis – with hearing dates set taking into account the length of the agreed filing calendar, and the availability of the court.

However, exceptions are made for "urgent" cases, especially in the context of summary proceedings.

6.2 Do the courts in Belgium have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Belgian courts have very limited case management powers. The most notable exception to this is the power of the courts to set a filing calendar, in the absence of an agreement thereon by the parties.

There are various interim applications available to the parties, including a request for interim investigatory measures and (limited) production of documents.

There are no specific cost consequences in relation thereto. However, if interim applications are made in a frivolous manner or with a clear intent to delay proceedings, the court may take this on board when awarding a compensation for costs.

6.3 What sanctions are the courts in Belgium empowered to impose on a party that disobeys the court's orders or directions?

As explained above, a court can choose to disregard evidence that is not filed in accordance with the set filing calendar.

No specific sanctions akin to "contempt of court" exist under Belgian procedural law. However, in very limited circumstances the court can impose a fine on a party which has conducted itself in a particularly vexatious or disloyal manner. This sanction is, however, very rarely applied.

6.4 Do the courts in Belgium have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

If filings are made, or documents produced outside of the agreed filing calendar, a court can disregard such filings or documents.

In addition, the court may disregard statements made in official filings which are not made in the official language of the proceedings (all references in the official filings to supporting foreign language evidence, case-law, or doctrine must be made in the language of the proceedings).

Finally, a court may dismiss a case in its entirety for lack of jurisdiction, or in the event of inadmissibility (e.g. legal time-bars).

6.5 Can the civil courts in Belgium enter summary judgment?

Yes, although only in urgent cases, and limited to provisional measures.

6.6 Do the courts in Belgium have any powers to discontinue or stay the proceedings? If so, in what circumstances?

In very limited circumstances, a court can stay proceedings and request the parties to first attempt mediation.

In addition, if proceedings remain inactive during a long period of time, a court can have the proceedings discontinued (following reminders sent to the parties involved requesting the reactivation of the proceedings).

Belgian civil courts will also stay proceedings awaiting the outcome of criminal proceedings which could impact on their decision ("*le criminel tient le civil en état*").

Finally, under certain circumstances, a court can discontinue proceedings for lack of jurisdiction.

7 Disclosure**7.1 What are the basic rules of disclosure in civil proceedings in Belgium? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?**

Belgian procedural law does not provide for separate disclosure or discovery proceedings, although parties can request the courts to order the production of one or more documents, held either by a party involved in the proceedings or by a third party.

The courts tend to be very strict when analysing these types of requests, and will only order production if the requesting party has shown clearly that (i) a specific document or set of documents exists, (ii) the opposing party (or third party) is in possession of the requested document or set of documents, and (iii) such document or set of documents is relevant to help decide the issue in dispute between the parties.

Requests for the production of documents have nonetheless become more common in Belgian court proceedings, and the authors have recently seen a move towards such requests being made by way of separate provisional “proceedings within proceedings”. Following a change of the Belgian Judicial Code in 2007, parties are now able to request various provisional or investigatory measures (including requests for the production of documents) at any stage in the proceedings.

A request for the production of documents can be made in the first stages of the proceedings, by way of provisional (investigatory) measures ordered by the court.

7.2 What are the rules on privilege in civil proceedings in Belgium?

Lawyer-to-lawyer communication in Belgium is in principle considered privileged, and cannot be relied upon or disclosed in the context of Belgian civil proceedings.

Deontological rules, however, prohibit Belgian lawyers from making statements which are contradicted by a privileged document. In the event a dispute arises in relation to a privileged document, the president of the Bar to which the lawyers belong will decide on whether, and to what extent, the document can be disclosed.

7.3 What are the rules in Belgium with respect to disclosure by third parties?

See above, question 7.1.

7.4 What is the court’s role in disclosure in civil proceedings in Belgium?

See above, question 7.1.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Belgium?

In principle there are no restrictions, as evidence or documents produced in civil proceedings are not subject to confidentiality rules.

8 Evidence

8.1 What are the basic rules of evidence in Belgium?

The basic principle of Belgian procedural law (“*actori incumbit probatio*”) is that a claimant bears the burden of proof, and must present sufficient evidence to found its claim. Failing the provision of sufficient evidence, the court may opt to dismiss the claim.

Parties are allowed to file evidence supporting their position. Oral evidence is, however, for the most part uncommon in Belgian civil proceedings.

Belgian courts do, however, have wide discretion as to how much weight should be given to a provided piece of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

For the most part, only written evidence, filed and presented within the timeframe of the filing calendar will be admissible.

(Party-appointed) expert evidence is admissible, but will be given less weight in light of the fact that (party-appointed) experts do not owe any duty to the court, and will usually defend the position of the instructed party.

Court-appointed expert evidence is, however, given significant weight (see below, question 8.4).

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The use of witnesses of fact is uncommon in Belgian civil proceedings.

A recent Belgian act (of 16 July 2012) has, however, inserted a framework for the issuance of written factual affirmations into the Belgian Judicial Code. It is expected that the use of factual affirmation will become more commonplace as a result.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert proceedings following (interim) judgments are common in Belgian civil proceedings. The court appoints the expert to decide on factual issues falling within the scope of his or her expertise. The expert will report to the court following meetings with the parties, and following the end of his or her own investigations. The expert owes a duty to the court, not to the parties.

Parties can opt to be assisted by their own experts – however, as these experts are not bound by a specific duty, and will in most cases defend only the interest of the party instructing them, only limited weight is given to their conclusions.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Belgium?

Although the court takes a largely passive role (it does not actively investigate the parties’ position), the court has a wide range of discretion when deciding which weight to give to a party’s evidence.

In limited circumstances, the court can, however, opt to intervene – for instance, a court can order an investigation of a document if it has sufficient reason to suspect that a document relied upon by a party is false.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Belgium empowered to issue and in what circumstances?

Belgian courts are empowered to issue a large array of types of judgments and orders, ranging from provisional measures (ordered in the framework of summary proceedings), interim judgments, to final judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Belgian courts can make orders and rulings awarding both damages claimed, and increase the damages awarded with interest.

Belgian courts can also award compensation for costs, within the framework and the limits set by the Belgian legislator.

9.3 How can a domestic/foreign judgment be recognised and enforced?

(Final) domestic judgments (which are no longer subject to appeal, or which are held to be enforceable notwithstanding appeal) are automatically recognised and enforceable. In relation to money judgments, the winning party may opt to have its judgment enforced by attaching the assets of the losing party (failing voluntary compliance). To do so, it must obtain prior authorisation of the attachment judge.

The proceedings for recognising or enforcing foreign judgments in Belgium differ depending on whether or not the foreign judgment is issued by an EU Member State or by a non-EU Member State.

For foreign judgments issued in jurisdictions with which no treaty (bilateral or multilateral) is in place with Belgium, recognition and enforcement will be done in accordance with the general rules as set out in the Private International Law of 16 July 2004 (the **PIL Code**). In accordance with the PIL Code, foreign judgments must be either recognised or declared enforceable by a Belgian court, prior to being recognised or becoming enforceable in Belgium.

The PIL Code sets out that when deciding on recognition or enforcement (or “*exequatur*”) requests, the Belgian courts will not review a foreign judgment as to its substance. It can, however, refuse recognition or enforcement of the foreign judgment based on one (or more) of the exhaustive refusal grounds set out in the PIL Code (relating mainly to violation of rights of defence and violation of public policy).

Recognition and enforcement proceedings are unilateral, i.e. the party seeking to obtain recognition or “*exequatur*” does not need to summon the opposing party, nor does this party need to be heard. The “losing” party may, however, file opposition proceedings against a recognition or “*exequatur*” order, although it must be noted that such opposition does not suspend the effects of the initial unilateral order.

If the judgment is issued by a jurisdiction with which Belgium has a treaty on enforcement, recognition and enforcement will take place in accordance with such treaty.

If the judgment is issued by an EU Member State, recognition and enforcement of such judgment (in commercial or civil matters) will be done in accordance with the revised Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (entry into force on 10 January 2015) (the **Revised Brussels Regulation**). The Revised Brussels Regulation holds that a final court decision issued by an EU Member State is recognised and immediately enforceable in another EU Member State, with no prior *exequatur* being required. Specific proceedings for the refusal of recognition or enforcement can be held (on limited grounds).

9.4 What are the rules of appeal against a judgment of a civil court of Belgium?

Appeal is open to most decisions of first instance courts. In general, the appeal needs to be filed within a period of one month following notification of the judgment (by court bailiff) to the opposing party, failing which the appeal becomes time-barred.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Belgium? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is often used in Belgium, most often institutional arbitration. The most common rules applied are the Cepina/Cepani rules (rules of the Belgian Centre for Arbitration and Mediation) and the ICC Rules.

Although mediation and other ADR proceedings are available, they are used less frequently than arbitration.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The rules applying depend on the rules chosen by the parties. Most often, parties opt for arbitration under the Cepina/Cepani rules or ICC Rules.

Belgium has also enacted a new and specific law on arbitration (in force since 1 September 2013) that is based in large part on the UNCITRAL Model Law.

1.3 Are there any areas of law in Belgium that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Yes. Some disputes falling within the exclusive jurisdiction of Belgian courts (e.g. most types of employer-employee claims) are non-arbitrable.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Belgium in this context?

The parties in arbitration can in most cases request Belgian courts to issue interim or provisional measures.

Belgian courts will, however, uphold arbitration agreements, to the extent these agreements are held to be valid and enforceable.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Belgium in this context?

Although much will depend on the specific wording and arrangement made in the arbitration clause, for the most part arbitral awards

are not open to appeal. Specific set-aside proceedings (on limited grounds) remain available before Belgian courts.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Belgium?

By far the largest and most well-known institution in Belgium is the Belgian Centre for Mediation and Arbitration (Cepina/Cepani).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration has become a more commonplace method of resolving disputes. Parties are becoming more sophisticated and are opting increasingly for arbitration under Cepina/Cepani rules and the ICC Rules.

In addition, we have noticed an increased trend in consolidation and uniformisation of dispute resolution, as evidenced very recently by the new Belgian arbitration act, based largely on the UNCITRAL Model Law.

Although witness hearings are uncommon in Belgian court proceedings, there is a move towards allowing witness hearings in arbitration proceedings with a seat in Belgium. Recently, the French-speaking Brussels Bar (in 2010) and Dutch-speaking Brussels Bar associations (in 2011) altered their deontological rules to allow Brussels lawyers to prepare witnesses in view of witness hearings. These changes have triggered an increase in witness hearings in (Belgian-seated) arbitration proceedings.

Mediation in commercial disputes remains relatively rare, with success rates depending mainly on the parties' will to reach a mutually agreeable solution to their dispute. Various institutions offer mediation services or have set out rules in relation thereto, with the most well-known being Cepina/Cepani.

Alternate dispute resolution mechanisms are rarely applied in Belgium, with the notable exception of the mechanism of binding third party advice. Binding third party advice clauses are relatively common in acquisition contracts whereby the binding third party advice will be of a financial nature, relating to the acquisition price.



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ALLEN & OVERY

The Allen & Overy Belgium team of nearly 100 lawyers in Brussels and Antwerp provides a full legal service to international and local corporations, financial institutions and public entities. Having been in the market for over 30 years, our Belgian clients appreciate our natural understanding of their industry and background. International clients come to us for our knowledge of the 'ins and outs' of doing business in Belgium. We cover litigation, corporate, M&A, finance, commercial contracts, restructuring, employment and benefits, intellectual property, IT, real estate, tax, environment, EU and competition and public law.

Our Litigation team offers a full litigation service, with few other firms being able to combine the quality of individuals, specialist knowledge and depth of resources and coverage. We cover all aspects of dispute resolution, including finance litigation, post-acquisition litigation, director's and auditors' liability, investigations and white-collar crime, arbitration, restructuring and insolvency.

Brazil

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Brazil got? Are there any rules that govern civil procedure in Brazil?

Brazil adopts civil law and civil procedure is governed by rules set forth by the Brazilian Code of Civil Procedure (“BCCP”).

1.2 How is the civil court system in Brazil structured? What are the various levels of appeal and are there any specialist courts?

Since Brazil is a federation of states, the vast majority of civil and criminal cases are handled by the State Trial Courts. If the litigant is not satisfied with the first judgment, it is possible to file an appeal to the State Appellate Court, where a new judgment may be rendered. Against such judgment, the litigant is only entitled to file an appeal to the Superior Court of Justice (“SCJ”), in case of non-conformity with the Federal Law and/or to the Supreme Federal Court (“SFC”), if the judgment was made against the Federal Constitution.

Besides the State Courts, there are the Federal Courts, with jurisdiction on any dispute against the Federal Union. There are also specialist Courts, such as the Labour Courts, the Electoral Courts and the Military Courts.

Finally, there are the small claim Courts, which have limited jurisdiction to hear civil cases with less complexity, as well as minor criminal offences.

1.3 What are the main stages in civil proceedings in Brazil? What is their underlying timeframe?

Civil proceedings commence with the complaint filed by the claimant. If the complaint is in conformity with the legal requirements, the defendant is served with a notice of the lawsuit and shall file a written response, comprising motions to dismiss, denial of the claimant’s allegations and counterclaims. Based on the nature of the case, a conciliatory hearing may be set by the judge and, if the case is not terminated by settlement or summary judgment, the parties are given the opportunity to produce further evidence, including the filing of new documents, expert examinations and hearings. Once all the evidence requested by the parties has been produced, the judge renders the judgment, with the

findings of fact and conclusions of law. The following stages of the civil proceeding are the appeal, as described in the preceding item, and the enforcement of the final judgment.

In most cases, civil proceedings before the trial courts may take up to three years, depending on the matter involved.

1.4 What is Brazil’s local judiciary’s approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are not deemed enforceable in cases in which Brazilian courts have exclusive jurisdiction, such as those involving real properties located in Brazil and estate proceedings in regards to properties situated in Brazil.

Additionally, exclusive jurisdiction clauses have also been repelled whenever the Brazilian jurisdiction is established as concurrent, such as in lawsuits against defendants domiciled in Brazil or involving obligations to be fulfilled in Brazil.

1.5 What are the costs of civil court proceedings in Brazil? Who bears these costs? Are there any rules on costs budgeting?

Costs vary depending on whether it is a court or a State Court that carries out the lawsuits. Some courts use fixed amounts and others charge a percentage, normally between 1% and 2% on amounts involved in the lawsuit.

Generally, the judgment imposes on the losing party the obligation to reimburse the court costs incurred by the winning party, as well as to pay its attorneys’ fees, up to 20% of the amount involved in the case. The litigants are not compelled to disclose what they intend to spend on a case.

1.6 Are there any particular rules about funding litigation in Brazil? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fee or conditional fee arrangements are fully permissible, being possible for a lawyer to charge, if the case is won, up to 30% of the amount awarded in favour of their client.

To secure the reimbursement of court costs incurred by the other party, foreign companies with no assets or subsidiaries in Brazil may be required to either deposit in advance the corresponding amount or present a collateral guarantee or bank bail.

1.7 Are there any constraints to assigning a claim or cause of action in Brazil? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

With the exclusion of rights that are not legally transferable, there are no constraints to assigning a claim or cause of action. However, once the lawsuit is already commenced, the admission of the assignee to take part in the proceedings requires the other party's consent.

The same applies to any arrangement made by the litigant with a third party to finance the proceeding. Even though such arrangement is not forbidden, the third party may not be admitted to take part in the litigation unless the other party agrees.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Further to the court costs that must be previously paid, the claimant is always required to prepare all the documents necessary to support the case, for these documents must be included in the initial filing, as well as the power of attorney and the articles of association, if the claimant is a corporation. In case of foreign documents, they must be all notarised and duly legalised before the Brazilian Consulate.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The applicable limitation periods are provided by the substantive law. The Brazilian Civil Code ("BCC") establishes limitation periods from one to five years, for specific cases, and adopts a general limitation period of 10 years, applicable whenever a specific limitation is not provided.

The limitation period starts to run on the first date in which the lawsuit could be filed by the claimant (for example, the day following the maturity date, in the case of credit recovery) and is subject to certain causes of interruption or suspension (for example, if the debtor makes a statement recognising its debt).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Brazil? What various means of service are there? What is the deemed date of service? How is service effected outside Brazil? Is there a preferred method of service of foreign proceedings in Brazil?

Civil proceedings are only validly commenced in Brazil when the defendant is properly summoned. The ways provided by law for the service of the process are: (i) personally, by a court clerk; (ii) by registered mail; and (iii) by publication in the official journal of the court, in the case the defendant cannot be found. The deemed date of service is the date when the proof of actual delivery of the summons is filed. To serve a defendant outside the country,

rogatory letters are required. The same applies for the service of foreign proceedings in Brazil. If a defendant is served in Brazil by any means other than a rogatory letter, the judgment made in a foreign proceeding may not later be enforceable in the country.

3.2 Are any pre-action interim remedies available in Brazil? How do you apply for them? What are the main criteria for obtaining these?

Interim remedies are widely available in Brazil, usually in the form of injunctions, and they may be granted (i) as a pre-action remedy, or (ii) either as an initial ruling or in any stage of the main proceeding, before a final judgment is made. For obtaining an interim remedy, the claimant must evidence that its case is grounded in sound arguments, as well as that there is a real risk either for the proceedings or for the enforceability of the final judgment.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's pleadings are: (i) the parties and their complete identification; (ii) the cause of action, comprising the facts of the case and the legal theory; and (iii) the remedies sought.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The pleadings may be freely amended before the defendant is summoned. After this, an amendment to the pleadings may only be accepted if the defendant agrees.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defence includes: (i) motion to change the venue; (ii) motions for the dismissal of the case; (iii) the defendant's opposition to the claimant's allegations and its legal theories; and (iv) any fact that defeats or mitigates the legal consequences pursued by the claimant (affirmative defence).

Finally, the defence may include counterclaims against the plaintiff, as well as claims against third parties, if they are connected to the same cause of action described by the pleadings.

4.2 What is the time limit within which the statement of defence has to be served?

Brazilian court proceedings may vary from one to another. Most common proceedings provide a time limit of 15 days to file a defence. In other proceedings, this time limit is reduced to 10 or five days, and there are proceedings in which the defence may only be presented in an initial hearing.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There are mechanisms by which the defendant may pass on or share liabilities, such as in the case of joint liability or in any case in which

a third party is legally or contractually bound to the obligation of reimbursing the defendant for amounts eventually paid to the claimant.

4.4 What happens if the defendant does not defend the claim?

If the defence is not filed in time, the defendant will be denied any later opposition to the facts alleged in the pleadings, which will be deemed as true, and the award may be rendered without trial, most likely against the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may dispute the court's jurisdiction, filing motions to change the venue whenever the lawsuit may be moved to another Brazilian court, or even for the dismissal of the lawsuit, in the case of arbitration and exclusive jurisdiction clauses.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Further to the cases in which a third party is sued by the defendant within the same civil proceeding (see question 4.3 above), a third party may be admitted to the proceeding as an assistant to the claimant or the defendant, whenever such third party's rights and obligations towards any of the litigants may be affected by the final judgment.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two or more sets of proceedings may be consolidated and jointly judged either when the proceedings refer to the same cause of action, or if one of the lawsuits has a broader cause of action that encompasses the other.

5.3 Do you have split trials/bifurcation of proceedings?

As a rule, the judge is not allowed to split trials. However, there are exceptions in which the judge firstly rules on the claimant's right to obtain certain amounts from the defendant, and the appraisal of the amount actually owned is left for a later stage. In this sense, the split of proceedings is admitted in cases such as those involving damages and the dissolution of corporations.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Brazil? How are cases allocated?

BCCP rules on case allocation take into consideration: (i) the litigants and the matter involved in the lawsuit, to determine

whether the court with jurisdiction on the case is a State Court, a Federal Court or a specialist Court; and (ii) territorial criteria, such as the place where the defendant is domiciled or the controversial obligation is to be fulfilled.

6.2 Do the courts in Brazil have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The judge is empowered to decide on his own jurisdiction, to determine whether the proceedings are eligible or not to a summary judgment, and to grant the parties the opportunity to produce evidence, dismissing any unnecessary evidence or measure to produce it.

6.3 What sanctions are the courts in Brazil empowered to impose on a party that disobeys the court's orders or directions?

A party that fails to comply with the court's orders may have fines imposed (usually calculated on a daily basis) and damages. The disobeying of judicial orders is also deemed a criminal offence.

6.4 Do the courts in Brazil have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts have powers to strike out part of the arguments presented by the parties, as well as to grant only part of the remedies sought. Each claim made by the claimant is legally deemed as a separate action and thus may be dismissed or denied without any prejudice to the other claims.

6.5 Can the civil courts in Brazil enter summary judgment?

Summary judgments are admissible in the case of dismissal of the lawsuit, when the judge decides that no trial or further evidence production is necessary for the ruling of the case.

6.6 Do the courts in Brazil have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The courts in Brazil have the power to dismiss a case, even if the defendant does not file a motion with this purpose. So that proceedings may be summarily terminated, if the judge understands that any condition for its validity and useful continuation is not present, such as when the pleadings are not properly presented by the claimant, the proceedings are not duly impelled, there is an arbitration or exclusive jurisdiction clause, and so on.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Brazil? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

All the relevant documents must be filed by each litigant jointly with its pleadings or defence, so that the other litigant is given the

opportunity to submit its allegations on the validity and the content of such documents. During the course of the proceedings, the filing of new documents is only accepted under suitable justification.

It is possible for a party to apply for pre-action disclosure of documents in the possession of the other party, indicating the facts to be evidenced by the disclosed documents. The disclosure of the documents may not be denied, unless the judge decides that the party has no legal obligation to disclose them.

7.2 What are the rules on privilege in civil proceedings in Brazil?

As established by the BCCP, the parties may not be required either to give deposition or to file documents concerning privileged information.

7.3 What are the rules in Brazil with respect to disclosure by third parties?

Third parties may be forced to disclose documents in their possession. However, they shall be given the opportunity to submit their arguments against such disclosure, especially if any of these documents are protected by privilege.

7.4 What is the court's role in disclosure in civil proceedings in Brazil?

The court is in charge of ruling on whether, and how a party may be requested, to disclose documents or information. The disclosure usually takes place in court or by the examination of an expert appointed by the court.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Brazil?

The records of civil proceedings are deemed public, so that there is no restriction on the use of any document filed before the court. However, at the party's justified request, the court may grant privacy protection to the entire proceedings or to any specific filing.

8 Evidence

8.1 What are the basic rules of evidence in Brazil?

The burden of proof is on the party that alleges the fact. If a fact is alleged as the cause of action, the claimant is required to produce evidence of it. Conversely, if the fact is alleged as an affirmative defence, the evidence shall be produced by the defendant.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Any type of evidence is admissible, provided it is against neither the law nor morals. The types of evidence explicitly foreseen by the BCCP are: the deposition of the parties and their witnesses; disclosure of documents; expert examination; and judicial inspection. In particular, the expert examination is admissible whenever the evidence requires technical knowledge to be produced before the court.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The parties are requested to justify the calling of witnesses, indicating the facts that will be evidenced by their testimony. Each party may call three witnesses for each fact, up to 10 in total, and the list of witnesses must be filed in advance. To be valid as evidence, the deposition of witnesses must be held before the court. Statements made out of court have restricted validity as evidence.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

An expert is appointed by the judge to perform an examination, and owes his duties to the court. The expert's technical procedures and conclusions shall be documented by a report, duly filed before the court. The parties are given the opportunity to appoint their own experts, as assistants, who are allowed to take part in the examination and to deliver their own conclusions.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Brazil?

The courts have powers to determine which types of evidence are admissible, as well as those that shall be produced in a particular case, even without the request of the parties, considering the matter involved and the evidence already produced.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Brazil empowered to issue and in what circumstances?

The civil courts are empowered to grant any legal remedy, either as an interim measure or as a final ruling, if such legal remedy is duly required by the party. Traditionally, there are three types of remedies rendered by the courts: declaratory judgments; money judgments; and injunctions.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Rulings on damages are bound by the limits provided in the pleadings and must be supported by evidence, especially evidence of actual losses incurred by the claimant and its connection with the defendant's behaviour. Interest is usually due from the date in which the losses occurred or from the date on which the defendant is summoned to present its defence, depending on the matter involved.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are recognised and enforceable all over the country, provided they were made by the court with jurisdiction on the case.

Foreign judgments, however, are not enforceable without previous recognition by the SCJ. To apply for such recognition, the party shall provide the court with copies of the foreign proceedings, duly notarised and legalised before the local Brazilian Consulate, giving evidence that the defendant was properly served to present its defence and that the judgment was made final and binding to the parties.

9.4 What are the rules of appeal against a judgment of a civil court of Brazil?

Appeals may be lodged by the parties against both final and interim judgments. Interim or interlocutory appeals are immediate and independent from the final ruling, being lodged within 10 days from when the interim judgment was made public. If the ruling is prejudicial to the party and it is not possible to wait for the final ruling, the interlocutory appeal may be filed directly before the superior court and an order to stay the proceedings may be granted.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Brazil? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used method of alternative dispute resolution is arbitration. According to the Brazilian Arbitration Law (“BAL”), arbitrations may be held in Brazil under the rules of domestic or foreign entities, freely elected by the parties, and the final award is granted the same status as a final judicial ruling, being thus enforceable without any previous request for its judicial recognition. However, if the arbitration proceedings take place abroad, the award is deemed as a foreign judgment, being subject to previous recognition by the SCJ.

Mediations are also available, but less frequently used by the parties.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Brazilian Arbitration Law (Law # 9.307/1996) provides the rules governing arbitration. In 2002, Brazil ratified the New York Convention Recognition and Enforcement of Foreign Arbitral Awards.

1.3 Are there any areas of law in Brazil that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration may not be used to settle disputes over non-patrimonial rights and over rights that may not be freely negotiated by the parties, such as family, criminal, patent and antitrust matters. The validity of arbitration is still controversial for others matters, such as labour and administrative agreements, consumer protection and bankruptcy.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Brazil in this context?

According to the BAL, arbitration agreements are binding for the parties, being fully enforceable, especially by the dismissal of any judicial lawsuit brought on a dispute that falls within the arbitration clause. Before the arbitral tribunal is constituted, the courts may issue interim orders, to be later confirmed by the arbitrators.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Brazil in this context?

After the final award is rendered by the arbitrators, the only judicial remedy available for the losing party is the nullification of the arbitration proceedings, which is admissible in the absence of any formality deemed as essential by law.

Judicial recognition are always required for settlement agreements, whether reached through mediation or not.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Brazil?

The major arbitration institutions are the: Centre of Arbitration of the Brazil-Canada Chamber of Commerce (“CCBC”); Chamber of Mediation, Conciliation and Arbitration of São Paulo (held by the Centre of Industries of the State of São Paulo – “CIESP/FIESP”); Centre of Arbitration of the American Chamber of Commerce (“AMCHAM”); Chamber of Arbitration of The Getúlio Vargas Foundation (“FGV”); and the Chamber of Business Arbitration – Brasil (“CAMARB”).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Currently, a law project to reform the BAL is being discussed, with the purpose of broadening the fields in which arbitration shall be admitted and providing for interim remedies to protect the parties. Another law project relating to mediation is also up for debate, being personally impelled by the president of the SFC.



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OLIVEIRA RAMOS, MAIA E ADVOGADOS ASSOCIADOS

Oliveira Ramos, Maia e Advogados Associados is a law firm which focuses on business law. Our areas of expertise comprise corporate law, tax, litigation, consumer protection, administrative and regulatory law, gaming law, e-payments, and computer and internet law, among others. We advise national and multinational clients from different industries on setting up and conducting their business in Brazil.

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We strive to establish enduring relationships with our clients based on trust, commitment and mutual respect. By staying one step ahead and by constantly challenging ourselves to bring new and original ways of thinking to the most complex legal challenges, we are able to anticipate risks and to identify opportunities, generating effective results for our clients.

British Virgin Islands

Lennox Paton

Scott Cruickshank



David Harby



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has the British Virgin Islands got? Are there any rules that govern civil procedure in the British Virgin Islands?

The Territory of the Virgin Islands (as it is officially known) is a largely self-governing British Overseas Territory. The BVI has a common law system, based upon English law. It has its own legislative framework and has adopted some UK legislation (particularly with respect to the implementation of international treaties). English common law was extended to the jurisdiction by the Common Law (Declaration of Application) Act (Cap 13). The result is that English authorities, whilst not strictly binding as precedents, are persuasive and, subject to differing authorities from the Eastern Caribbean Supreme Court, are routinely relied upon by the BVI Court. Authorities of other Commonwealth or common law jurisdictions, such as Canada and Hong Kong, are also frequently cited.

Civil procedure before the BVI Courts is governed by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (“the CPR”) as amended from time to time. The CPR is largely based on the Civil Procedure Rules in England and Wales with important differences.

1.2 How is the civil court system in the British Virgin Islands structured? What are the various levels of appeal and are there any specialist courts?

The superior Court of record in the BVI is the Eastern Caribbean Supreme Court (“ECSC”), which also serves as the superior Court of record for two other British Overseas Territories (Anguilla and Montserrat) and six independent Member States of the Organisation of Eastern Caribbean States (“OECS”) (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint Lucia and St Vincent and the Grenadines).

The ECSC consists of:

1. the High Court of Justice;
2. the Commercial Division of the High Court of Justice (the BVI became home to this new Division of the High Court in 2009, its first and present Judge being a highly regarded English QC, The Honourable Mr Justice Bannister QC); and
3. the Court of Appeal (this is an itinerant court, whose sittings rotate between the nine members of the OECS. Typically, the Court of Appeal will sit three times a year in Tortola (BVI),

in January, May and September of each year, although more urgent matters may be dealt with in other jurisdictions as the need arises).

In order for a matter to be placed on the commercial list and proceed in the Commercial Court the conditions set out in CPR rule 69A.1 must be satisfied. These are:

- (1) The matter must be a “commercial claim”. This means any claim or application arising out of the transaction of trade and commerce and includes any claim relating to:
 - (a) the law of business contracts and companies;
 - (b) partnerships;
 - (c) the law of insolvency;
 - (d) the law of trusts;
 - (e) the carriage of goods by sea, air or pipeline;
 - (f) the exploitation of oil and gas reserves;
 - (g) insurance and re-insurance;
 - (h) banking and financial services;
 - (i) collective investment schemes;
 - (j) the operation of markets and exchanges;
 - (k) mercantile agency and usages; and
 - (l) arbitration.
- (2) In order for a matter to qualify as a commercial claim, the claim or value of the subject matter to which the claim relates must be at least US\$500,000. However, the Commercial Division judge has the discretion to include in the commercial list a claim that has not satisfied the condition as to monetary value if he considers the claim to be of a commercial nature and warrants being placed on the commercial list.

Appeal from the ECSC Court of Appeal lies to the Privy Council in the United Kingdom.

Beyond litigation before the Eastern Caribbean Supreme Court, other forums for dispute resolution exist but these are encountered infrequently in international practice. For instance, persons dissatisfied with decisions of the BVI Financial Services Commission may bring an appeal to the Financial Services Appeal Board. Alternatively, small contractual claims of under US\$10,000 may be litigated before the Magistrates’ Court. There are moves (although they have been around for some time) to integrate the Magistracy within the ECSC Court system.

1.3 What are the main stages in civil proceedings in the British Virgin Islands? What is their underlying timeframe?

In the BVI, a civil suit is commenced by issuing at Court and

servicing a claim form and statement of claim on a defendant. The general rule is that a claim form must be served personally on each defendant (CPR rule 5.1) and that the claimant's statement of case must be served at the same time as the claim form (CPR rule 5.2). A claim form must normally be served within six months after the date when the claim was issued but this period is extended to 12 months for service of a claim form outside of the jurisdiction and in respect of the service of an Admiralty claim form *in rem* (CPR rule 8.12).

A defendant who disputes the claim or the BVI court's jurisdiction must file a defence and/or an acknowledgment of service containing a notice of intention to defend within 14 days after the date of service of the claim form (CPR rules 9.1 and 9.3). Where a defendant has filed an acknowledgment of service, they have 28 days after the date of service of the claim form to file a defence (CPR rule 10.3). Where a defendant fails to file either an acknowledgment of service or a defence within the time periods set out above then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)).

So far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference ("CMC") or a pre-trial review ("PTR"). If an application is made which could have been dealt with at a CMC or PTR, the Court must order the applicant to pay the costs of the application unless there are special circumstances (CPR rule 11.3). However, this rule does not apply to matters heard in the Commercial Division (CPR rule 69B.5).

Upon the filing of a civil claim in the High Court, the Court office will fix a CMC to be held not less than four weeks nor more than eight weeks after the defence is filed (CPR rule 27.3). If a party is represented by a legal practitioner, that legal practitioner or one who is authorised to negotiate on behalf of the client and competent to deal with the case must attend at the CMC and any PTR (CPR rule 27.4). The general rule is that at a CMC the Court must consider whether to give directions for (a) service of experts' reports, (b) service of witness statements, and (c) standard disclosure and inspection. The Court must fix a date for a PTR unless it is satisfied that having regard to the value, importance and complexity of the case, it may be dealt with justly without a PTR. The Court must in any event fix (a) the date on which a listing questionnaire is to be sent by the Court office to the parties, (b) the period within which the trial is to commence, and (c) the trial date (CPR rule 27.5). The above rules do not apply to claims in the Commercial Court. Instead, the claimant must, no later than 14 days after the last party to do so has served his defence, provide the High Court Registry's Commercial Division Case Management Unit ("the Unit") with an agreed written statement of the parties' best estimate of the length of the trial or, if no agreement can be reached, then separate estimates by each party. If the longest of the parties' estimates is more than one full hearing day, the Unit will fix a CMC for the first available date six weeks after the last of all defendants intending to defend the claim has filed his defence. At the CMC in a commercial matter, in addition to any orders or directions given pursuant to the court's general powers of management conferred by CPR rule 26.1, the Court will ordinarily give directions as to:

- (a) the nature and extent of any disclosure to be given;
- (b) whether and to what extent witness statements are required and whether in all the circumstances certain issues or factual matters can be more conveniently and economically dealt with by witness summaries (whether or not a party is or is not able to obtain a witness statement from the witness in question);
- (c) the nature of any expert evidence to be called and the identity of the respective parties' experts and the timetable for exchange of experts' reports;

- (d) whether it is appropriate for evidence on one or more matters in the issue to be given by a single expert pursuant to rules 32.9 and 32.11;
- (e) whether the services of an interpreter will be necessary at trial;
- (f) whether or not a pre-trial review should be held; and
- (g) such other matters as appear appropriate.

Provided that a party has sufficiently indicated to the other parties and to the Court his intention to apply at the CMC, it is not necessary for a party to make an application under CPR rule 28.5 for the disclosure of specific documents or under rule 32.6 for permission to call expert evidence (CPR rule 69B.7).

1.4 What is the British Virgin Islands' local judiciary's approach to exclusive jurisdiction clauses?

The BVI court's jurisdiction is based on the proper service of a claim form. Permission must be sought to serve outside of the jurisdiction pursuant to CPR rule 7.3. Subsection (3) deals with claims about contracts. This provides:

"A claim form may be served outside of the jurisdiction if –

- (a) a claim is made in respect of a breach of contract committed within the jurisdiction;
- (b) a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract (in either case) the contract –
 - (i) contains a term to the effect that the Court shall have jurisdiction to determine any claim in respect of the contract;
 - (ii) is by its terms or by implication governed by the laws of any member State or Territory;
 - (iii) was made by or through an agent trading or residing within the jurisdiction;
 - (iv) was made within the jurisdiction;
- (c) the claim is for a declaration that no contract exists."

In *OBM Limited v LSJ LLC*, Indra Hariprashad-Charles, J. cited the dicta of Farwell L.J., in *The Hagen* [1908] P 189 at page 201, holding that the "jurisdiction to subject a foreigner to the jurisdiction of the Court has been described as extraordinary and should only be exercised with great care and it remains open to the Court to stay a case on the basis of *forum non conveniens*". Hariprashad-Charles, J. held that, in deciding the *forum conveniens*, the Court will look first to see what factors there are which point in the direction of another forum. In that case it was noted there was no exclusive jurisdiction clause but rather a choice of law clause. Nevertheless, the Court declined jurisdiction, citing the dicta of Brandon, J., in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at page 246, where the Court held:

"It seems to be clear, however, that, in general and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the Courts of that country. That would be my view, as a matter of common sense, apart from authority."

From the above it will be seen that the BVI Court is likely to demure to the provisions of an exclusive jurisdiction clause agreed to by the parties to a contract. As can also be seen, in appropriate cases a choice of law clause may support an argument that the BVI is not the appropriate forum.

1.5 What are the costs of civil court proceedings in the British Virgin Islands? Who bears these costs? Are there any rules on costs budgeting?

The costs of pursuing civil proceedings in the BVI depend on the level of Court in which the claim is conducted. The Magistrates'

Court, the High Court and the Commercial Division of the High Court each have their own costs regimes and court fees which are payable. In the case of fees, the Commercial Division is the most expensive, requiring, for example, the claimant to pay a fee of US\$1,000 for each day of a trial.

CPR rule 64.6(1) provides that the general rule is that the Court must order the unsuccessful party to pay the costs of the successful party. The position is much the same with interlocutory applications. Where the interlocutory application is a “procedural application” of a type falling within CPR rule 65.11(3), the rules provide that the Court “must order the applicant to pay the costs of the respondent ‘unless there are special circumstances’”. The specified applications are: (a) applications to amend a statement of case; (b) an application for an extension of time; (c) an application for relief from sanctions; and (d) an application which could reasonably have been made at a CMC.

CPR rule 65.2 provides for no less than six categories of costs:

1. fixed costs (CPR rule 65.4);
2. prescribed costs (CPR rule 65.5);
3. budgeted costs (CPR rule 65.8) (a party may apply to the Court to set a costs budget);
4. assessed costs on “procedural” applications (CPR rule 65.11);
5. assessed costs (CPR rule 65.12); and
6. costs in the Court of Appeal (CPR rule 65.13 (as amended)).

In the High Court, the starting point is that where the fixed costs rules do not apply (they apply only to claims for a sum of money in which judgment has been entered in default) then the prescribed costs rules apply. CPR rule 65.5 speaks of it being “the general rule” that those costs should be calculated in accordance with the appendices against the appropriate value. Where the claim is not for a sum of money, the value by default is deemed to be US\$50,000, which produces a maximum costs recovery of US\$7,500 under the amended rule. Formerly it would have been US\$14,000.

The Court is invested with the discretion to determine the value of the claim. Such an application should usually be made at the CMC (see CPR rule 65.6(1)), but it appears that the Court will be prepared to entertain such an application even after the conclusion of the proceedings when the claim for costs comes to be assessed (see *Asiacorp v Green Salt* [2006] 5JBVIC 3102).

Prescribed costs operate to cap the costs which may be recovered *inter partes* to a proportion of the value of the claim (if awarded to the defendant), or to the sum recovered (if awarded to the claimant). By way of example:

- a claim worth US\$50,000 will produce a costs recovery of US\$7,500, assuming that it concludes at trial, and only US\$3,375 if it settles when the defence is served; and
- a US\$1 million claim will produce a costs recovery of US\$70,000, assuming that it concludes at trial.

CPR rules 65.4 to 65.11 (and in particular the prescribed costs rules) do not apply to cases in the Commercial Division. Instead, a simple mechanism to assess costs has been adopted. At the conclusion of the trial the Court will (in the absence of agreement) determine (a) which party should pay costs to another party, and (b) how much in principle (taking into account the provisions of rule 64.6 and any other matter appearing to the Court to be relevant in the circumstances to the incidence of costs in the proceedings) of the costs of the receiving party are to be paid by the paying party. Once the Judge has determined these questions the matter will then be sent for assessment on the basis of those principles. (CPR rule 69B.12). A similar process is undertaken in respect of applications in the Commercial Division but these costs are to be assessed summarily unless the application has occupied the time of the Court for more than one hearing day (CPR rule 69B.11).

1.6 Are there any particular rules about funding litigation in the British Virgin Islands? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

The BVI follow the English common law position in relation to the maintenance of litigation. Except to the extent that it has arguably been disapplied by the rules in relation to prescribed costs, the indemnity principle applies to litigation in the BVI. A litigant will therefore be able to recover from his opponent only to the extent that he was contractually liable to his solicitor.

Statutory developments in England in relation to conditional fee and contingency agreements do not apply within the context of contentious business in the BVI, and as such the common law rules against maintenance currently prevent lawyers practising in the BVI from entering into such agreements.

Insurers can and do indemnify their insured in relation to litigation costs, but there is a very limited market for after-the-event litigation products.

1.7 Are there any constraints to assigning a claim or cause of action in the British Virgin Islands? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

It is not possible to assign legal title to a chose in action in the BVI. It remains possible for such rights to be transferred in equity. However, to do so, it will usually be necessary to join the assignor of the claim or cause of action to the claim.

As set out above, it is not possible for lawyers to enter into conditional or contingency fee agreements. There is uncertainty about whether it is lawful for non-lawyer third parties to fund litigation. Insurers can and do indemnify their insured in relation to litigation costs.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no specific requirements in the CPR which must be complied with. However, it should be noted that, when making an order concerning costs, both the High Court and the Commercial Division are to have regard to “the conduct of the parties both before and during the proceedings” (CPR rule 64.6(6)(a)). There is support from English authority that this includes the conduct of the parties before proceedings were issued (see e.g. *Groupama Insurance Co Ltd v Overseas Partner Re Ltd (Costs)* [2003] EWCA Civ 1846). In practice it is normal in the BVI for parties to engage in pre-litigation correspondence prior to initiating a claim.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In the BVI limitation periods are treated as a substantive rather than a procedural issue and may provide a complete defence to a claim. They are governed by the Limitation Ordinance (Cap 43). Section 4(1) of the Ordinance provides a limitation period of six years from the date on which the cause of action accrued in respect of actions based on simple contract or tort. Section 4(3) provides a limitation period of 12 years from the date on which the cause

of action accrued in respect of actions upon a specialty. Further, section 4(4) provides that an action shall not be brought upon any judgment after the expiration of 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 the expiration of six years from the date on which the interest became due.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in the British Virgin Islands? What various means of service are there? What is the deemed date of service? How is service effected outside the British Virgin Islands? Is there a preferred method of service of foreign proceedings in the British Virgin Islands?

As set out above, proceedings are commenced in the BVI by issuing and serving a claim form. The claim form is issued at the High Court Registry and service is effected by the claimant. The general rule is that the claim form must be served personally on each defendant (CPR rule 5.1). A claim form is served personally on an individual by handing it to, or leaving it with, the person to be served (CPR rule 5.3). Personal service must be proved by affidavit (CPR rule 5.5). In the alternative, service must be effected on a party's legal practitioner where they have been authorised to accept service on behalf of that party and the legal practitioner has notified the claimant in writing that he or she is so authorised (CPR rule 5.6). Service may be effected on a limited company in the following ways:

- (a) by leaving the claim form at the registered office of the company;
- (b) by sending the claim form by telex, fax or prepaid post or cable addressed to the registered office of the company;
- (c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;
- (d) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company; or
- (e) in any other way allowed by any enactment (CPR rule 5.7).

Service may be effected on a firm or partnership in the following ways:

- (a) by serving the claim form personally on a manager of the firm at any place of business of the firm or partnership which has a real connection with the claim;
- (b) by serving the claim form personally on any partner of the firm; or
- (c) in any other way allowed by any enactment.

However, if the claimant knows that a partnership has been dissolved when the claim is issued, the claim form must be personally served on every person within the jurisdiction whom the claimant seeks to make liable (CPR rule 5.8).

Service by post is proved by affidavit of service by the person responsible for posting the claim form to the person to be served (CPR rule 5.11).

There are also rules governing service on minors and patients.

A party may apply to the Court for an order that an alternative form of service be permitted (CPR rules 5.13 and 5.14). In addition, a contract may provide for an agreed form of service (CPR rule 5.16).

The service of foreign proceedings is governed by CPR Part 7. The general rule is that a claim form may only be served out of the jurisdiction if CPR rule 7.3 allows or the Court gives permission (CPR rule 7.2). CPR rule 7.3 provides that a claim form may be served out of the jurisdiction if a claim is made:

- (a) against someone on whom the claim form has been or will be served and:
 - (i) there is between the claimant and that person a real issue which it is reasonable for the Court to try; and
 - (ii) the claimant now wishes to serve the claim form on another person who is outside of the jurisdiction and who is a necessary or proper party to that claim;
- (b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or
- (c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction.

CPR rules 7.3(3) to (10) provide that a claim form may be served out of the jurisdiction in relation to:

- (a) claims in contract (where the contract provides for the BVI Court to have jurisdiction or was made within the jurisdiction or made by or through an agent trading or residing in the jurisdiction);
- (b) claims in tort (where the act causing the damage was committed within the jurisdiction or the damage was sustained in the jurisdiction);
- (c) concerning property if the whole subject matter of the claim relates to property within the jurisdiction;
- (d) claims about companies if the subject matter of the claim relates to:
 - (i) the constitution, administration, management or conduct of affairs; or
 - (ii) the ownership or control of a company incorporated within the jurisdiction;
- (e) claims about trusts if:
 - (i) a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction;
 - (ii) a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of, or probate proceedings as defined in Part 68 relating to a person who died domiciled within the jurisdiction; or
 - (iii) a claim if made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument and the trusts ought to be executed according to the law of the BVI; and the person on whom the claim form is to be served is a trustee of the trusts;
- (f) claims for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction; and
- (g) claims under an enactment conferring jurisdiction on the Court.

CPR rule 7.3 was amended by the Civil Procedure (Amendment) Rules 2014 to provide that a claim form may now be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made by a foreign Court or tribunal and is amenable to be enforced at common law.

In respect of other cases, an application may be made to the Court for permission to serve out of the jurisdiction. This must be supported by affidavit evidence and set out the grounds on which the application is made, that in the deponent's belief the claimant has a claim with a realistic prospect of success and in what place, within what country, the defendant may probably be found (CPR rule 7.5).

A claim form may be served out of the jurisdiction by the methods provided for in CPR rule 7.9 (service through foreign governments, etc.) or rule 7.11 (service on a state), in accordance with the law of the country in which it is to be served; or personally by the claimant or the claimant's agent (CPR rule 7.8). Where such service

is impracticable, the claimant may apply for an order under CPR rule 7.8A for an order that the claim form be served by a method specified by the Court.

As regards the service of process other than the claim form, an application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the Court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction, using the same methods of service as for the claim form (CPR rule 7.14).

3.2 Are any pre-action interim remedies available in the British Virgin Islands? How do you apply for them? What are the main criteria for obtaining these?

The Court has the jurisdiction to grant, and a party may apply for, an interim remedy, such as an injunction at any time, including after judgment has been given or before a claim has been made. The Court may only grant an interim remedy before a claim has been made if the matter is urgent or it is otherwise necessary to do so in the interests of justice. However, unless the Court orders otherwise, a defendant may not apply for an interim order before filing an acknowledgment of service (CPR rule 17.2).

CPR rule 17.1 sets out the list of interim remedies available to the Court, which include:

- (a) an interim declaration;
- (b) an interim injunction;
- (c) an order authorising a person to enter any land or building in the possession of a party to the proceedings;
- (d) an order directing a party to prepare and file accounts relating to the dispute;
- (e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;
- (f) an order for a specified fund to be paid into the Court or otherwise secured where there is a dispute over a party's right to the fund;
- (g) an order for interim costs;
- (h) an order for the:
 - (i) carrying out of an experiment on or with relevant property;
 - (ii) detention, custody or preservation of relevant property;
 - (iii) inspection of relevant property;
 - (iv) payment of income from relevant property until a claim is decided;
 - (v) sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly; or
 - (vi) taking of a sample of relevant property;
- (i) an order permitting a party seeking to recover personal property to pay a specified sum of money into the Court pending the outcome of proceedings and directing that, if the party does so, the property must be given up to the party;
- (j) an order (referred to as a "freezing order") restraining a party from:
 - (i) dealing with any asset whether located within the jurisdiction or not; and
 - (ii) removing from the jurisdiction assets located there;
- (k) an order to deliver up goods;
- (l) an order (referred to as a "search order") requiring a party to admit another party to premises for the purposes of preserving evidence, etc.; and/or

- (m) an order (referred to as an "order for interim payment") for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay.

Each interim remedy has its own criteria that need to be met by an applicant pursuant to case law. In relation to interim injunctions, the BVI Court applies the test set out in English authority of *American Cyanamid v Ethicon Ltd* [1975] AC 396, namely that there must be a serious issue to be tried, whether damages would be an adequate remedy and finally, in the event that the Court finds that damages would not suffice, it will consider the "balance of convenience" test and will look to preserve the *status quo* wherever possible.

In relation to freezing injunctions, the Court will again look to apply the principles set out in English authority, namely that the applicant can show that he has a good arguable case, that failure to obtain an injunction would involve a real risk that any judgment would not be satisfied and that it is just and convenient to grant the injunction (see *Polly Peck International plc v Nadir* [1992] 4 All ER 769. Following the Commercial Court's decision in *Black Swan Investments ISA v Harvest View Limited* (BVIHCV (Com) 2009/399), it now appears that free-standing freezing injunctions in support of foreign proceedings may be obtained without the need for the same to be tied to a domestic cause of action in the BVI). Applicants for both ordinary and freezing injunctions will normally be required to provide an undertaking in damages.

3.3 What are the main elements of the claimant's pleadings?

Pursuant to CPR rule 8.6, the claim form must include a short description of the nature of the claim, specify any remedy that the claimant seeks and give an address for service in accordance with CPR rule 3.11. A claimant must set out in the claim form or in the statement of claim a statement of all of the facts on which he relies which must be as short as practicable. In addition, the claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case and, in respect of the recovery of any property, the claimant's estimate of the value of that property must be stated. Finally the statement of claim must include a certificate of truth in accordance with rule 3.12. (CPR rule 8.7).

3.4 Can the pleadings be amended? If so, are there any restrictions?

Part 20 of the CPR (as amended by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) (No 2) Rules (No 48 of 2014)) governs changes to statements of case. CPR rule 20.1(1) provides that a statement of case may be amended once, without the Court's permission, at any time prior to the date fixed by the Court for the first case management conference. However, CPR rule 20.1(3) provides that a statement of case may not be amended without permission if the change is sought to be made after the end of a relevant limitation period. This includes adding or substituting parties after such a period. In such circumstances the Court, on application, may allow an amendment to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings (CPR rule 20.2). The Court will only allow an amendment to correct a mistake as to the name of a party where the mistake was genuine and not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question (CPR rule 20.2).

CPR rule 20.1(2) provides that the Court may otherwise give permission to amend a statement of case at a case management conference or at any time on an application to the Court. CPR rule 20.1(3) sets out the factors to which the Court must have regard when deciding whether to grant such an application. These are:

- (a) how promptly the applicant has applied to the Court after becoming aware that the change was one which he or she wished to make;
- (b) the prejudice to the application if the application were refused;
- (c) the prejudice to the other parties if the change were permitted;
- (d) whether any prejudice to any other party can be compensated by the payment of costs and/or interest;
- (e) whether the trial date or any likely trial date can still be met if the application is granted; and
- (f) the administration of justice.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In the BVI a statement of defence is simply known as a “defence”. The contents of a defence are set out at CPR rule 10.5. This provides that the defence must set out all of the facts on which the defendant relies to dispute the claim and that such a statement must be as short as practicable. A defendant must say which (if any) allegations in the claim form or statement of claim:

- (a) are admitted;
- (b) are denied;
- (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
- (d) the defendant wishes the claimant to prove.

Further, if a defendant denies any of the allegations in the claim form or the statement of claim he or she must state their reasons for doing so, and if the defendant intends to prove a different version of events from that given by the claimant, the defendant must set out his or her own version in the defence. If, in relation to any allegation in the claim form or the statement of case, a defendant does not admit it or deny it and put forward a different version of events the defendant must state the reasons for resisting the allegation. A defendant must also identify in or annex to the defence any document which is considered to be necessary to the defence.

A defendant is not permitted to rely on any allegation or factual argument which is not set out in the defence but which could have been set out there unless the Court gives permission or the parties agree to the same (CPR rule 10.7).

It is possible for a defendant to bring an ancillary claim against either the claimant (also known as a counterclaim) or a third party. Any such claim should be pleaded in the same way as a claim (CPR Part 18). It is also possible for a defendant to rely on a defence of set-off. Details of the same should be set out in the defence.

4.2 What is the time limit within which the statement of defence has to be served?

As set out above, a defendant who disputes the claim or the BVI Court’s jurisdiction must file a defence and/or an acknowledgment of service containing a notice of intention to defend within 14 days after the date of service of the claim form (CPR rules 9.1 and 9.3).

Where a defendant has filed an acknowledgment of service, they have 28 days after the date of service of the claim form to file a defence (CPR rule 10.3). Where a defendant fails to file either an acknowledgment of service or a defence within the time periods set out above then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes, it is possible for a defendant to bring an ancillary claim against a third party. This is pleaded in the same way as a counterclaim (CPR Part 18) (see above).

4.4 What happens if the defendant does not defend the claim?

CPR Part 12 contains provisions under which a claimant may obtain judgment by application in Form 7 to the Court office and without trial where the defendant has failed to file a defence or an acknowledgment of service giving notice of an intention to defend. This is known as default judgment.

Pursuant to CPR rule 12.4, a claimant may only obtain judgment for a failure to file an acknowledgment of service in respect of a claim for a specified sum of money. CPR rule 12.5, which deals with judgments for a failure to defend, is broader and relates to all claims where the claimant has proved service of the claim form and statement of claim or an acknowledgment of service has been filed but the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired.

Pursuant to CPR rule 12.9, a claimant may apply for default judgment on a claim for money or on a claim for delivery of goods against one or more defendants and proceed with the claim against the other defendants. However, if the claim cannot be dealt with separately from the claim against the other defendants, the Court may not enter judgment against that defendant and must deal with the application at the same time as it disposes of the claim against the other defendants.

Following default judgment, unless the defendant applies for and obtains an order for the judgment to be set aside pursuant to CPR Part 13, the defendant will only be heard on the assessment of damages (provided that they give the appropriate notice in Form 31), the form of any other remedy, costs, the enforcement of the judgment and the time period for payment of the judgment debt (CPR rule 12.13).

4.5 Can the defendant dispute the court’s jurisdiction?

CPR rule 9.6 provides that a defendant will not lose any right to dispute the Court’s jurisdiction by filing an acknowledgment of service. Further, CPR rule 9.7 provides that a defendant who disputes the Court’s jurisdiction to try the claim may apply to the Court for a declaration to that effect and that they must first file an acknowledgment of service. Such an application must be made within the period for filing a defence, which includes any period of extension by the Court, or by agreement between the parties.

Where the defendant has been served outside of the jurisdiction and contends that the Court should not exercise its jurisdiction in respect of any proceedings, the defendant may apply to the Court for a stay and a declaration to that effect. Again, before doing so the claimant must first file an acknowledgment of service if he or she has not previously done so (CPR rule 9.7A).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The addition and substitution of parties is governed by CPR Part 19. CPR rule 19.2 provides that a claimant may add a new defendant to proceedings without permission at any time prior to the CMC. The claimant does so by filing at the Court office an amended claim form and statement of claim. The same rule also provides that the Court may add a new party to the proceedings without an application if: (a) it is desirable to add the new party so that the Court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the Court can resolve that issue. In addition, the Court may order a new party to be substituted for an existing one if: (a) the Court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or (b) the existing party's interest or liability has passed to the new party. The Court may add, remove or substitute a party at the CMC. However, the Court may not add a party (except by substitution) after the CMC on the application of an existing party unless that party can satisfy the Court that the addition is necessary because of some change in circumstances which became known after the CMC.

Special provisions apply in relation to adding or substituting parties after the end of a relevant limitation period. The Court may only do so if: (a) the addition or substitution is necessary; and (b) the relevant limitation period was current when the proceedings were started. The same is only "necessary" if the Court is satisfied that:

- (a) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;
- (b) the interest or liability of the former party has passed to the new party; or
- (c) the new party is to be substituted for a party that was named in the claim form by mistake for the new party (CPR rule 19.4).

A person may not be added or substituted as a claimant unless that person's written consent is filed with the Court office (CPR rule 19.3(4)).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, Part 26 of the CPR provides the Court with broad case management powers, which include the power to consolidate proceedings (CPR rule 26.1). In so doing, the Court is to have regard to "the overriding objective" set out at Part 1 of the CPR. This is namely to "enable the court to deal with cases justly" (CPR rule 1.1(1)). CPR rule 1.1(2) provides that dealing justly with the case includes:

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with cases in ways which are proportionate to the:
 - (i) amount of money involved;
 - (ii) importance of the case;

- (iii) complexity of the issues; and
- (iv) financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

5.3 Do you have split trials/bifurcation of proceedings?

It is not unusual for the BVI Court, and in particular for the Commercial Division, to order a split trial. This typically arises where an assessment of damages is likely to involve different evidence from that to be advanced on the issue of liability and the Court is of the view that a trial on the latter first is likely to save costs in the event that the claimant is unsuccessful. Again, the Court has the power to order a split trial pursuant to its broad case management powers in Part 26 and specifically CPR rule 26.1(3). In making any such order, the Court is required to have regard to the overriding objective in CPR Part 1 as set out above.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in the British Virgin Islands? How are cases allocated?

The majority of civil cases are heard in the High Court, for which there is no specific case allocation system. In order for a claim to be placed on the Commercial List of the High Court, the claim must be a "commercial claim" within the meaning set out in CPR rule 69A.1(2) and the claim or the value of the subject matter to which the claim relates must be at least US\$500,000. However, the Court has the discretion to include a matter on the commercial list notwithstanding that it has not satisfied the required monetary value if it "considers the claim to be of a commercial nature and warrants being placed on the commercial list" (CPR rule 69.1A(4)).

A commercial claim may be placed on the commercial list at the time that it is filed or on application by a party at any time before the first CMC. In the former case, the legal practitioner for the claimant or applicant filing a claim must file a certificate to the effect that the claim is appropriate to be treated as a commercial claim and setting out such facts relating to the claim as shall demonstrate this (CPR rule 69A.4). In addition, the Court may place on the commercial list any claim or application of its own motion where it appears that the claim or application is a qualifying claim and that it is appropriate for the claim to be placed on the commercial list. Where a claim is allocated in this way, any party may apply and in the case of a claim proceeding by way of claim form, at any time before the close of pleadings for the claim to be transferred to another list (CPR rule 69B.2).

The Magistrates' Court also has jurisdiction to determine small contractual claims of under US\$10,000.

6.2 Do the courts in the British Virgin Islands have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes, the Courts in the BVI have a broad range of case management powers set out in CPR Part 26, which they will attempt to exercise to meet the Overriding Objective. See the answer to question 3.2 above regarding interim applications and the Court's case management

powers more generally. The general rule is that costs follow the event such that, depending on the applicable costs regime, at least some of the successful party's costs will be met by the losing party.

6.3 What sanctions are the courts in the British Virgin Islands empowered to impose on a party that disobeys the court's orders or directions?

The BVI Courts have a wide discretion to impose sanctions on a party that has failed to comply with a court order. These may include adverse costs orders against a party and/or a party's legal representatives and the striking out of pleadings. In extreme cases it may be possible to bring committal proceedings against a defaulting party pursuant to CPR Part 53.

6.4 Do the courts in the British Virgin Islands have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Yes, CPR rule 26.3 provides that "in addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10 (form and content of claim form, statement of case and defence)".

6.5 Can the civil courts in the British Virgin Islands enter summary judgment?

Yes, this is governed by Part 15 of the CPR. Pursuant to CPR rule 15.2, the Court may give summary judgment on the claim or on a particular issue if it considers that:

- (a) the claimant has no real prospect of succeeding on the claim or the issue; or
- (b) the defendant has no real prospect of successfully defending the claim or the issue.

However, CPR rule 15.3 prevents summary judgment being given in certain types of proceedings, such as admiralty proceedings *in rem*, probate proceedings and defamation.

6.6 Do the courts in the British Virgin Islands have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes, the general rule is that a claimant may discontinue all or part of a claim without the permission of the Court (CPR rule 37.2). In order to discontinue a claim or any part of a claim, a claimant must serve a notice of discontinuance on every other party and file a copy of the same at Court (CPR rule 37.3). Unless the parties agree, or the Court orders otherwise, a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served (CPR rule 37.6).

The Court is also granted broad powers to "stay the whole or part of any proceedings generally or until a specified date or event" (CPR rule 26.1(q)). In so doing the Court will look to meet the Overriding Objective set out in CPR Part 1, as discussed above.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in the British Virgin Islands? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

The rules governing the disclosure and inspection of documents are set out in CPR Part 28. The usual direction given by the Court at a CMC is that the parties should give "standard disclosure". This means that a party must disclose all documents which are directly relevant to the matters in question in the proceedings (CPR rule 28.4). Pursuant to CPR rule 28.1(4), a document is "directly relevant" if:

- (a) the party with control of the document intends to rely on it;
- (b) it tends to adversely affect that party's case; or
- (c) it tends to support the other party's case.

However the rule in the English authority of *Peruvian Guano* is expressly disappplied.

A party is not required to disclose documents which are subject to legal privilege.

7.2 What are the rules on privilege in civil proceedings in the British Virgin Islands?

The rules have been codified in the Evidence Act, 2006 ("the Evidence Act") and largely follow English law. A party will not be required to disclose the contents of confidential documents or communications which were created for:

- (a) the dominant purpose of providing legal advice;
- (b) the dominant purpose of providing or receiving legal services in relation to anticipated or pending legal proceedings; or
- (c) the dominant purpose of preparing or conducting legal proceedings.

A party will also generally be exempted from disclosing documents which are marked "without prejudice" or "without prejudice save as to costs".

7.3 What are the rules in the British Virgin Islands with respect to disclosure by third parties?

The English common law rule in *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133 (disclosure orders against third party wrong-doers) is followed in the BVI. It was relied upon extensively by JSC Bank in its quest to recover the fruits of the fraud said to have been perpetrated by its former chairman, Mukhtar Ablyazov. In *JSC BTA Bank v Fidelity Corporate Services & Others* [2011] JBVIC 2101, the Court of Appeal reversed a judgment of the Commercial Court Judge which doubted whether Registered Agents had the necessary degree of participation to the found jurisdiction to obtain relief against them. However, the BVI Court will not permit a party to apply for a *Norwich Pharmacal Order* simply to strengthen its own case and will be less inclined to grant such relief if the applicant already knows of the location of assets, or the identity of a requisite party. The Court will be especially slow

to make such an order if the effect of it would be to pre-empt the disclosure that is likely to be given in the ordinary course under the CPR. These principles were espoused in *Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation* [2006] ECSC J0403-5 and *TSJ Engineering Consulting Limited v (1) Al-Rushaid Petroleum Investment Company (2) Al-Rushaid Parker Drilling Limited* [2010] ECSC J0727-3.

The receivers appointed at the behest of JSC BTA Bank by the English Commercial Court over certain assets of Mukhtar Ablyazov, established before the Court of Appeal in *Jeremy Outen et al. v Mukhtar Ablyazov* [2011] ECSC J1110-1 in November 2011 that it was within the arsenal of the Court, when recognising a foreign receivership order, to order a wide class of third parties to provide such unspecified information or documentation to the receivers as they might reasonably request.

7.4 What is the court's role in disclosure in civil proceedings in the British Virgin Islands?

The Courts in the BVI, as part of their case management functions or upon application by a party for specific disclosure or a *Norwich Pharmacal Order*, may make orders for disclosure of documents or classes of the same.

7.5 Are there any restrictions on the use of documents obtained by disclosure in the British Virgin Islands?

CPR rule 28.17(1) provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless: (a) the document has been read to or by the Court, or referred to in open Court; or (b) (i) the party disclosing the document and the person to whom the document belongs; or (ii) the Court, gives permission. In any event the Court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the Court, or referred to in open Court. Such an application may be made by any party or person to whom the document belongs.

8 Evidence

8.1 What are the basic rules of evidence in the British Virgin Islands?

The rules governing the form of evidence in the BVI are set out in Parts 29-33 of the Civil Procedure Rules, the Evidence Act, 2006, the Oaths Act, 1911 and the common law. As set out above, under the CPR the parties are normally required to provide advance disclosure of all "directly relevant" material before trial. In the usual course, the Court will give directions at a CMC for the exchange of expert reports and witness statements on which the parties seek to rely at trial. Hearsay evidence is admissible at trial provided that adequate notice identifying the hearsay notice is given to the other parties in advance.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The types of evidence which are admissible include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence provided adequate notice is given.

Pursuant to CPR rule 29.1, the Court may control evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means, as to:

- (a) the issues on which it requires evidence; and
- (b) the way in which any matter is to be proved.

Subject to the control exercised by the Court set out above, expert evidence is permitted pursuant to CPR Part 32. This is generally required to be in written form and should be seen to be the independent product of the expert uninfluenced as to the form or content by the demands of the litigation. CPR rule 32.9 provides that the Court may direct expert evidence on a particular issue to be given by a single expert.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Written witness statements of fact for each witness of fact are generally exchanged by the parties prior to trial and stand as the evidence-in-chief of the witnesses to be called. Witnesses giving evidence at Court are normally cross-examined before the Court. Reluctant witnesses may be compelled to attend Court upon the issue and service of a witness summons (CPR Part 33).

The Court may give leave for witnesses to give evidence by videolink.

The rules governing the form of witness statements and affidavits are set out in CPR Parts 29 and 30. A party may apply for an order for a person to be examined before the trial or the hearing of any application (CPR rule 33.7). Generally (and subject to any directions contained in the order for examination), the examination must be conducted in the same way as if the witness were giving evidence at trial. With the consent of the parties, the Court may order that the evidence of a witness be taken as if before an examiner, but without an examiner being appointed or present (CPR rule 33.9).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Part 34 sets out the rules governing experts and assessors. Pursuant to CPR rule 32.2, expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. CPR rule 32.3 provides that it is the duty of an expert witness to help the Court impartially on matters relevant to his or her expertise and that this duty overrides any obligation to the person by whom he or she is instructed or paid. CPR rule 32.13 provides that an expert witness must address his or her report to the Court and not to any person from whom the expert witness has received instructions.

CPR rule 32.4 sets out the way in which the expert is to carry out his or her duty. The expert must:

- (a) provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within the witness's expertise;
- (b) state the facts or assumptions upon which his or her opinion is based, and must consider and include any material fact which could detract from his or her conclusion;
- (c) state if a particular matter or issue falls outside his or her expertise;
- (d) state if the opinion of an expert witness is not properly researched with an indication that the opinion is no more than a provisional one;

- (e) state if the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without qualification and give that qualification; and
- (f) communicate to all parties any change of opinion on a material matter after service of the expert's report.

An expert may apply to the Court for directions to assist them in carrying out their functions (CPR rule 32.5). Further, the Court may direct a meeting of experts instructed by the parties and specify the issues which the experts must discuss (CPR rule 32.15).

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in the British Virgin Islands?

The Court has broad powers to control the evidence that is adduced in the proceedings (see above). This includes making orders as to the issues which the Court requires the evidence to address, disclosure and expert evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in the British Virgin Islands empowered to issue and in what circumstances?

The Court has the power to make summary and default judgments (see above).

The Court's judgment can be for damages (e.g. lost contractual profits) or an order that a defaulting party perform their obligations under a contract (equitable remedy of specific performance). The BVI Court also has the power to give declaratory relief.

A wide variety of orders may be made by the Court in the BVI including but not limited to:

- (a) injunctions (both prohibitory and mandatory);
- (b) consent orders (contractual agreement between the parties); and
- (c) Tomlin orders (a form of consent order the terms of which are set out in a schedule and remain confidential to the parties).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Court may award damages for loss, including economic loss. As in most other common law jurisdictions, damages are generally aimed at compensating a victim rather than at punishing a wrongdoer. Where the loss suffered is negligible, nominal damages are normally awarded.

See above in relation to the powers of the Court relating to costs.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The Court has a wide armoury of powers which enable it to enforce local judgments. Writs of Possession or Execution are available, which enable the Bailiff to be instructed to enforce against land, or against goods, as the case may be. Attachments of debts or charging orders are also available, as are oral examinations, which permit the debtor to be examined in relation to their assets. In addition, the Judgment Summons procedure remains in wide use.

However, the reality of international commercial practice is that it is very rare to see companies registered in the BVI ("BVICs") which are either controlled or have assets within the jurisdiction. Even where assets exist within the jurisdiction, they will commonly be limited to shareholdings in other BVICs. In such cases, a local judgment will enable the judgment creditor to take advantage of the provisions of Part 48 of the Eastern Caribbean Supreme Court Civil Procedure Rules ("CPR"). This provides the Court with the power to grant charging orders (and associated stop notices). But it is more common to see creditors making an application to appoint a liquidator of a defaulting BVIC debtor in the alternative.

It is open to a creditor to apply for the appointment of a liquidator of a defaulting debtor company where the debt is not the subject of a *bona fide* dispute on substantial grounds (*Sparkasse Bregenz Bank v. Associated Capital Corporation* [2003] ECSC JO618-5). In any case where a judgment (local or foreign) has first been obtained, this is usually easily established. In addition, the debtor company must not have the benefit of a counterclaim which exceeds its own liability to the creditor, which would extinguish its own liability or reduce it to below the statutory minimum of US\$2,000 (Rule 149 of the Insolvency Rules, 2005).

Enforcement of foreign judgments

Attempts to enforce foreign judgments and to convert them into judgments of the BVI Court are therefore relatively uncommon. Where it is desired to do so, perhaps in order to obtain a charging order, foreign judgments may be enforced in the BVI at common law, or in one of the limited instances provided for by statute.

The statutory machinery is to be found in:

1. the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964; and
2. the Reciprocal Enforcement of Judgments Act (Cap 65) 1922.

The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964

Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964 provides that the Governor in Council may nominate the High Courts of jurisdictions in which he is satisfied that "*substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court*". To those jurisdictions, the intention was that an application for registration of the foreign judgment might be made under Section 4.

Certain jurisdictions have purportedly been designated, but some doubt exists as to whether or not the designation exercise was carried out effectively.

The Reciprocal Enforcement of Judgments Act (Cap 65) 1922

No such doubts exist in relation to the earlier Reciprocal Enforcement of Judgments Act (Cap 65) 1922. However, as originally enacted, it applied only to judgments given in the High Court of England and Wales, and Northern Ireland and the Court of Session in Scotland. It has since been extended to the Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia).

Section 3(1) provides that any such application for registration may be made within 12 months of the date of the judgment where it is just and convenient for the Court to do so. Section 3(2) of the Act excludes judgments from the system of registration where: they were obtained by fraud (section 3(2)(d)); an appeal is pending or the time for appealing has not expired (section 3(2)(e)); or it would be contrary to public policy to enforce the award. The BVI Court would generally look to English decisions as to the types of

conduct which may affront public policy; as a matter of policy, the Courts of the BVI will not enforce, directly or indirectly, foreign tax claims. In *JSC BTA Bank v. Mukhtar Ablyazov* (2014), the Court of Appeal held that it was not open to a defendant to use the test of just and convenient in section 3(1) to challenge the underlying processes of the English Court where the tests set out in section 3(2) had been met. In that case, the defendant wished to challenge the validity of the English judgment on the basis that he had filed an appeal with the European Court of Human Rights (“ECHR”). The Court rejected the defendant’s argument that his appeal to the ECHR represented an appeal of the English judgments and, noting that the criteria in section 3(2) had been met, held that the judge had been correct to refuse to consider the defendant’s case pursuant to a separate consideration of section 3(1).

Section 3(2)(a) of the Act excludes from the system of registration judgments obtained where the original Court lacked jurisdiction, or where:

1. in the case of a judgment debtor present within that jurisdiction, he was not served with the proceedings (section 3(2)(c)); or
2. in the case of a judgment debtor not ordinarily resident or carrying on business within the jurisdiction of the home Court, he did not submit to the jurisdiction of the Court.

This takes a narrow view of jurisdiction. Many common law jurisdictions will assert jurisdiction over parties not present within the jurisdiction on the discretionary grounds that they are “necessary and proper” parties to ongoing litigation within that jurisdiction. However, in the BVI this does not apply and judgments obtained in the circumstances described above will be excluded from the system of registration.

Where the Act does apply, it has the undoubted advantage of simplicity. All that is required before a judgment may be registered and enforced as if it were a judgment of the BVI Court, is an application under Part 72 of the CPR. The application may be made without notice, but must be supported by evidence. The application must contain certain prescribed information and must exhibit:

1. a duly authenticated copy of the judgment; and
2. details of any interest which has become due under the law of the country in which judgment has been entered.

The simplicity of the without notice application is to be contrasted with the common law route, which is to sue on the judgment itself. The result is much the same, but it can take longer.

Enforcement at common law

At common law, the Courts in the BVI will treat any final and conclusive monetary judgment as being a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction in which the judgment was obtained. There is no requirement of reciprocity.

The judgment creditor must:

1. prove the judgment; and
2. show that it is a final and conclusive monetary judgment for a specified sum.

If those matters are established, a retrial of the issues in the action will not be necessary. The creditor may instead apply for summary judgment under Part 15 of the CPR.

However, since the judgment creditor is proceeding by way of a fresh action, he will only be able to proceed in the BVI if he is able to serve the proceedings upon the judgment debtor by a means permitted by Parts 5 and 7 of the CPR.

It will still be possible to defeat an application for summary judgment, or indeed an action founded upon a foreign judgment, even one which is conclusive and made in respect of a specific sum, if:

1. the foreign Court did not have jurisdiction in the matter (i.e. the judgment debtor either did not submit to the jurisdiction, or was resident or carrying on business within the jurisdiction and was not duly served with the process);
2. the foreign judgment includes penalties, taxes, fines or similar fiscal or revenue obligations;
3. the judgment was obtained by fraud;
4. recognition or enforcement of the judgment in the BVI would be contrary to public policy; or
5. the foreign proceedings were conducted in a manner which infringed the rules of natural justice.

The position is more complex in relation to foreign judgments which are not for a specified sum of money. In those circumstances, the common law doctrine will not strictly engage, but the creditor may instead seek to avoid a re-trial of the issues by relying upon the equitable principles of estoppel, in essence by arguing that it would be an abuse of the process of the Court:

1. to re-litigate matters decided before in a court of competent jurisdiction. Even where the judgment of the foreign court cannot be enforced at common law, it may nevertheless be possible to argue that the losing party should not re-litigate those issues that were decided by the foreign judgment; and
2. to litigate matters in subsequent proceedings which ought to have been advanced in the original proceedings. As a rule, the Courts will expect a party to advance all of his case at the same time, so as to prevent the other party being vexed twice by the same matter (see the rule in *Henderson v. Henderson* 1843-60 All ER Rep 378).

9.4 What are the rules of appeal against a judgment of a civil court of the British Virgin Islands?

Where an appeal may be made only with the leave of the High Court or the Court of Appeal, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. Where an application for leave to appeal has been refused by the High Court, an application for leave may be made to the Court of Appeal within seven days of such refusal (CPR rule 62.2). An application for leave to appeal may be considered by a single Justice of Appeal, who may give leave without hearing the applicant. However, if the judge considering an application for permission to appeal is minded to refuse leave, he or she must direct: (a) that a hearing be fixed; and (b) whether that hearing is to be by a single judge or the Court (CPR rule 62.2).

An appeal is made in the case of an appeal from the High Court by filing a notice of appeal (CPR rule 62.3). The notice of appeal must be filed: (a) in the case of an interlocutory appeal where leave is not required within 21 days of the date the decision appealed against was made; (b) in an interlocutory appeal where leave is required, within 21 days of the date when such leave was granted; or (c) in the case of any other appeal, within 42 days of the date when judgment is delivered or the order is made, whichever is the earlier.

Appeal from the Court of Appeal lies to the Judicial Committee of the Privy Council (the Privy Council), which is located in the United Kingdom. Any such appeals are governed by the Judicial Committee (Appellate Jurisdiction) Rules 2009 (“PC Rules”) and accompanying Practice Directions. In cases where permission to appeal is required, no appeal will be heard by the Privy Council unless permission has been granted by the Court of Appeal or the Privy Council (PC rule 10). An application to the Privy Council

for permission to appeal must be filed within 56 days from the date of the order or decision of the Court of Appeal or the date when the Court of Appeal refused permission. The Privy Council will normally consider permission applications on paper but may direct an oral hearing (PC rules 15 and 16). Where the Privy Council grants permission to appeal an appellant must, within 14 days of the grant of permission, file a notice of an intention to proceed with the appeal in the appropriate form (PC rule 17). Where permission has been granted by the Court of Appeal, an appellant must file a notice of appeal within 56 days of the date of the order or the decision of the Court below granting permission or final leave to appeal (PC rule 18). Readers are directed to the PC rules and practice directions which govern the content and numbers of copies of documents which must be filed.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in the British Virgin Islands? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently encountered method of alternative dispute resolution in the BVI is arbitration. However, at present parties normally conduct their arbitrations in other jurisdictions (such as the London Court of International Arbitration) and then seek to enforce the terms of the order in the BVI.

On 23 January 2014, the BVI passed the Arbitration Act 2013 to come into force on 1 October 2014. The 2013 Act repeals and replaces the 1976 Ordinance. The New York Convention was also extended directly to the BVI from 24 May 2014.

The 2013 Act seeks to address a number of difficulties in the present law. The 1976 Ordinance was based on a mixture of previous English statutes and is widely considered to be unsuitable to deal with modern commercial litigation. The 2013 Act introduces the UNCITRAL Model Law on arbitration (as amended on 7 July 2006) to the territory with some minor exceptions. In addition, the fact that the New York Convention had not previously been extended directly to the territory meant that BVI arbitral awards were largely unenforceable outside of the jurisdiction. Finally, until now the BVI has rarely been the seat of arbitration hearings. This is addressed by the establishment of the BVI International Arbitration Centre (or the BVI IAC).

That said, the 2013 Act is likely to have only a limited impact on the enforceability of foreign arbitration awards from New York Convention states that were already capable of enforcement pursuant to the Arbitration Ordinance 1976. One important change is that the definition of a convention state is now wide enough to include the United Kingdom, which will permit enforcement of awards from, for example, the London Court of International Arbitration, which had previously been excluded from the former legislation. The 2013 Act also includes provision for the enforcement of arbitral awards from non-convention states, which may be refused where it is not just to do so.

The Courts of the Eastern Caribbean have long encouraged mediation and other forms of alternative dispute resolution. By

rule 27.7 of the CPR the Court may adjourn a case management conference to enable settlement discussions or a form of ADR procedure to continue.

A process of Court-connected mediation was instituted by Practice Direction 1 of 2003, which created, in each ECSC territory, a national mediation committee. The Practice Direction confers upon the Court jurisdiction to refer a dispute to mediation, and provides that the parties “*will not be allowed to opt out of the referral order to mediation, except by order of the Master or Judge and upon adducing good and substantial reasons*”.

The BVI now has a growing number of qualified mediators. However, their services are infrequently (if ever) used in international commercial litigation.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Please see the answer to question 1.1 above.

1.3 Are there any areas of law in the British Virgin Islands that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In the BVI virtually all commercial matters are capable of being referred to arbitration or mediation. At present, however, very little ADR takes place within the jurisdiction.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to the British Virgin Islands in this context?

Please see the answer to question 1.1 above.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to the British Virgin Islands in this context?

An arbitral award is binding and final. Parties can only appeal on a point of law and will not be able to do so where the right to appeal is not expressly provided for in an arbitration agreement to which the 2013 Act does not automatically apply such a right.

Settlement agreements which are reached through mediation are contracts and are therefore enforceable as such if the requirements for a valid contract are satisfied. Where the Court orders mediation, there is a requirement for the mediator to lodge a certificate of non-compliance if a party to the claim fails to attend the mediation session, whether or not its legal practitioners attend. In such circumstances costs penalties may apply.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in the British Virgin Islands?

Provision has been made for the establishment of the BVI International Arbitration Centre (or the BVI IAC) (see above) with the coming into force of the Arbitration Act, 2013.



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Scott is the Managing Partner and Head of Litigation of the British Virgin Islands office. He has considerable experience in areas such as shareholder disputes, insolvency, fraud and asset tracing, trust litigation, and corporate and commercial disputes generally.

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Scott routinely works with large city law firms, financial institutions and corporate and commercial clients based throughout the world with respect to large multi-jurisdictional disputes and transactions. He has considerable courtroom experience matched with an acute commercial acumen.

In addition to corporate and commercial litigation, Scott also has a wide experience of ADR procedures such as arbitration and mediation.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

It remains to be seen whether the Arbitration Act, 2013 will increase the number of cases referred to arbitration whose seat is in the BVI. At present it is rare for parties to a commercial case in the BVI to engage in any other form of alternative dispute resolution, including mediation.



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David qualified as a solicitor in 2005, having completed his training contract at a well-known corporate law firm in the UK before retraining and joining the Bar. He was called to the independent Bar of England and Wales in 2006, where he developed a successful chancery and commercial practice. David qualified as an accredited mediator with the Centre for Effective Dispute Resolution (CEDR) in 2011. He was admitted to the Bar of the Eastern Caribbean Supreme Court (Virgin Islands) in March 2013.

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Canada



Blake, Cassels & Graydon LLP

Ryder Gilliland

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Canada got? Are there any rules that govern civil procedure in Canada?

The law in every province and territory except Québec is based on the common law system. The system of private law in Québec is based on the civil law system, as codified in the *Civil Code of Québec*. Public law in all provinces and territories is based on the common law.

Unless otherwise specified, the discussion below relates only to the common law jurisdictions in Canada. Where common law jurisdictions differ, the focus here is on Ontario, as it is the jurisdiction in which the authors primarily practise.

Each province and territory has its own set of rules governing civil procedure. In Ontario, for instance, civil procedure is governed by the *Rules of Civil Procedure* (the “Ontario Rules”), available at www.canlii.org.

While the Ontario Rules are, in general, representative of the civil procedure rules in other provinces, litigants must, of course, be guided by the civil procedure rules of the province in which they are litigating.

1.2 How is the civil court system in Canada structured? What are the various levels of appeal and are there any specialist courts?

Each province and territory has its own system of courts. Claims below a certain amount (\$25,000 in Ontario) may be brought in small claims court. Larger civil claims must be brought in Superior Courts, which are known in various provinces as the Superior Court of Justice (Ontario), Supreme Court (British Columbia, Nova Scotia, Newfoundland and Labrador), or the Court of Queen’s Bench (Manitoba, Saskatchewan, Alberta).

Appeals from the Superior Courts are generally brought to intermediate appellate courts, known in most provinces as the Court of Appeal. Further appeal lies to the Supreme Court of Canada. Leave to appeal to the Supreme Court of Canada is required for all civil matters.

There is also a system of federal courts. The largest federal court is the Federal Court, which has exclusive or concurrent jurisdiction over cases involving intellectual property, aboriginal law, maritime law, federal administrative law and claims by or against the federal government. The Tax Court of Canada is a specialist court with jurisdiction over taxation matters. Appeals from both the Federal

Court and the Tax Court of Canada go to the Federal Court of Appeal, and then with leave to the Supreme Court of Canada.

Juries are generally available for civil trials in Canadian courts, except in the federal courts. However, they are quite rarely used.

1.3 What are the main stages in civil proceedings in Canada? What is their underlying timeframe?

The main stages of an action before the Canadian courts include:

- issuance of a statement of claim;
- delivery of a statement of defence;
- discovery of documents;
- oral examinations for discovery;
- exchange of expert reports;
- setting down for trial;
- pre-trial conference; and
- trial.

The deadlines for each of these steps vary by jurisdiction. In practice, the timeline will often depend on the complexity of the case.

1.4 What is Canada’s local judiciary’s approach to exclusive jurisdiction clauses?

The Supreme Court of Canada has held that forum selection clauses should be enforced unless there is “strong reason” why enforcing the clause would be unreasonable or unjust: *Z.I. Pompey v. ECU-Line N.V.*, [2003] 1 S.C.R. 450.

It is generally more difficult to get an anti-suit injunction from a Canadian court than to have domestic proceedings stayed in favour of another jurisdiction: *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897.

1.5 What are the costs of civil court proceedings in Canada? Who bears these costs? Are there any rules on costs budgeting?

The cost of litigation in Canada varies enormously depending on the complexity of the case.

The general rule is that the loser is required to pay the winner’s costs. In most cases, this amounts to “partial indemnity” (also known as “party-and-party”) costs, which in Ontario usually account for about 25-50 per cent of the winner’s actual legal fees. Where the losing party behaved unreasonably or acted in bad faith, the winner may

be entitled to an increased measure of costs, known as “substantial indemnity” or “solicitor-client” costs.

Costs are discretionary, however, and a judge therefore has the power to order that no costs be awarded in appropriate circumstances, or even that the winner pay the loser’s costs.

Settlement offers may also play a role in costs awards. In Ontario, where a plaintiff makes a proper settlement offer and then “beats” that offer at trial, the defendant must pay him or her substantial indemnity costs from the date of the offer. Similarly, where a defendant makes an offer and “beats” that offer at trial, the plaintiff must pay him or her partial indemnity costs from the date of the offer, even if the defendant has actually lost a trial: see Ontario Rule 49.10.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Canada? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fees are permitted in Canada. They are quite common in certain types of litigation, including personal injury and class actions. There are certain exceptions to this, however. In Ontario, for instance, contingency fees are not allowed for criminal or family law matters.

Despite recognising contingency fee agreements, Canadian courts maintain the common-law prohibition against champerty and maintenance. This may limit third party funding of litigation, especially where the third party has no legitimate interest in the claim: see *Fredrickson v. Insurance Corp. of British Columbia* [1986], 28 D.L.R. (4th) 414 (B.C.C.A.). Third party litigation funding does exist in Canada, but it is still in its infancy.

Security for costs is available in Canada. In Ontario, it is governed by Rule 56.01. Security for costs is available where:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has brought another proceeding in Ontario or elsewhere seeking the same relief;
- the defendant has an outstanding unpaid costs order against the plaintiff;
- the plaintiff is a corporation and lacks sufficient assets in Ontario to pay the defendant’s costs;
- the action is frivolous and vexatious and the plaintiff lacks sufficient assets in Ontario to pay the defendant’s costs; or
- a statute entitles the defendant to security for costs.

It remains a discretionary matter for the judge, and courts may be reluctant to order security for costs against an impecunious plaintiff.

1.7 Are there any constraints to assigning a claim or cause of action in Canada? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

As a general rule, a party is permitted to assign cause of action. There are a number of exceptions to this grounded in public policy, the most significant of which is the rule against assigning a cause of action in tort claim unless the assignee has a legitimate commercial interest in the claim or the claim is incidental to the ownership of assignable property.

As noted above in response to question 1.6, Canadian courts maintain the common-law prohibition against champerty and maintenance. While this no longer prohibits contingency fee agreements, it does limit other forms of third party litigation funding.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For the most part, there are no formalities required before initiating proceedings. However, such formalities may be required by contract or under certain specific statutory regimes (for example, in Ontario the *Proceedings Against the Crown Act* requires that a plaintiff give the provincial government six weeks’ notice before commencing an action against it).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Each province and territory has its own limitation laws. In Ontario, the *Limitations Act, 2002* establishes a two-year basic limitation period for most claims. This period begins to run on the earlier of the day on which the claim became known to the plaintiff, and the day on which it was discoverable. Regardless of when the claim became known to the plaintiff, however, it generally must be brought within 15 years of the date the underlying event or omission occurred.

However, some legislation creates different limitation periods governing specific types of claims. For instance, the Ontario *Libel and Slander Act* requires that actions for libel in a newspaper or broadcast be commenced within three months of publication, or within one year if the action also relates to another publication within the last three months. A plaintiff bringing such an action must also give the defendant notice of their intention to sue within six weeks of publication.

Judges in Ontario have no jurisdiction to waive or extend a limitation period, although in certain circumstances the period may be suspended or extended by contract.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Canada? What various means of service are there? What is the deemed date of service? How is service effected outside Canada? Is there a preferred method of service of foreign proceedings in Canada?

An action is generally commenced by issuing a statement of claim. However, where there is insufficient time to prepare a statement of claim, in Ontario a plaintiff may also commence an action by filing a notice of action (a shorter document), to be followed shortly by a statement of claim.

Under the Ontario Rules, a statement of claim may be served personally, or through a recognised alternative to personal service. This is generally done either by leaving a copy with an individual defendant, with an officer, director or agent of a corporation, or with the party’s lawyer.

In situations where Ontario courts presumptively have jurisdiction (enumerated in Ontario Rule 17.02), a statement of claim may be served outside the province by right. In all other cases, leave of the court is required.

Service outside Ontario may be effected by: (a) serving the statement of claim in the same manner as prescribed in Ontario; (b) serving the central authority of a contracting statute under the Hague Convention

on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; or (c) serving in a manner provided for by the rules of the jurisdiction, as long as it could reasonably be expected to come to the attention of the person being served.

The preferred method for serving a foreign claim in Canada is on the defendant's lawyer, if the lawyer agrees to accept service.

In certain circumstances, a civil proceeding dealing with certain issues may also be brought by way of application, which is a more summary procedure. An application is commenced by notice of application, which must be served in the same way as a statement of claim.

3.2 Are any pre-action interim remedies available in Canada? How do you apply for them? What are the main criteria for obtaining these?

A motion for pre-action interim relief may be brought in an urgent case. The moving party must undertake to commence proceedings as soon as possible: Ontario Rule 37.17.

3.3 What are the main elements of the claimant's pleadings?

The basic rule is that the statement of claim must contain "a concise statement of the material facts" on which the plaintiff relies: Ontario Rule 25.06(1). The plaintiff should clearly identify the cause of action on which he or she relies, and he or she must plead facts that, if true, would establish every element of that cause of action. The statement should also clearly identify the relief sought by the plaintiff.

A statement of claim must be divided into consecutively-numbered paragraphs, and each allegation should be contained in a separate paragraph: Ontario Rule 25.02.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended without leave of the court up until the "close of pleadings", which means after the plaintiff's delivery of a reply, or 10 days after the delivery of a statement of defence: Ontario Rule 26.02(a).

After that, leave of the court is required. However, courts must grant such leave unless the amendments would cause prejudice to the other side that cannot be compensated for with an adjournment or costs: Ontario Rule 26.01. In practice, this means that amendments are usually allowed, even on the eve of trial.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence must conform to the rules described above for statements of claim. It must also specify which allegations are admitted by the defendant, which allegations are denied, and which allegations the defendant has no knowledge of. It should include any alternative facts relied on by the defendant, and set out any affirmative defences upon which the defendant intends to rely, including set-off: Ontario Rule 25.07.

If the defendant wishes to bring a counterclaim, he or she must do so in the same document as the statement of defence. In such a

case, the statement of defence is entitled "Statement of Defence and Counterclaim": Ontario Rule 27.02.

4.2 What is the time limit within which the statement of defence has to be served?

The timelines depend on whether the statement of claim was served outside the province. In Ontario, a statement of defence must be filed and served within 20 days if the defendant was served with the claim in Ontario. The defendant can extend this to 30 days by filing a basic pleading called a Notice of Intent to Defend. A defendant served elsewhere in Canada or in the United States must respond within 40 days, and a defendant served outside Canada or the USA must respond within 60 days: Ontario Rule 18.01.

A defendant who misses these deadlines may still file a statement of defence unless he or she has been noted in default: Ontario Rule 19.01(5).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The Ontario Rules and those in other jurisdictions permit a defendant to bring a third party claim, so long as it arises out of facts related to the initial claim.

A third party claim is commenced by originating process in the same manner as a statement of claim, and must be responded to by a third party defence. In Ontario, a third party claim must generally be issued within 10 days after the defendant delivers a statement of defence or within 10 days after the plaintiff delivers a reply. Such a claim may not be issued after the defendant is noted in default. However, the court may grant leave to file a third party claim after these deadlines expire: Ontario Rule 29.02.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, the plaintiff may note him or her in default and obtain default judgment against the plaintiff without trial: Ontario Rule 19.

The court may set aside a noting in default or default judgment. The party seeking to set such an order aside will generally have to prove that: (a) the motion to set aside was brought promptly; (b) there is a reasonable explanation for the non-compliance with the Rules; and (c) there is an arguable defence on the facts of the case.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute the court's jurisdiction in three ways:

- by arguing that extra-provincial service was not authorised by the Rules;
- by arguing that an order granting leave for extra-provincial service should be set aside; or
- by arguing that the jurisdiction is not a convenient forum for the proceeding.

In Ontario and most other jurisdictions, these arguments should be raised before the defendant has filed a notice of appearance, notice of intent to defend, or statement of defence. Filing any pleading in an action can constitute attornment.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There is provision for the joinder of multiple plaintiffs or defendants in a single action where the claims arise out of common facts, where a common question of fact or law may arise, or where joinder would promote the convenient administration of justice for some other reason: Ontario Rule 5.02.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Where two or more proceedings before the court pose common questions of fact or law or seek relief arising out of the same facts, the court may order that:

- the proceedings be consolidated;
- the proceedings be heard at the same time;
- the proceedings be heard consecutively;
- any of the proceedings be stayed until another proceeding is determined; or
- any of the proceedings be asserted by way of counterclaim in another proceeding: see Ontario Rule 6.01.

5.3 Do you have split trials/bifurcation of proceedings?

Canadian courts have the inherent jurisdiction to bifurcate proceedings when necessary. However, this is the exception rather than the rule, and courts will only exercise their jurisdiction to bifurcate trials in clear cases.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Canada? How are cases allocated?

There is no general case allocation system in Canadian courts. There are some local exceptions to this, however. In Toronto, for instance, there is a Commercial List, staffed by judges with experience in managing complex commercial litigation.

6.2 Do the courts in Canada have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Case management is available in some jurisdictions. Where a case is assigned to case management, the court has extensive powers to supervise and control the progress of litigation. A judge or case management master may establish a timetable governing the progress of a case.

Parties may make a wide range of interim applications, including:

- interim or interlocutory injunctions, including *Mareva* injunctions (freezing orders) and *Anton Piller* orders (search orders);
- motions for particulars;

- motions for security for costs;
- matters relating to the amendment of pleadings;
- motions to strike pleadings;
- motions to compel the production of documents or responses to questions in examinations for discovery; and
- motions for summary judgment.

As noted above, cost consequences are a discretionary matter for the judge or master hearing a motion. However, costs will usually be awarded to the successful party on the motion.

6.3 What sanctions are the courts in Canada empowered to impose on a party that disobeys the court's orders or directions?

The primary and most common sanction is an adverse costs award. As noted above, courts can order that a party bear a higher-than-usual proportion of the other side's costs where that party is deemed to have acted unreasonably or in bad faith.

In extreme cases of a clear breach of a court order, the court has the power to hold a non-compliant party in contempt of court. This can result in imprisonment.

6.4 Do the courts in Canada have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Canadian courts do have the power to strike out all or part of a statement of claim. This can be done based on non-compliance with the requirements of the rule relating to the substance or form of a statement of claim.

A statement of claim may also be struck out where the allegations in it do not disclose a reasonable cause of action against the defendant, even when assumed to be true, or where the action is an abuse of process.

6.5 Can the civil courts in Canada enter summary judgment?

Canadian courts do have the power to issue summary judgment in favour of any party, in whole or in part, without trial. This power is generally exercised when the court concludes that a trial would be unnecessary, or where no facts are in dispute.

Certain jurisdictions, including Ontario and British Columbia, have recently liberalised the rules governing summary judgment to give judges enhanced powers to receive evidence, weigh credibility, and resolve factual disputes without trial. Summary judgment is available "when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": *Hryniak v. Mauldin*, 2014 SCC 7 at para. 4.

6.6 Do the courts in Canada have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court may stay or dismiss an action where:

- the court has no jurisdiction over the subject matter of the action;
- the plaintiff lacks legal capacity to bring the action, or the defendant lacks legal capacity to be sued;

- the action is duplicative of other proceedings; or
- the action is frivolous, vexatious, or an abuse of process: Ontario Rule 21.01(3).

An action may also be discontinued by the plaintiff, although leave of the court is required to do so after the close of pleadings, and the plaintiff may be ordered to pay the defendant's costs.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Canada? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Every document relevant to any matter in issue that is or has been in the possession, control, or power of either party must be disclosed to the other parties. It does not matter whether the document helps or harms its case.

Each party must provide all other parties with a sworn affidavit of documents listing all relevant documents, documents which it refuses to produce on the basis of a privilege claim and documents that it no longer has in its possession.

Where it is necessary to obtain information before commencing an action it is possible to obtain pre-action disclosure by obtaining a "Norwich" order to require a third party to disclose information in its possession.

A party may request to inspect any or all non-privileged documents in the possession, control or power of another party.

7.2 What are the rules on privilege in civil proceedings in Canada?

There are three main types of privilege in Canada:

- solicitor-client privilege protects confidential communications between a lawyer and client relating to the seeking, formulating or giving of legal advice;
- litigation privilege protects all information created or communicated with the dominant purpose of responding to litigation, whether it has been commenced or is contemplated; and
- settlement privilege protects statements made in a good faith effort to reach a settlement or compromise of a dispute.

Solicitor-client privilege is jealously protected by Canadian courts. Canadian courts recognise that solicitor-client privilege can apply to advice given by in-house counsel, so long as it constitutes legal and not business advice.

7.3 What are the rules in Canada with respect to disclosure by third parties?

The party seeking the disclosure must bring a motion before the court. The test is whether the document is relevant to a material issue in the action, and whether it would be unfair to require the moving party to proceed to trial without the disclosure: Ontario Rule 30.10.

A non-party from whom disclosure is sought has the right to appear and object to the production.

7.4 What is the court's role in disclosure in civil proceedings in Canada?

Courts are generally not directly involved in discovery or disclosure unless a dispute arises. Where there is a dispute, courts have the jurisdiction to order the production of documents or to compel answers to questions asked in examinations for discovery, and to sanction parties with costs. In extreme cases, courts can dismiss a claim or strike a statement of defence for failure to comply with certain discovery obligations.

In Ontario, where parties fail to agree on a discovery plan, one can be imposed by the courts. Where a case is assigned to case management, courts also play a more active role supervising discovery and setting a timetable.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Canada?

At common law and under the civil procedure rules of most provinces, there is a "deemed undertaking" that a party receiving documents or information from the discovery process may not use that information outside the litigation for which the documents or information were produced.

Exceptions to this rule include:

- use to which the disclosing party consents;
- use of evidence which is filed in court; and
- the party receiving the evidence can use it to impeach a witness's credibility in another action.

8 Evidence

8.1 What are the basic rules of evidence in Canada?

Each jurisdiction has an *Evidence Act*, which supplements, rather than codifies, the common law.

The most basic rule of admissibility is that the probative value of evidence must outweigh its prejudicial effects. Evidence must also be relevant to be admissible.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Relevant fact evidence is generally admissible, as long as its probative value outweighs its prejudicial effects.

The largest exception to this is the rule that hearsay (second-hand evidence) is generally not admissible. Hearsay will be admissible, however, where the court is satisfied that it is reliable and necessary.

In order for expert opinion evidence to be admissible, the court must be satisfied that:

- the expert is qualified;
- the evidence is relevant;
- the evidence is necessary; and
- there is no other applicable exclusionary rule: *R. v. Mohan*, [1994] 2 S.C.R. 9.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A party may call any fact witness whose evidence is admissible. If necessary, a party may compel a witness's attendance through a summons.

A party may conduct an oral examination for discovery (a deposition) of any party adverse in interest. A corporation may produce any officer, director or employee for examination, but the court has the power to order the examination of a corporate representative. Only one representative from a corporation may be examined without leave of the court.

A party must also receive leave of the court if it wishes to examine a non-party.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert evidence is permissible as long as the expert is qualified and the evidence is relevant and necessary, and not barred by any other exclusionary rule. Although experts are generally appointed by the parties, some jurisdictions, including Ontario, also permit court-appointed experts.

The rules of civil procedure in each jurisdiction impose timelines on the filing of expert reports in order to ensure that there is no unfair surprise. In Ontario, for instance, expert reports must be filed at least 90 days before trial, and no more than three expert witnesses can be called by each side without leave of the court.

Experts, whether appointed by the parties or by the court, owe their duties to the court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Canada?

The court has a role in ensuring compliance with discovery obligations. As noted above, it may order the examination of a non-party or of a different corporate representative, and it may compel answers to disputed questions at examinations for discovery.

At trial, judges have the power to compel the attendance of witnesses by enforcing summonses.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Canada empowered to issue and in what circumstances?

Canadian courts have the power to make a wide variety of judgments and orders in law or equity.

Upon default judgment, summary judgment or after a trial, the court can grant judgment for monetary damages, specific performance or declaratory relief.

Courts also have broad discretion to issue a wide range of orders, depending on the circumstances. These include orders:

- permitting amendments to a pleading;
- striking a pleading;
- staying or dismissing an action;

- requiring a party to post security for costs;
- compelling compliance with discovery obligations;
- related to case management and scheduling;
- granting an interim or interlocutory injunction;
- relating to the structure and conduct of a trial;
- relating to the admissibility of evidence at trial; and
- enforcing a judgment.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts have broad powers to award damages. This includes:

- general damages;
- special damages: specific losses capable of precise calculation;
- prospective damages: damages for losses not yet suffered;
- aggravated damages: damages for mental distress; and
- punitive damages: damages awarded in exceptional cases where the defendant's conduct offends the court's sense of decency.

As noted above, costs are a matter for the discretion of the court. In most cases, however, the successful party is awarded costs amounting to roughly 1/3-1/2 of actual legal fees.

Courts also have the power to order both pre-judgment and post-judgment interest on both the award and costs. Though an interest rate is prescribed by legislation, courts have the power to disallow or vary interest.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced by getting a writ of seizure and sale, a garnishment order or writ of sequestration. A creditor may conduct an examination in aid of execution (also known as a judgment debtor examination) in order to identify and locate a debtor's assets.

A party seeking to enforce a foreign judgment must commence proceedings in domestic courts. A Canadian court will usually recognise and enforce the decision of a foreign court as long as that court has a "real and substantial connection" to the dispute and the foreign order is not offensive to Canadian public policy. The traditional defences to the enforcement of a foreign judgment are that the judgment was obtained through fraud, that the foreign proceedings were unfair or violated the principles of natural justice, or that enforcing the judgment would violate Canadian public policy.

In Ontario, the *Reciprocal Enforcement of Judgments Act* allows a judgment from any other province or territory (with the exception of Québec) to be enforced in the same manner as an Ontario judgment simply by registering it with the Ontario Superior Court of Justice.

9.4 What are the rules of appeal against a judgment of a civil court of Canada?

A judgment or final order in Superior Court (as opposed to small claims court) can generally be appealed as of right to the appropriate court of appeal. In Ontario, the system is complicated slightly by the fact that certain judgments, including those under \$50,000, are instead appealed to an intermediate court called the Divisional Court. The Divisional Court is composed of judges of the Superior Court of Justice, who usually sit as a panel of three on the Divisional Court.

Decisions of courts of appeal may be appealed, with leave, to the Supreme Court of Canada.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Canada? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The primary methods of alternative dispute resolution used in Canada are arbitration and mediation.

There is a strong presumption in favour of courts enforcing arbitration clauses. Where a valid arbitration clause exists, a court will stay judicial proceedings seeking to circumvent arbitration. Unless an arbitration agreement provides otherwise, Canadian arbitrators have the power to rule on their own jurisdiction. The parties, in conjunction with the arbitrator, have broad discretion as to how an arbitration will be conducted.

Mediation is also common in Canada. Many court systems offer mediation services. In some jurisdictions, including parts of Ontario, mediation is actually mandatory for certain cases.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Like the courts, arbitration is regulated by provincial and territorial legislation, with a separate system in place for matters in federal jurisdiction (such as maritime disputes). Some provinces, including Ontario, have separate legislation dealing with international arbitration.

Ontario and Nova Scotia also have legislation regulating mediation, based on the United National Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation.

1.3 Are there any areas of law in Canada that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Although criminal matters are not arbitrable in Canada, courts are otherwise very reluctant to interfere with parties' autonomy to choose arbitration.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Canada in this context?

Canadian arbitration legislation gives arbitrators and courts concurrent jurisdiction over interim measures, unless the arbitration

clause provides differently. There is some dispute over how this power should be exercised by courts. Some courts will grant relief so long as the usual test for such relief is met, regardless of the arbitration clause. Other courts, however, will refuse to grant relief unless the moving party can demonstrate that the arbitral tribunal is unable to grant the relief sought.

Arbitral tribunals in Canada lack the jurisdiction to grant interlocutory relief binding third parties, such as *Mareva* injunctions (freezing orders), so these remedies must always be sought from the courts.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Canada in this context?

The rules with respect to appeals differ across the provinces. Appeal rights may also be supplemented or (in some provinces) eliminated by the consent of the parties.

In Ontario, appeals from arbitration awards may be brought to the Superior Court of Justice. Unless the parties agree otherwise, however, appeals may only be brought on questions of law, and leave of the court is required. As noted above, courts will generally defer to arbitrators on questions of fact and mixed fact and law, but legal issues will usually be reviewed on a correctness standard.

Regardless of appeal rights, in most provinces a court has the jurisdiction to set aside an arbitral award on a number of grounds, including an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator, an improperly composed arbitral tribunal, manifestly unfair or unequal treatment of a party, a reasonable apprehension of bias on the part of the arbitrator, or an award obtained by fraud.

Mediation is not binding, and does not in itself result in enforceable awards. However, a release or settlement agreement entered into as a consequence of mediation is enforceable in court as a matter of contract. In Ontario and Nova Scotia, mediation legislation simplifies this process and allows settlement agreements obtained through mediation to be presented to the court for enforcement in much the same manner as arbitral awards.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Canada?

Major Canadian ADR institutions include ADR Chambers and the British Columbia International Commercial Arbitration Centre.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

On August 1, 2014 the Supreme Court of Canada released its decision in *Sattva Capital Corp. v. Creston Moly Corp.*, which has significant implications for domestic cases involving alternative dispute resolution in Canada.

In particular, the Supreme Court has overruled previous findings by lower courts to effect that the determination of rights and obligations of parties under a written contract is a question of law. Following *Sattva*, this will always be a question of mixed fact and law.

This is significant because it reduces the avenues for challenging domestic commercial arbitration awards by eliminating contractual interpretation challenges from the ambit of decisions open to appeal. Thus the decision reinforces the finality of the arbitration process.



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Ryder's broad practice has exposed him to many industries, such as financial services, media (traditional and digital), healthcare and airlines.



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Chile got? Are there any rules that govern civil procedure in Chile?

The Chilean legal system is based on the continental law tradition, mainly influenced by the French and Spanish legal systems. Civil procedure is essentially written and ruled by the Civil Procedural Code (“*Código de Procedimiento Civil*”, hereinafter the “CPC”), the Courts Statute Code (“*Código Orgánico de Tribunales*”, hereinafter the “CSC”) and complementary laws. Exceptionally, certain general instructions given by the Supreme Court and Courts of Appeal, known as “*Auto Acordados*”, apply in addition to some matters.

1.2 How is the civil court system in Chile structured? What are the various levels of appeal and are there any specialist courts?

The first level comprises the first instance courts, which may include one or more districts.

First instance courts used to be divided according to the matter they know into civil courts, family courts, criminal courts and labour courts.

The second level comprises the Courts of Appeal, which act as second instance courts mainly in civil and family matters (normally a region of the country or part of it). The Courts of Appeal also have jurisdiction over the nullity remedies which are possible to file exceptionally in criminal and labour matters.

The Supreme Court is the last level and it has jurisdiction over the whole national territory. The Supreme Court is divided into several courtrooms specialised in particular matters and it is only possible to file exceptional remedies before it.

The system is finally completed by courts with jurisdiction over specific matters excluded from ordinary courts, such as the Antitrust Court or the Public Procurement Court (“*Tribunal de Contratación Pública*”), Tax Courts and Environmental Courts. However, the Court of Appeal of Santiago and the Supreme Court have jurisdiction over the remedies filed against rulings of those specific courts.

1.3 What are the main stages in civil proceedings in Chile? What is their underlying timeframe?

The main stages in civil proceedings in Chile are:

- Filing of a claim.
- Service of process on the defendant.
- Answer to the claim.
- Plaintiff’s rejoinder (“*Réplica*”).
- Defendant’s rejoinder (“*Dúplica*”).
- Settlement hearing.
- Order to produce evidence.
- Time allotted for producing evidence.
- Observations on produced evidence.
- Judgment/Ruling.

Against the first instance judgment, the parties may file a remedy of appeal and, in addition, a remedy requesting the nullity of the sentence due to formal defects (“*recurso de casación en la forma*”).

Against the second instance judgment, the parties may file a nullity remedy that is known and decided by the Supreme Court. In this case, the nullity remedy can be based on procedural defects, as well as errors in the application of the law (“*recurso de casación en el fondo*”).

The first instance of a civil proceeding may take from one to two years. The second instance may take up to one, two or even three years and remedies before the Supreme Court may take from six months to one year.

Consequently, a civil proceeding, including all stages, may take between four to six years.

1.4 What is Chile’s local judiciary’s approach to exclusive jurisdiction clauses?

The Chilean judicial system accepts the exclusive jurisdiction clauses, except for those matters that affect public order.

As a consequence, the Chilean judicial system normally: (i) recognises the validity of clauses under which the parties of a contract decide to be ruled by a foreign jurisdiction (except for those rules affecting Chilean public order); and (ii) allows the execution in Chile of decisions made by foreign courts as long as they do not affect Chilean public order.

1.5 What are the costs of civil court proceedings in Chile? Who bears these costs? Are there any rules on costs budgeting?

Court proceedings in Chile are free of cost. The parties must only pay service of notice of some acts within the proceeding and experts' fees. Attorneys' fees are paid by each party.

In their sentences, judges may order the party completely defeated in the trial to pay the costs of a civil proceeding, provided that it lacked any actual reason for bringing such proceeding (articles 138 to 147 of the CPC). However in most cases such order only works to cover a minor portion of the total costs incurred in civil proceedings. Except for the rule described above, there are no other rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Chile? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

In Chile there are no particular rules about funding litigation, except for the rule related to assignment of litigious rights that limit the credit of the assignee to the amount paid in the assignment.

Contingency/conditional fee arrangements are permissible.

There are no rules on security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Chile? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Chilean law allows the assignment of litigious rights in article 1911 of the Civil Code. The object of the assignment "*is the uncertain event of litigation*"; that is, the contingency of winning or losing on trial. The assignment of rights is restricted to the plaintiff, who is the only one who can assign the disputed right and shall not be responsible for the result of the litigation. For this assignment to operate there must be a pending lawsuit, which means that the claim should be legally served and the right shall be assignable as long as it remains in dispute until there is a final judgment in process. Once the assignment has been produced, it is sufficient for the transferee to appear at trial accompanying the title of the assignment. From that time, the transferee replaces the transferor in the process and in the claim asserted in court. However, what the transferee can obtain in court will be limited by what the latter has given or paid for the assignment. Regarding whether it is permissible for a non-party to litigation proceedings to finance those proceedings, please refer to questions 1.5 and 1.6 above.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Unlike the common law, there are no pre-action procedures in the Chilean legal system. Exceptionally, our law entitles the future plaintiff to request, before commencing the proceeding, certain specific interim measures specified in the law either to prepare the proceeding commencement or to ensure evidence that might disappear.

To request this type of measure, the future plaintiff shall inform the court of the action he intends to file with a brief explanation of the

claim's grounds and also to prove the necessity to request the specific measure. The measures that the future plaintiff is entitled to request are set forth in article 273 and subsequent of the CPC, as follows:

- An affidavit of an event related to the capacity of the defendant to appear in court, or his legal personality, or the name and address of his representative.
- The exhibition of the thing that shall be the subject matter of the action that the plaintiff wishes to bring.
- The exhibition of sentences, wills, inventories, appraisals, ownership titles or any other document – public or private – that, because of its nature, may be of interest to several people. Likewise, the exhibition of accounting books.
- A sworn statement acknowledging the signature in a private document.
- A court's personal inspection or experts' reports appointed by the court.
- The deposition of the future defendant.
- The deposition of witnesses that might be absent during the civil proceeding.

In addition, Chilean law allows for a person who fears – for well-grounded reasons – that an action may be brought against him to request certain pre-action evidence measures. These measures – set forth in article 288 of the CPC – are the following:

- A sworn statement acknowledging the signature in a private document.
- The court's personal inspection or experts' reports appointed by the court.
- The deposition of the future plaintiff.
- The deposition of witnesses that might be absent during the civil proceeding.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Several limitation periods apply in Chilean law depending on the class of action. The statute of limitation that applies to civil contract claims is five years counted from the date that the obligation is enforceable. For commercial contract claims, the statute of limitation is four years as per the Chilean Commercial Code ("*Código de Comercio*").

In turn, the statute of limitation of torts is four years from the date that the offence occurred.

In addition, the statute of limitation for requesting an enforcement proceeding is one or three years depending on the nature of the title.

Finally, there are special short-term statutes of limitation for collecting taxes, certain fees and professional fees, among others.

Under Chilean law, the statute of limitation provides a substantive defence to a claim ("*excepción perentoria*").

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Chile? What various means of service are there? What is the deemed date of service? How is service effected outside Chile? Is there a preferred method of service of foreign proceedings in Chile?

Chilean civil proceedings commence by filing a claim and its service of notice. The latter is carried out by court servants called "*receptores*".

A first notice must be served in person. However, service can be made on the defendant's addresses, provided that the following requirements are complied with: (i) the address of the defendant must be confirmed; (ii) the court's servant must have sought the defendant at his address on two different days; and (iii) it must be confirmed that the defendant is in the jurisdiction where the proceeding takes place.

Exceptionally, in cases where the defendant's address is difficult to determine or service is difficult due to the number of defendants, Chilean law allows the service to be accomplished by publishing ads.

The Chilean legal system does not provide a period of time within which a notice is to be served. The limitation to serve a notice is subject to the statute of limitations (see question 2.2 above). The service is the act that interrupts the statute of limitation.

Service outside the jurisdiction must be made through a rogatory letter ("exhorto"). The service method is governed by the applicable rules in the country of the addressee, even if there are good grounds to affirm that the first notice must be served in person to be valid in Chile.

The Chilean legal system does not establish a particular way to serve foreign rulings. The method of service is the same as the one used to serve Chilean courts' orders and decisions.

3.2 Are any pre-action interim remedies available in Chile? How do you apply for them? What are the main criteria for obtaining these?

Under Chilean law, the plaintiff can request pre-action interim remedies before submitting his claim. These remedies are known as "precautionary pre-action remedies" ("*medidas prejudiciales precautorias*") and are specified – in a non-restricted manner – in article 290 and subsequent of the CPC. The remedies listed in such article are the following:

- Preventive attachment over the thing that shall be the subject matter of the proceeding.
- Appointment of one or more controllers.
- Attachment of certain assets.
- Prohibition to execute acts or contracts over certain assets.

In general, the plaintiff must submit a written request indicating the action that he intends to file and a brief explanation of its grounds, submitting enough evidence supporting – as a serious presumption – the right claimed, as well as the urgency and necessity of the remedy, notwithstanding other special requirements. If the requested remedy is not expressly stated in the law, the court also has the authority to require a bond to the future plaintiff.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's pleadings under Chilean law are set forth in article 254 of the CPC, which states:

- The identification of the court where the claim is filed.
- The name, address and profession of the plaintiff and the persons that represent him and the nature of such representation.
- The name, address and profession of the defendant.
- The facts and legal grounds of the claim.
- The petitions submitted to the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Exceptionally, the pleadings can be amended by the plaintiff provided that the following requirements are complied with:

- Once the claim has been served to any of the defendants and before they answer the complaint, the plaintiff can enlarge and amend his claim, but in such case, he shall have to serve the enlarged and/or amended claim and the period to answer the complaint shall only commence from the date of this service of notice.
- Once the defendant has answered the complaint, the plaintiff can only accessorially enlarge and/or amend his action in his rejoinder ("*réplica*"), but he is not entitled to substantially change or modify the main cause of action of the trial.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of a statement of defence are set forth in article 309 of the CPC, which provides as follows:

- The identification of the court where the claim is filed.
- The name, address and profession of the defendant.
- The defences opposed to the claim and the facts and legal grounds on which they are based.
- The petitions made to the court.

In addition, the defendant may submit a counterclaim together with his statement of defence. For such purpose, Chilean law requires that both actions (the action of the claim and the action of the counterclaim) are ruled by the same kind of proceeding.

Finally, the defendant may bring, among others, the set-off as one of several defences to be filed as part of the defendant's answer.

4.2 What is the time limit within which the statement of defence has to be served?

For proceedings served to the defendant within the same jurisdiction of the corresponding court, as a general rule, the statement of defence has to be filed at court within 15 working days counted from the service of notice of the statement of claim (excluding Sundays and public holidays). For proceedings served outside the jurisdiction of the corresponding court, the time limit varies depending on the country of service. However, there are several special proceedings with different deadlines to file the statement of defence, such as the summary proceedings, where it has to be filed at court within five working days.

Under Chilean law the defendant does not have to serve his statement of defence.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Exceptionally, Chilean law establishes certain cases where a defendant can force a third party to take part in a proceeding, such as the following cases: (i) the purchaser of an estate being sued by a third party who claims rights over that estate, may legally summon the seller to defend it in the proceeding (article 1843 of the Civil Code); and (ii) a guarantor can request that the plaintiff has to sue the main debtor in the first place (article 2357 of the Civil Code).

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, the proceeding shall continue in all the stages until a final decision is made by the court. Chilean law does not provide for a summary proceeding in this case and the plaintiff has the burden to prove all the facts asserted in his claim.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction through dilatory defences ("*excepciones dilatorias*") on grounds of the matter or the territory (stating that there is another court that has jurisdiction to rule the case). This kind of defence has to be filed at court within the term to submit the statement of defence and prior to taking any steps in the trial. In ordinary proceedings this kind of defence must be previously decided and has the effect of suspending the proceeding, but in summary proceedings ("*juicio sumario*") the court may decide this matter in the final award.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The CPC contains provisions that allow a third party to join ongoing proceedings in the following cases:

- Article 21. If the claim is filed by one person and the action submitted also corresponds to another person or persons, the defendants can request to the court that the claim be informed to other potential plaintiffs that have not concurred to join it. Those other plaintiffs must decide within a short period of time whether or not they shall join the ongoing proceeding. If they do not do so, the court decision shall affect them with no further notice.
- Article 22. This allows a third party whose rights are incompatible to those of the other parties over the object of the action to join the proceeding admitting the current status of the proceeding.
- Article 23. This allows a third party to join the proceeding in order to support any of the parties' positions in the trial and it also allows the intervention of a third party that invokes an independent interest to the one alleged by the other parties.
- See also question 4.3 above.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Article 92 of the CPC allows the consolidation of two sets of proceedings, provided that the following requirements are fulfilled: (i) there are closely connected claims based on identical legal actions, or when the proceedings arose from the same facts; (ii) there are closely connected claims based on a similar subject matter between the same parties, notwithstanding the fact that the legal actions are not identical; or (iii) in general, whenever the sentence that should be issued entitles to file the *res judicata* defence in another proceeding.

5.3 Do you have split trials/bifurcation of proceedings?

As a general rule, the Chilean legal system does not contemplate split trials or bifurcations of proceedings. However, there are a few exceptions, which are very unusual in the legal practice, namely: (i) if a case consists of several separate actions in a same claim and some of them do not require proof, as long as they are divisible, the court may immediately pronounce partial or intermediate rulings on their regard (article 313 of the CPC); and (ii) a court may issue a ruling over the lack of jurisdiction filed as defence in enforcement proceedings before and notwithstanding a decision over the other defences opposed (article 465 of the CPC).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Chile? How are cases allocated?

In the Chilean legal system cases are allocated between the courts (as explained in question 1.2 above) exclusively on the basis of territory and subject matter.

As a general rule, courts hear all the claims filed within the scope of their jurisdiction. However, the CPC contemplates simplified proceedings for civil claims worth no more than US\$42,000 approximately.

6.2 Do the courts in Chile have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

In general, a judge in civil proceedings has a passive role and decides only upon the parties' requests. The court is obliged to actively manage cases in only three situations: (i) to summon the parties to a settlement hearing; (ii) to enter the order to produce some exceptional evidence; and (iii) in final ruling summons.

6.3 What sanctions are the courts in Chile empowered to impose on a party that disobeys the court's orders or directions?

According to article 238 of the CPC, for the fulfilment of their decisions the courts have the power to impose fines or even arrest a party for up to two months, notwithstanding repeating those measures.

6.4 Do the courts in Chile have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

No, they do not. However, article 256 of the CPC allows a judge – after the filing of a claim and prior to the issuing of any order in the proceeding – to decide *ex officio* not to proceed with a claim that does not contain some of the first three elements listed in article 252 of the CPC (pointed out in question 3.3 above).

6.5 Can the civil courts in Chile enter summary judgment?

The civil courts in Chile cannot enter summary judgment.

6.6 Do the courts in Chile have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Our civil courts do not have any powers to discontinue or stay proceedings. However, they have the power to declare the abandonment of the proceeding if the parties fail to take any steps over a period of six months (“*neglect to prosecute*”) and provided that the defendant requests the court make such statement. The courts cannot act *ex officio* in this matter. Likewise, civil courts may also accept their lack of jurisdiction if the defendant requests to make such statement.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Chile? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Under Chilean law, there is only one special case where the parties, or even a third party, can be forced to produce documentation in trial – when the documents whose exhibition is requested are directly related to the case and they are not secret or confidential (article 349 of the CPC). However, disclosure in Chile is not as effective as in other jurisdictions since: (i) a party may not exhibit documentation that could be considered confidential; and (ii) the court does not have sufficient authority to sanction the non-disclosure.

Exceptionally, as explained in question 2.1 above, our law entitles a future plaintiff to request, before commencing a proceeding, certain specific interim measures specified in the law to prepare his trial’s entry.

7.2 What are the rules on privilege in civil proceedings in Chile?

See question 7.1 above.

7.3 What are the rules in Chile with respect to disclosure by third parties?

See question 7.1 above.

7.4 What is the court’s role in disclosure in civil proceedings in Chile?

The court’s role is limited to ordering a party or a third party to disclose certain documents that have been previously required by the other party, and imposing the sanctions set forth in the law against a party that refuses to disclose such documents without a legitimate cause. However, as stated in question 7.1 above, disclosure is not as effective as in other jurisdictions.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Chile?

See question 7.1 above.

8 Evidence

8.1 What are the basic rules of evidence in Chile?

The basic rules of evidence in Chile are, in summary, the following: (i) the law determines which forms of evidence the parties may use in a civil proceeding; (ii) the law establishes the forms in which to submit the evidence; (iii) the law establishes the value of each piece of evidence; and (iv) the law determines how the judge must assess the evidence.

Under the non-inquisitorial principle that rules civil proceedings in Chile, the parties have the burden of proof, so they must provide all the evidence they deem appropriate. Exceptionally, judges can order *ex officio* certain evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The means of evidence allowed in court are the following: (i) documents; (ii) witness testimonies; (iii) inspections by the court; (iv) expert reports; (v) confessions; and (vi) presumptions.

Article 348 *bis* allows the parties to include as evidence electronic documents, such as videos or audio records, provided they fulfil certain formal requirements.

Expert witness reports can be mandatory or optional in a civil proceeding.

Expert witness reports shall be mandatory, that is to say, Chilean courts must accept a party’s request for calling an expert where the law requires that an expert’s report is necessary to rule on the case.

As a general rule, expert evidence is optional; that is, Chilean courts can order it in a civil proceeding whenever (i) this means of evidence is requested to clarify a fact that requires special knowledge of a certain science or art, or (ii) when the subject matter of the expert report is referred to legal aspects of a foreign law.

Parties can submit their own experts’ reports, but they shall be deemed as documentary evidence and the experts who signed those reports must appear before the court as witnesses.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A witness deposition must be requested within five working days counted from the beginning of the evidentiary period, through a list where the witnesses are duly individualised.

As a general rule, only the witnesses included in the list can be examined in oral hearings. In the event that a party fails to provide a witness list within the abovementioned period of time, he loses his right to submit witness testimonies.

If a party submits his witness list within the period of time and conditions specified above, the court must accept such evidence and it shall schedule the hearings for depositions. As a general rule, under Chilean law any and all persons must attend to the court as witnesses and make a deposition if they were summoned.

Written witness statements and witness evidence via video link are not admissible.

Pre-trial depositions of witnesses are allowed by the CPC through a pre-trial measure (please see question 2.1 above).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Please see question 8.2 above.

The expert owes his/her duties to the court. The expert is appointed by agreement of the parties, and in the case there is no agreement, by the court. The parties shall have three days to oppose the court's appointment.

However, it is a practice in Chile that the parties may also appoint their own experts to submit their reports, especially regarding technical matters. In these cases the expert appointed by the party should be included as a witness of the party and he/she may only relate to facts and not to opinions.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Chile?

As a general rule, the courts lack the power to order the provision of evidence *ex officio*. The exception to this rule is the court's authority to order the production of evidence after the closing of the proceedings, known as "*medidas para mejor resolver*".

Accordingly, the role of the courts in the production of evidence is limited to ensuring that an evidence motion is requested and rendered according to the law. Once evidence has been provided, the court's role is limited to assessing and weighing the same under the method stated in the law.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Chile empowered to issue and in what circumstances?

The different types of judgments that Chilean courts can issue in civil proceedings depend on the type of proceeding. In general, the judgments can be as follows:

- Final judgments that declare the existence, scope and type of a given right.
- Final judgments that order the defendant to fulfil a certain obligation and entitle the plaintiff to commence an enforcement proceeding through coercion measures (the attachment and auction of goods).
- Interim measures or injunctions.
- Orders to organise the proceeding following the parties' activities.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

According to Chilean law, the concept of damage is broad-ranging and it has been understood as any loss, decrease, detriment or impairment to the plaintiff's assets (patrimonial damages), as well as "*the suffering, pain, or discomfort that the wrongful action causes to a person's physical sensitivity, feelings or emotions*" (moral damages) (Supreme Court, 7.1.2003, GJ 271, p. 96).

Notwithstanding the sweeping nature of these damages, in Chile there is no equivalent concept to punitive damages. The only damages (whether patrimonial or moral) amenable to compensation are direct damages (thereby excluding indirect damages) that reflect the cause-and-effect bond that must exist between the tort and the damage.

Regarding the costs of the litigation, please see question 1.5 above.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The enforcement of a domestic judgment is governed by article 231 and subsequent of the CPC. The enforcement methods depend on the type of judgment and include, amongst others, the following:

- If the judgment orders the defendant to grant a specific good, the assistance of the police can be enforced.
- If the judgment orders the defendant to pay a sum of money, an attachment and an auction of the defendant's goods can be enforced.
- For the enforcement of resolutions in general, the application of fines and arrests can be enforced (see question 6.3 above).

The recognition of foreign judgments depends on: (i) the existence of treaties between Chile and the country from where the judgment comes from; and if there is no treaty (ii) whether the country from where the judgment comes from recognises Chilean judgments. If a specific judgment comes from a country that does not recognise Chilean judgment, such ruling shall not be recognised in Chile.

The enforcement of foreign judgments (article 242 and subsequent of the CPC) is subject to an *exequatur* (authorisation) by the Supreme Court. The party seeking enforcement must submit a certified copy of the award with, if necessary, an official translation into Spanish. As Chile has signed the New York Convention, the *exequatur* may only be denied for the reasons provided in article V therein. The award must be final and respect Chilean public policy. Once the *exequatur* is granted, the foreign judgment is as enforceable as any domestic award and, therefore, it can be enforced under the general rules. Enforcement must be sought before the court that would have been competent to hear the proceeding if it would have been brought before Chilean courts.

9.4 What are the rules of appeal against a judgment of a civil court of Chile?

Under Chilean law, as a general rule, all final judgments pronounced by first instance civil courts can be appealed.

An appeal remedy suspends the proceeding. Exceptionally, an appeal remedy shall not suspend a proceeding with respect to judgments pronounced against the defendants in enforcement or summary proceedings.

An appeal remedy against final judgments must be filed within the term of 10 working days (five working days in the case there are no final orders). An appeal remedy must be well-grounded and it must contain the precise petitions submitted to the court of second instance. Otherwise, the appeal remedy shall be declared inadmissible.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Chile? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is the most commonly used method to settle major business disputes. The Chilean legal system does not provide for settlement via other dispute mechanisms like tribunals or ombudsmen. Mediation is not commonly used, except in family law proceedings.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

There are two arbitration regimes in Chile; one for domestic matters governed by the CSC (article 222 and subsequent) and the CPC (article 628 and subsequent), and the other for international matters ruled by the Law on International Commercial Arbitration (Law 19.971). Law 19.971 contains the characteristics and principles of modern commercial arbitration schemes, such as party autonomy, procedural flexibility and limited court intervention, and is based on the UNCITRAL Model Law on International Commercial Arbitration.

1.3 Are there any areas of law in Chile that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In general, arbitration can be used to decide all kinds of matters, unless there is an express prohibition to do so. In this regard, arbitration is banned for the following matters:

- Alimony rights.
- The right to claim separation of community property between husband and wife.
- Criminal cases and local justice cases (“*Juzgados de Policía Local*”).
- Cases to be heard by the district attorney (article 230 of the CSC). In turn, article 357 indicates in which cases the district attorney must be heard.
- Antitrust matters save for conflicts that arise from the results of antitrust litigation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Chile in this context?

Local courts can provide assistance to parties that wish to invoke the available methods of alternative dispute resolution in Chile.

In this regard, local courts are entitled to issue an injunction prior to the constitution of an arbitral tribunal in support of the arbitration proceeding success. Post-constitution of the arbitration, ordinary courts are entitled to enforce an injunction issued by an arbitral tribunal.

Even though an arbitrator cannot compel a witness to testify before him, upon requesting local courts’ assistance, it can practise this diligence, according to article 635 of the CPC.

The CPC also empowers the local court to take the statements of witnesses and experts located outside the place of the trial upon request of the arbitrator.

Furthermore, the CPC allows the judge to appoint the arbitrators when the parties do not agree on such appointment (article 232).

Finally, mediation is mandatory in civil proceedings. While mediation is just a formality in proceedings held before ordinary courts, within arbitration it is usually used to get agreement between the parties.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Chile in this context?

The methods of alternative dispute resolution are binding under Chilean law. The settlement agreements reached at mediation do not need to be sanctioned by the court. However, since arbitrators and mediators have no authority to enforce an award or a settlement agreement, the assistance of the local courts is needed. Under the Chilean practice, normally the arbitral awards are not subject to appeal, but nullity remedies are usually available before the Appeal Courts and the Supreme Court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Chile?

Nowadays, the major dispute resolution institutions in Chile are: the Arbitration and Mediation Centre of the Santiago Chamber of Commerce (www.camsantiago.cl), which also acts as an ICC representative in Chile; the Arbitration and Mediation Centre of the Chilean-American Chamber of Commerce (“*AmCham*”); and the National Arbitration Centre (“*Centro Nacional de Arbitrajes*”) (www.cna.cl).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The current trend in this matter aims to strengthen domestic and foreign arbitration as an alternative mechanism for settling commercial disputes.

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Mr. Ovalle possesses vast experience in a wide variety of litigations as a consequence of his more than 20 years of professional practice. He worked as an associate at Ortúzar & Cía. between 1993-1995 and was previously a partner at Ovalle, Cubillos & Labarca (1995-2000). From 2000 to 2005 he worked as a litigant attorney associate at Carey & Cía., before becoming partner in charge of one of its litigation groups from 2005 to 2010.

Between 2009 and 2011 he was also Professor of the Public Interest and Human Rights Clinics at the School of Law of Universidad Diego Portales, and was *ad honorem* Professor of Civil Law at Universidad de Chile (2003-2006).

Mr. Ovalle is a member of the Chilean Bar Association and Chambers Latin America 2013 has referenced him as one of the leading attorneys in dispute resolution.

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OVALLE UGARTE & LETELIER ■ ABOGADOS

Ovalle Ugarte & Letelier Abogados is a law firm focused exclusively on complex litigations and arbitration, preventive analysis of judicial contingencies and alternative dispute resolutions.

Its partners are a consolidated team in litigation, having worked for several years representing local and foreign clients as members of Chile's largest general practice law firm.

The firm does not offer merely corporate advice. One of its main goals is to take on a limited number of cases, so they will be handled directly by its partners.

Its services are aimed at offering solutions that are creative, but also aware of clients' needs, applying the highest ethical and professional quality standards.

Cyprus



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Cyprus got? Are there any rules that govern civil procedure in Cyprus?

Cyprus is a common law jurisdiction with its own legal system, which operates under a codified and written Constitution. While the principles of common law and equity largely apply in Cyprus, many of these principles have been codified into statutes. Following the accession of Cyprus to the European Union in 2004, European Union law has supremacy over the Constitution and national legislation of Cyprus.

Civil procedure in Cyprus is regulated through the Civil Procedure Rules, which draw largely on the 1954 English Civil Procedure Rules.

1.2 How is the civil court system in Cyprus structured? What are the various levels of appeal and are there any specialist courts?

Cyprus has a two-tier Court system:

- (i) the Supreme Court; and
- (ii) the Subordinate Courts (the District Courts and the specialist courts).

The Supreme Court acts as an appellate Court, in which decisions from the Subordinate Courts can be appealed to the Supreme Court.

The District Courts have jurisdiction to hear at first instance any civil action, unless the subject matter of the action falls within the exclusive jurisdiction of a specialist court, namely the Labour Court, the Family Court, the Rent Control Court and the Military Court.

1.3 What are the main stages in civil proceedings in Cyprus? What is their underlying timeframe?

There are three main stages in civil proceedings:

The *first* stage involves the commencement of the proceedings (through the filing of a writ of summons or originating summons) and the filing and closing of the pleadings.

Applications for interim reliefs can be filed at any stage of the proceedings and interim injunctions can even be issued, if the application is filed on an *ex parte* basis, within a few days from filing.

The *second* stage involves the case management period, during which the Courts issue procedural directions, examine interim applications (such as discovery and inspection of documents, amendment of pleadings, etc.) and explore the possibility of settlements.

The *third* stage involves the hearing of the main proceedings and the issuing of the Court's decision.

The underlying timeframe for completing the main proceedings takes between two to four years.

1.4 What is Cyprus's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are respected and adhered to by the Cyprus Courts.

1.5 What are the costs of civil court proceedings in Cyprus? Who bears these costs? Are there any rules on costs budgeting?

The costs involved in civil court proceedings vary, depending on how protracted the case will prove to be and the time dedicated by the lawyers handling the case. There are court regulations which, based on the scale of the claim, set out by description and in detail the minimum charge for each particular service provided throughout the proceedings.

The general rule is that the "losing" party bears the costs of the proceedings; however the Court has a wide discretion to make different awards as to costs, depending on the special circumstances of the proceedings and the conduct of the parties.

1.6 Are there any particular rules about funding litigation in Cyprus? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Funding of the litigation proceedings is usually arranged by the parties. A lawyer may negotiate the legal fees of the litigation proceedings and can reach any special arrangement/retainer freely with his/her client, which can be filed with the Court and in which case supersedes the Court's fixed fees.

The matter regarding conditional/contingency fee agreements has not been examined by the Courts yet; however we assume that these are not permissible due to offending 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.

Where a party is in financial difficulty regarding funding litigation proceedings, it may apply to the Court for Legal Aid. However, such an application can only be made in criminal cases, family cases and cases regarding the infringement of human rights.

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 counter-claim which is not merely in the nature of a set-off) at any stage of the action where:

- (a) the respondent is ordinarily (even temporarily) residing out of Cyprus or any other European Member State; and
- (b) the respondent has no assets in Cyprus to satisfy any cost order that is made against him/her.

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.

1.7 Are there any constraints to assigning a claim or cause of action in Cyprus? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Third party funding is not available in Cyprus. Equitable principles such as the principles of “champerty and maintenance”, which aim to restrict the selling and funding of litigation, are generally applicable in Cyprus.

The principle of maintenance precludes a person from maintaining a case without just cause or excuse. Champerty is a particular category of maintenance where the person who maintains the action takes, as a reward, a share of the property recovered in the action.

On that basis, assignment of a cause of action and third party funding are not permissible. However, it must be noted that the matter is not regulated and there is no case law or other precedent on the above.

It should also be noted that it is permissible in Cyprus to assign personal rights recognised by the law e.g. the right to collect a debt, rights under a contract, etc., in which case the assignor may bring a claim, if necessary, to protect the rights he/she was assigned.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no general pre-action protocols or procedural formalities that must be followed prior to the initiation of the proceedings in Cyprus. However in certain specialist proceedings, such as winding-up proceedings or tenant evictions, certain pre-action procedures must be followed.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Limitation of Causes of Action Law of 2012 (Law 66(I)/12), which does not apply to disputes regarding rights and obligations of public law, was put into effect on 1 July 2012.

Law 66(I)/12 provides that, with respect to causes of action which accrued *prior* to 1 July 2012, the provisions of the same do not apply where proceedings are brought by 31 December 2014 (the Cyprus Parliament is currently examining whether to extend this to 31 December 2015). Actions brought *post* 31 December 2014 with respect to causes of action which completed prior to 1 July 2012, will be time-barred where the time between the date when the cause of action accrued and 31 December 2014 exceeds the time permitted by the provisions of Law 66(I)/12.

With respect to causes of action completed *post* 1 July 2012, the provisions of Law 66(I)/12 apply normally.

The main provisions of Law 66(I)/12 are the following:

- (a) Torts: six years' limitation period from the date when the cause of action accrued except for cases of negligence/nuisance/breach of statutory duty, where there is a three-year limitation period from the date when the injured person knew of the cause of action.
- (b) Contract: six years' limitation period from the date when the cause of action accrued.
- (c) Mortgage/Pledge: 12 years' limitation period from the date of the accrual of the cause of action.
- (d) Bills of exchange, etc.: six years' limitation period from the accrual of the cause of action.
- (e) Causes of action for which no particular provision is made with regard to limitation in Law 66(I)/12 or in any other law: 10 years' limitation period from the accrual of the cause of action.

The above limitation periods may be extended by the Courts by two years where the Court considers this to be just and reasonable.

Time limits are treated as a matter of procedural rather than substantive law.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Cyprus? What various means of service are there? What is the deemed date of service? How is service effected outside Cyprus? Is there a preferred method of service of foreign proceedings in Cyprus?

Commencing Proceedings

Civil proceedings are commenced by filing a writ of summons with the Registrar of the competent District Court with jurisdiction to adjudicate upon the case. The writ of summons may be either (i) generally endorsed and thus include merely the relief sought, or (ii) specially endorsed and thus provide full particulars of both the relief sought and the basis upon which that relief is being sought.

Means of service

Service of the writ of summons shall be effected by personal service; namely by leaving a copy with the person to be served, via a private bailiff. The writ of summons must be served within 12 months of its filing.

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

The deemed date of service is the date on which the private bailiff served the writ of summons to the defendant.

Service outside Cyprus shall be made only after leave has been obtained from the Court. The Plaintiff must satisfy the Court that the case is a proper one 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.

European Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters is applicable and regulates the serving of civil proceedings initiated in Cyprus against defendants who reside in the European Union. The service may also be made in accordance to the bilateral conventions and multilateral conventions that Cyprus is a party thereto; such as the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters (the “Hague Convention”). Usually such service is effected either through private process servers (such as couriers) or via the Ministry of Justice.

It is noted that what is served outside the jurisdiction to a non-Cypriot defendant is not the writ of summons but a notice of the writ of summons.

Is there a preferred method of service of foreign proceedings in Cyprus?

Service of foreign proceedings in Cyprus should be made in accordance to any bilateral and/or multilateral convention/treaty/legal instrument which Cyprus has ratified in relation to the service of foreign proceedings in Cyprus. Such conventions include European Regulation 1393/2007, which regulates service in Member States, and the Hague Convention, which regulates service in States that are signatories in the said Convention. Usually such service is effected either through private process servers (such as couriers) or via the Ministry of Justice.

3.2 Are any pre-action interim remedies available in Cyprus? How do you apply for them? What are the main criteria for obtaining these?

There are no pre-action interim remedies available in Cyprus. An interim remedy may only be applied for after the filing of the writ of summons. However, by filing a generally endorsed writ of summons, interim remedies/orders may be issued on an *ex parte* basis within a few days from the filing of the writ of summons.

3.3 What are the main elements of the claimant’s pleadings?

The claimant’s pleadings, namely the statement of claim, shall include the following:

- (a) a statement in summary form of the material facts (but not the evidence) upon which the claimant relies for his/her claim; and
- (b) a statement of the relief or remedy sought in the action.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended at any stage of the proceedings provided leave to amend has been granted by the Court.

In order for such leave to be granted, the Court must be satisfied that the amendment is necessary for determining the real questions in controversy between the parties. The Court may specify the time within which the amendment needs to be made, otherwise the amendment shall be made within 15 days from the date on which leave for amendments has been granted. The Court can also stipulate the manner and terms upon which the amendment shall be effected.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence shall:

- (a) deal specifically with each allegation of fact included in the statement of claim by either admitting, denying (expressly or by necessary implication), or not admitting the truth of the allegation; and
- (b) include a statement in summary form of the material facts on which the defendant relies upon for his/her defence.

It is noted that no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted.

The defendant can set up, by way of counter-claim against the claim of the claimant, any right of claim, and such counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim.

However, it is noted that there is generally no right to set-off in Cyprus.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed and served within 14 days from the time limit for appearance or from the delivery of the statement of claim, whichever shall be the later, unless the time is extended by the Court.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The third-party procedure is available to a defendant where he/she claims against any person not already a party to the action that:

- (a) he/she is entitled to contribution (sharing liability);
- (b) he/she is entitled to indemnity (passing liability); or
- (c) he/she is entitled to any relief/remedy relating to or connected with the original subject matter of the action and is substantially the same as some relief/remedy claimed by the claimant (sharing or passing liability).

4.4 What happens if the defendant does not defend the claim?

Where the defendant does not file an appearance and/or a statement of defence, the claimant may apply for judgment against the defendant in default. If the defendant files an appearance, then the claimant may apply by summons for judgment. If the defendant fails to file an appearance, then the judgment application may be made without notice to the defendant.

It is noted that in order for a judgment to be issued in default as above, the claimant shall prove his claim before the Court, including all facts upon which the claimant relies for his/her claim, either by filing an affidavit or by giving oral testimony in Court.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the Court's jurisdiction either by:

- (a) applying, without entering a conditional appearance, to stay the proceedings or set aside the writ of summons; or
- (b) applying, upon entering conditional appearance, or shortly thereafter within a reasonable time, to stay the proceedings or set aside the writ of summons.

If the defendant fails to act as provided above, then he/she may be deemed to have waived/abandoned his/her right to dispute the jurisdiction of the Court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A person may be joined in an ongoing action as *claimant* in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative where if such person brought separate action any common question of law or fact would arise.

Further, a person may be joined as *defendant* against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative.

Lastly, it is established under common law that an interested party may apply to the Court for leave to intervene in the action.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Where two or more actions are pending in the same Court, whether by the same or different claimants against the same or different defendants, and the claims of such actions involve a *common question of law or fact* of such importance in proportion to the rest of the matters involved in such actions as to render it desirable that the actions should be consolidated, the Court may so order upon the application of any party to any of such actions.

5.3 Do you have split trials/bifurcation of proceedings?

The claimant may unite in the same action several causes of action, but upon the application of any of the parties or upon the Court's own initiative it appears that any such causes of action *cannot be conveniently, tried or disposed of together*, the Court may order separate trials of any such causes of action.

Further, the Court may order split trials/bifurcation of proceedings as may seem necessary or desirable provided this was so ordered with a view to saving time and expense.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Cyprus? How are cases allocated?

Cases are allocated to the judges (District Judge, Senior District Judge and President) in accordance with the scale of the value of the claim.

The value of each claim is the amount which is in reality in dispute between the parties and which is disclosed in the pleadings or is admitted by the parties at any stage of the proceedings.

The scales of the value of each claim are as follows:

- Up to €500.
- €500 to €2,000.
- €2,000 to €10,000.
- €10,000 to €50,000.
- €50,000 to €100,000.
- €100,000 to €500,000.
- €500,000 to €2,000,000.
- Over €2,000,000.

6.2 Do the courts in Cyprus have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes, the Courts have inherent power to manage and control the procedure before them as may be necessary with a view to save time and costs. The Courts may make the following orders:

- (a) an order for further and better particulars;
- (b) an order for the discovery and inspection of documents;
- (c) an order for the admission of fact and of documents;
- (d) an order for particular facts to be proved by affidavit, that the affidavit of any witness may be read at the trial or that the attendance of some witnesses in the Court are dispensed with; and/or
- (e) an order directing either party to apply to the Registrar to fix the case for trial and/or to direct the Registrar to fix it at short notice.

The parties may file any interim applications for any interim order or relief. Among others, the following interim applications can be made:

- (a) freezing injunctions (with either local or world-wide application);
- (b) interim injunctions;
- (c) for the appointment of an interim receiver/liquidator;
- (d) search orders (*Anton Piller*);
- (e) for summary judgment; and/or
- (f) for the discovery and inspection of documents.

The Court may order that the costs of the application either follow the result of the application or the result of the main action.

6.3 What sanctions are the courts in Cyprus empowered to impose on a party that disobeys the court's orders or directions?

The disobedience of a Court's *order* constitutes contempt of Court. The Courts, following an application for contempt, may order the imprisonment and/or the sequestration of assets of, or the payment of fine by, anyone who does not act in conformity with a Court order, including interim orders.

In case a Court's *direction* is not properly or otherwise complied with, then the Court may make such order as to costs as it deems necessary against the disobedient party and/or draw adverse inferences in appropriate circumstances and/or to have his pleadings struck out.

6.4 Do the courts in Cyprus have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The Courts have the power to *strike out* any matter in any indorsement or pleading, including part of a statement of case, which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the case.

Further, the Court may *strike out* any pleading, including a statement of case, on the ground that it discloses no reasonable cause of action and in any such case of the action being shown by the pleadings to be frivolous or vexatious. The Court may then enter judgment accordingly as may be just and thus dismiss a case entirely.

6.5 Can the civil courts in Cyprus enter summary judgment?

The civil courts in Cyprus can enter summary judgment where:

- (a) the writ of summons is specially endorsed;
- (b) the application for summary judgment is filed after the defendant has filed a notice of appearance;
- (c) the application is made by summons;
- (d) the affidavit supporting the application for summary judgment is made by the claimant himself/herself or by any other person who can swear positively to the facts;
- (e) the affidavit supporting the application for summary judgment includes facts which verify the cause of action and the amount claimed (if any);
- (f) the affiant states that in his/her belief there is no defence to the action; and/or
- (g) the application is for the amount endorsed in the writ of summons together with interest (if any) or for the recovery of the land (with or without rent), or for delivering up of a specific chattel, as the case may be, and costs.

Judgment for the claimant may be given thereupon, unless the defendant satisfies the Court that he has a good, *bona fide* defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him/her to defend.

6.6 Do the courts in Cyprus have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The Courts may *discontinue* the proceedings at any stage, including after the hearing, upon any order as to costs, as to any other action and as may be just. However, the claimant may, at any time before the receipt of the defendant's defence or after the receipt of the defendant's defence but before taking any other proceeding in the action, save an interim application or wholly discontinue his/her action against all or any of the defendants by notice in writing and without obtaining leave from the Court.

The Courts have the power to *stay* the proceedings *inter alia* in the following situations:

- (a) where an action is brought before payment of the costs of a discontinued action for the same or substantially the same cause of action, the Court may stay the subsequent proceedings until such costs have been duly paid;

- (b) in the case the action is being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed;
- (c) where the dispute should be dealt with by arbitration rather than litigation, the Court may order the claim to be stayed pending completion of the arbitration process; or
- (d) where another European Court has already been seized with same cause of action and between the same parties the Court shall, or where another European Court has been seized with a related action then the Court may, stay the proceedings in accordance with the provisions of Reg. 44/2001.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Cyprus? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

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 which are, or have been, in his/her possession or power relating to any matter in question therein. Such an application can be made at any time after the commencement of the proceedings; pre-action disclosure is not available.

There are no particular classes of documents that do not require disclosure but the discovery is subject to privilege and admissibility rules. However, the affidavit shall specify the documents therein mentioned which the party making the affidavit refuses to produce.

If a party ordered to make discovery of documents fails to do so, he/she shall not afterwards be at liberty to put evidence in the action or allow any document he/she failed to discover to be inspected, unless the Court is satisfied that he/she has a sufficient excuse for not disclosing the said document.

7.2 What are the rules on privilege in civil proceedings in Cyprus?

A party shall disclose a privileged document, however he/she shall be at liberty to refuse to produce the same for inspection on grounds of privilege. A document may be covered by privilege on any one of the following grounds:

- (a) litigation privilege;
- (b) legal professional privilege;
- (c) without prejudice communications;
- (d) self-incrimination privilege;
- (e) public interest immunity; and
- (f) confidential nature.

7.3 What are the rules in Cyprus with respect to disclosure by third parties?

The most widely used basis for third-party disclosure is the *Norwich v Pharmacal principle*, according to which a person who is involved in, or in some way connected to, the wrongdoing of another against the claimant, either voluntary or involuntary, innocently or not, but who is not a mere witness of the wrongdoing, is under a duty to assist the applicant by giving him/her full information regarding the wrongdoing.

An order pursuant to the *Norwich v Pharmacal principle* may be used with a view to trace alienated assets or establish the identity of fraudsters such as in the case where these are the ultimate beneficial owners of companies within a complex corporate structure.

7.4 What is the court's role in disclosure in civil proceedings in Cyprus?

Disclosure (discovery) and inspection of documents can only take place if so ordered by the Court, and the Court controls the process of disclosure (discovery) and inspection of documents in general. The Court rules upon whether discovery of documents is necessary or not; both in general as well as at a particular stage in the proceedings.

The Court has the power to inspect a document which is allegedly covered by privilege so as to decide whether it should indeed be privileged from inspection.

The Court decides whether a party should be allowed to put in evidence a document that was not disclosed/discovered when it ought to and may impose sanctions in the case a party fails to allow inspection of any document at the place named by him/her in that behalf and within the prescribed time.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Cyprus?

There is no legal rule restricting the use of documents obtained by means of disclosure. However, the Courts, as a matter of good practice, usually restrict the use of disclosed documents in the proceedings in which the documents were disclosed.

8 Evidence

8.1 What are the basic rules of evidence in Cyprus?

The general rule is that all available evidence, whether oral, documentary or real, must be brought before the Court during the hearing of an action. Such evidence must be the best possible evidence at hand, must be admissible and must be relevant to the facts in issue.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

As a general rule any oral, real or documentary evidence is admissible at Court provided it is relevant or connected to the matters in issue in the case and does not contravene the provisions of the Cyprus Constitution and Cyprus laws.

Evidence which is covered by privilege is not admissible. Further, character evidence is non-admissible in civil actions unless the character of a person is in issue. Evidence which has been obtained by illegal means or means contrary to the provisions of the Cyprus Constitution is also not admissible.

Opinion evidence is not admissible; however expert evidence/opinion is admissible where it is required to determine an issue of scientific or technical nature.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witnesses of fact are called to the Court for examination or to produce a document by means of a witness summons which is issued by the Court Registry. The witness is examined by the party that has called him/her to Court 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/she was called to give evidence.

A written statement may be put before the Court for the purpose of being adopted by the witness under oath and constitute the witness's examination-in-chief.

The Courts have the power to make an order for commission to examine a witness namely for the taking of a deposition. The examination shall take place in the presence of the parties, their advocates or as such of them as shall attend. On such an examination witnesses shall be subject to cross-examination and re-examination in the same way as evidence is taken on the trial of an action. The depositions are taken down in writing by the examiner and shall be signed by the witness.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

In order for an expert to give evidence in Court, it must be proved to the satisfaction of the Court that expert evidence is necessary in order for the proceedings to be disposed of by the Court and that the person in question has the necessary expert knowledge and skills.

An expert may be appointed by any one or more of the parties (in conjunction or separately) or by the Court itself.

The expert is called to Court and is examined by the parties. The expert may bring an expert report with him/her, which he/she then adopts under oath.

The duties of the expert are to the Court to present objectively, impartially and in a justified manner the scientific or technical criteria that apply to a given situation so as to enable the Court to rule upon the facts of the case in question.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Cyprus?

The Courts have a wide discretion to issue orders regarding the form and means by which evidence is brought before them.

The Courts also rule upon the admissibility of evidence when this is in issue.

Finally, the Courts ensure that examination and/or cross-examination of witnesses are conducted appropriately and in accordance with the Civil Procedure Rules.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Cyprus empowered to issue and in what circumstances?

The Courts may issue *judgments* after the adjudication of the case or pursuant to an agreement reached between the parties provided

the Court approves the agreement reached. Also the Court has the power to issue judgments in default and summary judgments.

The Courts may issue *interim orders*, such as interim injunctions, disclosure orders, winding-up orders, orders appointing an interim receiver or liquidator, orders as to costs, etc.

Judgments may be issued for damages, specific performance, declaratory judgments, injunctive relief, interest, costs, etc.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Courts in Cyprus have the power to issue judgments ordering any party to pay *damages* to another for any loss suffered, either as a lump sum or by instalments.

The Courts also have the power to order that *interest* is paid in the following circumstances:

- (a) on a debt from the date when the said debt accrued; and
- (b) on the judgment debt from the date the judgment is issued.

Lastly, the Court has power to rule upon the *costs* of the proceedings which are recoverable from the “losing” party. These are capped to specific amounts in accordance with the scale in which the claim is allocated to.

9.3 How can a domestic/foreign judgment be recognised and enforced?

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

- (a) by a writ of movables, namely the seizure and sale of movable property;
- (b) by sale of real/immovable property;
- (c) by registering the Court’s judgment on the real/immovable property in the District Land Office;
- (d) by a writ of attachment, namely the seizure of movables or debts owed to the judgment debtor by a third party;
- (e) by a charging order over shares and an order for the sale of the shares; and/or
- (f) by an application for an order for repayment of the debt in question via monthly instalments.

A *foreign* judgment issued by a European Court can be recognised and enforced in accordance with the provisions of European Regulation 44/2001.

A non-European judgment/order may be recognised and enforced by virtue of the bilateral and/or multilateral agreements which Cyprus has ratified and/or under the Foreign Judgments (Reciprocal Enforcement) Law 1935, Cap. 10. Alternatively, a fresh action may be brought regarding the same cause of action as the action brought in the foreign jurisdiction.

9.4 What are the rules of appeal against a judgment of a civil court of Cyprus?

An appeal of any interim decision shall be brought within 14 days, and any other appeal against a judgment on the merits of the case shall be brought within 42 days from the time when the judgment or order is issued. The Court may, upon application, extend the time for filing the appeal.

The appellant may appeal from the whole or part of any judgment or order.

Appeals are brought by written notice to the Registrar of the Court appealed from, in which notice is specified which part of the judgment/order is appealed together with the grounds of appeal. The notice shall then be served on any party that is directly affected by the appeal.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Cyprus? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The methods of alternative dispute resolution that are available in Cyprus today are primarily arbitration and mediation.

The most widely used method is arbitration, which is mainly tried by commercial 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 which 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.

Mediation is a newly introduced means of alternative dispute resolution which has been instituted as a result of a government initiative to provide an efficient and inexpensive dispute resolution forum regarding primarily banking law conflicts. Mediation is a rather informal process which depends upon the consensual and voluntary referral of a dispute to an impartial third party that assists the parties in engaging in fruitful communication so as to reach a workable settlement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The only regulated alternative dispute resolution is arbitration. The Arbitration Law of 1987 (Cap.4) and the International Commercial Arbitration Law (N.101/1987), which are applicable to domestic and cross-border arbitration processes respectively, provide the general framework and set the principal rules that any arbitration process must follow.

Furthermore, L. 101/87 incorporates the main provisions of the New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards. Accordingly, L. 101/87 applies to the recognition and enforcement of awards issued abroad.

1.3 Are there any areas of law in Cyprus that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The following areas of law cannot be arbitrated: (i) the right of a shareholder of a limited liability company to petition the winding-up of the company; (ii) matrimonial disputes; (iii) disputes involving illegality and fraud (for domestic arbitrations only); (iv) disputes falling under Articles 85 and 86 of the Treaty of Rome; (v) disputes affecting the public at large such as a judgment *in rem* against a ship, etc.; and (vi) criminal law matters.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Cyprus in this context?

The Courts may stay the proceedings pending the resolution of disputes by arbitration where there is a prior binding agreement concluded between the parties to that effect.

The Courts, though, will normally not force any party, directly or indirectly, to participate in alternative dispute resolution processes.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Cyprus in this context?

Arbitral awards cannot be appealed though they may be judicially reviewed on the basis of specific grounds provided by statute and which affect the just and proper disposal of the process. The local judiciary will readily uphold an arbitral award unless any of the specific grounds are proved.

There are no particular sanctions for refusing to mediate or participating in other alternative dispute processes.

Settlement agreements reached in mediation do not require judicial sanction so as to be valid. It is noted, though, that in order for both arbitration awards and mediation settlements to be enforced they need firstly to be registered as Court judgments.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Cyprus?

In April 2010 the Cyprus Arbitration and Mediation Centre was established with a view to promoting and facilitating alternative dispute resolution. There are no other major alternative dispute resolution institutions in Cyprus.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The current trend is for wider use of arbitration and other alternative dispute resolution processes. It is expected that in the following years the use of arbitration proceedings and other alternative dispute resolution methods will increase.



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Andreas' practice focuses on dispute resolution. He is a Barrister of the Middle Temple.

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With a strong background in both litigation and finance, Antreas focuses on transaction and dispute resolution practice. He has previously undertaken litigation and advised clients on all aspects of Cyprus law while part of the team representing clients in multi-jurisdiction litigation in various corporate, commercial and arbitration disputes.

Antreas advises local and international clients on private equity transactions, structuring investments and corporate restructurings. Since 2010 Antreas has also been working with and offering legal advice to a private equity fund targeting social investments in India and Asia.

Antreas has been called to the Bar of England and Wales, is a member of the Cyprus Bar Association and holds an M.Sc. in Management from Imperial College London. With a strong local presence and an international perspective, Antreas aims to offer clients niche solutions.

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EROTOCRITOU

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England & Wales

Greg Lascelles



David Thomas



King & Wood Mallesons LLP

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has England & Wales got? Are there any rules that govern civil procedure in England & Wales?

The English legal system is based on the common law tradition. The English courts are bound by the principle of precedent (*stare decisis*). Civil procedure in England is governed by the Civil Procedure Rules (CPR) 1998, which are accessible online at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules>. The “overriding objective” of the CPR, which courts must always have regard to, is to enable the court to deal with cases justly and at proportionate cost, taking into consideration various factors, including ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate and ensuring that it is dealt with expeditiously and fairly.

The English legal profession is split between solicitors and barristers. Solicitors deal with and represent the client on a day-to-day basis and provide contentious and non-contentious advice on law and legal strategy; barristers are normally instructed for highly specialised advice and for advocacy before the higher courts. (Solicitor-advocates may also have rights of audience in the higher courts.)

1.2 How is the civil court system in England & Wales structured? What are the various levels of appeal and are there any specialist courts?

Civil proceedings in England can be conducted in the County Courts or the High Court. More sizeable cases are dealt with by the High Court, which is divided into three divisions: the Queen’s Bench Division (QBD); the Chancery Division (ChD); and the Family Division. The QBD deals with general claims in contract and tort. The ChD deals with disputes involving intellectual property, trusts and land (among others).

There are various specialist courts, including the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Companies Court and the Patents Court. The Commercial Court forms part of the High Court, QBD, in London, and is generally regarded as the most appropriate forum in England to resolve international commercial disputes. Its practice and procedures are laid down in the CPR and the Commercial Court Guide.

Appeals lie with the High Court, the Court of Appeal and the Supreme Court in the last instance. Matters which involve the application of EU law may be referred or appealed to the Court of Justice of the European Union (CJEU) if the outcome of the case will depend on the judgment of the CJEU.

1.3 What are the main stages in civil proceedings in England & Wales? What is their underlying timeframe?

The main stages in civil law proceedings before the English courts are:

- issue of a claim form;
- service of process (i.e. the claim form) on the defendant(s);
- service of the parties’ statements of case;
- allocation of the claim to a case management track (depending on the value and complexity of the case);
- disclosure of documents;
- exchange of witness and expert evidence;
- trial; and
- assessment of costs.

The CPR lays down strict procedural requirements for the various stages. These will be addressed where the individual stages are discussed in further detail below. The overall average duration of civil proceedings before the English courts (excluding appeals) varies between one and two years (but can sometimes be less). Appeal proceedings can take substantially longer, particularly if taken to the highest court in England and Wales (the Supreme Court) or if a reference or appeal is made to the Court of Justice of the European Union.

1.4 What is England & Wales’ local judiciary’s approach to exclusive jurisdiction clauses?

The English judiciary takes a favourable approach to exclusive jurisdiction clauses. It will usually: (i) stay proceedings commenced before the English courts in breach of an exclusive jurisdiction clause prescribing a foreign dispute resolution forum; or (ii) grant an anti-suit injunction against proceedings commenced outside the European Union in breach of an exclusive jurisdiction clause in favour of the English courts.

1.5 What are the costs of civil court proceedings in England & Wales? Who bears these costs? Are there any rules on costs budgeting?

Costs in civil proceedings before the English courts vary considerably, depending primarily upon the size and complexity of the case and the level of fees of the solicitors and barristers instructed. Costs “follow the event”, so it is generally the loser who bears most of the costs of the proceedings. Exceptions to this rule exist, primarily depending on the conduct of the prevailing party over the course of the proceedings.

Unless agreed between the parties, costs will need to be assessed by the court. A substantial proportion of the costs incurred will generally be recoverable after assessment, but this is unlikely to amount to a full reimbursement.

The civil litigation costs system was comprehensively reviewed by Lord Justice Jackson, who published his final report in January 2010. The majority of Jackson LJ’s recommendations took effect from 1 April 2013, including:

- the abolition of recoverability by the successful party of success fees and after-the-event insurance premiums under agreements entered into on or after 1 April 2013;
- the introduction of contingency fee agreements (also known as damages-based agreements) for contentious work (see questions 1.6 and 1.7 below);
- a new costs management procedure for claims allocated to the “multi-track” (i.e. cases which are more complex in nature and valued in excess of £25,000), with certain limited exceptions;
- an additional costs sanction (equivalent to 10% of the amount awarded up to a limit of £500,000, and then 5% of any amount awarded in excess of that figure, up to a limit of £1,000,000) payable by a defendant who does not accept a claimant’s reasonable “Part 36” offer (i.e. an offer to settle made in accordance with Part 36 of the CPR) and fails to beat it at trial; and
- a new test of proportionality for recoverable costs.

Where applicable, the new costs management procedure for claims allocated to the multi-track requires parties (except litigants in person) to file and exchange costs budgets setting out costs for each stage of the proceedings, at least seven days before the first case management conference, if no other date is specified. If a party fails to file a budget when required to do so, they will be deemed as having filed a budget comprising only the applicable court fees. The parties are expected to try and agree their respective budgets, and to revise those budgets if circumstances require, during the course of the proceedings. If parties are not able to agree their budgets, or revisions to their budgets, the issues in dispute will be referred to the court.

1.6 Are there any particular rules about funding litigation in England & Wales? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

The English legal system is open to conditional fee arrangements between lawyers and their clients (“no win, no fee”). These agreements are limited to an uplift on the fees payable. The maximum uplift on a conditional fee arrangement is 100% of the normal fee. However, following the Jackson reforms (see question 1.5 above), the success fee will no longer be recoverable as a cost from an unsuccessful party where the conditional fee agreement was entered into on or after 1 April 2013.

With effect from 1 April 2013, contingency fee agreements (also known as damages-based agreements or DBAs) are permitted for all contentious business, excluding criminal and family proceedings. DBAs are a form of “no win, no fee” agreement between the client and their representative, whereby if the client is unsuccessful there will be no fee, but if the client obtains a “specified financial benefit” the representative will receive an agreed amount, determined by reference to the amount of financial benefit the client has obtained (i.e. the lawyer will usually receive an agreed percentage of the compensation received by the client).

Once proceedings have been commenced, defendants may apply for security for costs against the claimant. The purpose of granting security for costs is to protect the defendant against the risk of being unable to enforce any costs order which the defendant may later obtain. There are a number of grounds on which security for costs can be applied for, the main ones being:

- the claimant (wherever resident) has taken steps to dissipate his assets;
- the claimant is a company (wherever incorporated) and there is reason to believe that it will be unable to pay the defendant’s costs (if ordered to do so); and
- the claimant is resident outside of the UK or the EU.

After one of the grounds is established, the court will have discretion and will take into account:

- if the claimant is resident outside the UK, the ability to enforce any costs order in that jurisdiction;
- whether the claimant is resident in a signatory country to the European Convention on Human Rights, because requiring a party to provide funds that it is unable to raise may amount to a breach of its rights to a fair trial under Article 6(1);
- the likelihood of the claim succeeding;
- whether the claimant is able to comply with the order; and
- whether the claimant’s financial position was caused by the defendant’s actions.

It should be noted that a claimant can also make an application for security for costs where the defendant has brought a counterclaim.

An order for security for costs will require the claimant to pay a specified sum of money into court or provide a bond or guarantee for the defendant’s costs.

1.7 Are there any constraints to assigning a claim or cause of action in England & Wales? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The English public policy against “champerty and maintenance” aims to restrict the selling and funding of litigation. Champerty means funding an action in return for payment of a share of the proceeds of the action. Maintenance prevents a third party funding the litigation in which the funder has no genuine commercial interest.

If a cause of action is assigned and the assignment offends the policy against champerty and/or maintenance (for example, if the assignee is to pass on a share of any proceeds of the litigation to the assignor or if the assignee has no genuine commercial interest in the claim), such assignment would not be valid. Rules prohibiting assignment have been gradually relaxed.

There is a growing trend for litigation to be funded by professional funders of litigation. The following non-exhaustive list of factors will be taken into consideration when determining whether such funding arrangements fall foul of the public policy against champerty and/or maintenance:

- the extent to which the funder controls the litigation;
- the amount of profit the funder stands to make;
- whether there is a risk of inflating damages; and
- whether there is a risk of distorting evidence (particularly relevant if the third party funds expert evidence on a contingency basis).

The general judicial trend is towards recognising the validity of commercial funding and limiting the role of champerty and maintenance in regulating such arrangements (however, should such arrangements infringe champerty and/or maintenance, they will be void and unenforceable). There is increasing pressure for statutory regulation to be introduced in order to control third party funding.

The English courts have the power to grant cost orders against a third party in favour of a party to the proceedings. The court has wide discretion in making such orders and will only make such a costs order against a third party when it is just to do so (considering factors such as the amount of control which the third party had over the proceedings and whether it stood to gain from them financially).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Before commencing proceedings, the parties have to comply with certain pre-action procedures. Depending on the nature of the case, the requisite guidance will be set out in the relevant pre-action protocol and practice direction. The intention of the pre-action protocols is to provide a procedure for the exchange of information about the claim before the proceedings are commenced. This assists the parties in agreeing a settlement before commencing proceedings or, failing that, with the management of the proceedings.

The information provided by the intended claimant must be sufficient to enable the intended defendant to investigate and evaluate the prospective claim. The intended defendant's response must be reasoned and contain sufficient comment and detail to enable the intended claimant to evaluate and respond to any settlement offer made.

The court will expect all parties to have complied in substance with the terms of an approved pre-action protocol and will take this into account when making cost orders.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Under English law, limitation is a matter of procedural law and provides a complete defence to a claim. It is for the defendant to plead the defence.

The various limitation periods are laid down by statute, the most important of which is the Limitation Act 1980. The limitation period for contract and tort claims is six years, with the time starting to run respectively from the breach of contract, and generally from the date on which the cause of action occurred. In cases of claims founded on deed, the limitation period is 12 years, with time starting to run from the date of the breach of the deed. In certain limited circumstances the limitation period may be extended, for example, in cases of fraud or concealment. As a general rule, limitation periods are counted from the day the cause of action arose.

The limitation periods set down in the Limitation Act 1980 are subject to any agreement between the parties to a dispute which varies such limitation periods.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in England & Wales? What various means of service are there? What is the deemed date of service? How is service effected outside England & Wales? Is there a preferred method of service of foreign proceedings in England & Wales?

In England, civil proceedings are started when the court issues a claim form (by stamping it with the seal of the court). However, certain interim remedies are available before the proceedings are commenced (for example, the court may allow inspection of property which may become the subject-matter of subsequent proceedings).

The claim form must contain a concise statement of the nature of the claim, the remedy which the claimant seeks and the value of the claim (if it is a claim for money).

If the defendant is in England, the claimant will have four months to serve the claim form. If the defendant is outside England, the claimant will have six months to do so. If these time limits are not complied with, the claim form expires and needs to be re-issued. However, these time periods can be extended by agreement between the parties or by an order of the court.

The method of service also depends on whether the defendant is in England, in the EU or outside the EU. However, if the defendant has instructed solicitors in England who are authorised to accept service, then the claim form must be served on those solicitors.

If the defendant is in England, the following methods of service are acceptable, with the deemed date of service depending on the method used:

- personal service;
- leaving the document at one of the places specified in the CPR, such as the defendant's usual or last known residence;
- first-class post;
- by fax; and
- email or other means of electronic communications (if expressly accepted by the other side).

A claim form is deemed served on the second business day after completion of the relevant method.

Permission of the English court is not required to serve proceedings on a defendant in the EU provided that the dispute concerns an obligation to be performed or harm done in England. Service may be carried out in accordance with the EU Service Regulation (1391/2007/EC) or by any method permitted by the law of the relevant country. The EU Service Regulation permits service by:

- post;
- direct service (if permitted by the states' domestic law);
- diplomatic or consular agents; and
- transmitting and receiving agencies designated by the state.

Service needs to be effectively carried out under the EU Service Regulation – it cannot be deemed to be carried out.

Permission of the English court is required to serve proceedings on a defendant outside of the EU. Various "gateways" exist which would entitle the court to grant such permission, for example, if the claim is for an injunction ordering the defendant to do or refrain from doing something within the jurisdiction, the contract was made

in, or breach of contract occurred in, England or the claim is against a co-defendant who is a necessary or proper party to proceedings in England. England must also be the appropriate forum in which to hear the dispute.

Service may be carried out under the Hague Convention (if the country in which proceedings are to be served is a signatory to the Hague Convention) or through the judicial authorities or the British Consular authority in that country if the law of that country permits. The Hague Convention permits service in the following ways:

- through consular and diplomatic channels;
- by post (but the signatory country may have objected to this);
- through designated judicial officers; or
- under any bilateral agreement concluded between the signatory states.

As to foreign proceedings being served on defendants in England, this depends on whether the proceedings being served are from another EU Member State (in which case the EU Service Regulation will apply) or from outside the EU (in which case the Hague Convention will apply if the proceedings being served are from another Hague Convention signatory).

3.2 Are any pre-action interim remedies available in England & Wales? How do you apply for them? What are the main criteria for obtaining these?

Under the CPR, the claimant can apply for pre-action interim remedies if:

- the matter is urgent; or
- it is otherwise desirable to grant the interim remedy in the interests of justice.

Under this heading, the English courts are empowered to grant a wide variety of injunctions, including freezing and search orders.

A freezing order seeks to freeze a party's assets, in particular bank accounts, in England or on a worldwide basis, in order to ensure that, should judgment be entered against that party, the judgment can be enforced against those assets. The criteria which need to be satisfied for a freezing order to be obtained are:

- the applicant must have a "good arguable case" in the underlying proceedings;
- there is a real risk that the defendant will dissipate assets; and
- it would be just and convenient in all the circumstances to grant the order.

Applications for such orders are often made without notice to the other party when there is a need for secrecy or in cases of overwhelming urgency. The applicant will be under a duty to provide full and frank disclosure and disclose all material matters to the court if this application is made without notice. The defendant will have a subsequent opportunity to contest any order made.

An application for an interim remedy can also be made in relation to proceedings that are taking place, or will take place, outside the jurisdiction.

3.3 What are the main elements of the claimant's pleadings?

In England, the claimant's main pleadings are referred to as the particulars of claim. The particulars of claim should clearly set out:

- the names and addresses of the parties;
- the facts giving rise to the dispute;
- the claimant's claims and the essential elements of the underlying causes of action;

- sufficient reasoning for the defendant to know what case he has to meet; and
- the relief sought, including interest.

The claimant will also be able to reply to the defendant's defence, and that reply will also form part of the claimant's pleadings.

It should be noted that the case will be confined to the pleaded allegations and the duty is therefore on the claimant to put forward his case in as much detail as possible.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Generally speaking, amendments to a statement of case are allowed at any time before they have been served on the other party. If the particulars of claim have been served, they can only be amended:

- with the consent of the other party; or
- with the permission of the court.

Whilst the court often gives such permission, late amendments (i.e. just before or during trial) can be disallowed by the court. Amendments of causes of action following the expiry of the limitation period are only permissible where the new cause of action arises out of substantially the same facts as those that underlie the original claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defence must state:

- which allegations made in the particulars of claim the defendant denies;
- which allegations the defendant admits;
- which allegations the defendant is unable to admit or deny (but must state the reasons for this inability), but on which he puts the claimant to proof;
- reasons for the denial of any of the allegations made in the particulars of claim and the defendant's defence against those allegations; and
- any alternative versions of the facts underlying the dispute.

Any allegations not addressed in the defence will be taken as admitted unless the defence on that allegation appears from other points made in the statement of defence. The defendant can make a counterclaim, provided he has a cause of action against the claimant and that the parties to the counterclaim can be sued in the same capacity in which they appear in the initial claim. A defence of set-off is available under English law (but this can be excluded by contract).

Where the defendant makes a counterclaim, the claimant will also have to file a defence to counterclaim.

4.2 What is the time limit within which the statement of defence has to be served?

For proceedings served within the jurisdiction, the statement of defence has to be filed at court and served upon the claimant within 14 days of service of the particulars of claim, unless the defendant has expressly acknowledged service of the particulars of claim, in which case the defence only falls due 28 days after service of the

particulars of claim. The parties may agree to extend this period by up to a further 28 days. For proceedings served outside the jurisdiction, time limits vary depending on the country of service.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Under Part 20 of the CPR, a defendant may bring a claim (a “Part 20 claim”) against a third party for an indemnity or contribution or some other remedy within the context of the existing proceedings, rather than commencing separate proceedings against that party. Once served with the Part 20 claim form, the third party becomes a party to the original action with the same rights of defence as all the other defendants.

Under the Civil Liability (Contribution) Act 1978, one of two persons who are liable for having caused the same damage may bring separate proceedings for contribution against the other person liable within a two-year time limit after the original judgment finding only the first person liable. If successful, the assessment of such contribution from the second defendant, generally, will be such as the court finds to be just and equitable, with regard to the extent of that person’s responsibility for the damage in question.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to defend the claim, a default judgment may be entered against him. A default judgment is a judgment in favour of the claimant without a prior trial before the courts.

Default judgment can be obtained if:

- the defendant fails to acknowledge receipt of the claim form within the requisite timeframe; or
- the defendant fails to file and serve a statement of defence within the requisite timeframe.

A default judgment can be set aside if the defendant can show a real prospect of defending himself.

4.5 Can the defendant dispute the court’s jurisdiction?

The defendant can dispute the court’s jurisdiction by issuing an application notice with evidence in support within 14 days of filing an acknowledgment of service (except proceedings before the Commercial Court, where the deadlines are longer). If a defendant wishes to challenge jurisdiction, he should indicate this on the acknowledgment of service and take no further steps in the action (bar the application to challenge jurisdiction). If any other steps are taken, the defendant may be taken to have submitted to the jurisdiction of the English courts.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The CPR contain provisions for the joinder of any number of claimants or defendants as parties to a claim, provided there is a cause of action by or against each party joined.

The court, however, preserves a discretionary power to order separate trials in order to ensure the swift and efficient conduct of the proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Under the CPR, it is possible to consolidate closely connected claims on a similar subject-matter between the same parties. Consolidation is only possible if there is a considerable overlap between the two claims which are before the court at the same time, and there is a real risk of irreconcilable judgments in the absence of consolidation.

Viable alternatives to consolidation are an order by the court to the effect of sequential judgments on the two claims by the same judge or the stay of one of the claims pending determination of the other claim.

5.3 Do you have split trials/bifurcation of proceedings?

Under the CPR, the English courts have the discretion to allow split trials (for example, between liability and *quantum*) either of their own motion or upon application by the parties. The court will consider various factors when deciding whether to order a split trial, such as the inconvenience or detriment that such a split may cause, the cost and time saving, and the ease of splitting the issues.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in England & Wales? How are cases allocated?

The English courts apply a track allocation system, according to which civil claims are allocated to one of three case management tracks, i.e. (i) the small claims track, (ii) the fast track, or (iii) the multi-track.

The small claims track provides an efficient and inexpensive procedure for simple claims worth no more than £5,000 if issued before 1 April 2013, or £10,000 if issued on or after 1 April 2013. The fast track aims to provide an equally streamlined procedure for resolving disputes which are valued between £5,000 (if issued before 1 April 2013) or £10,000 (if issued on or after 1 April 2013) and £25,000. The multi-track caters for the resolution of disputes whose value exceeds £25,000. However, claims worth less than £50,000 which have been commenced in the High Court will generally be transferred to a County Court, unless there is a specific requirement for them to be tried in the High Court.

Claims brought before the Commercial Court, Technology and Construction Court and Mercantile Court are automatically allocated to the multi-track.

6.2 Do the courts in England & Wales have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Under the CPR, the English courts are obliged to manage cases actively (and in future it is expected the judiciary will be increasingly proactive in case management with a view to minimising costs incurred; see question 1.5 above). Active judicial case management includes:

- encouraging the parties to co-operate in the conduct of the proceedings;
- identifying the issues that require full investigation and trial and deciding summarily on those that do not;
- encouraging the parties to resort to ADR if the court considers this appropriate;
- facilitating the settlement of the dispute in whole or in part;
- controlling the process of the case in a cost-conscious and efficient manner by setting procedural timetables and giving other appropriate directions;
- keeping the parties' need to attend court to a minimum; and
- making full use of technology.

A whole range of interim applications are available to the parties, including the following:

- interim injunctions (such as freezing and search orders, see question 3.2 above);
- security for costs (see question 1.6 above);
- amendment of a statement of case (see question 3.4 above);
- orders for specific disclosure (see question 7.4 below); and
- costs sanctions and other coercive measures against a party that does not comply with the court's previous procedural directions.

In respect of hearings of one day or less, the court will usually make a summary assessment of the costs of the application the same day as issuing the order applied for.

6.3 What sanctions are the courts in England & Wales empowered to impose on a party that disobeys the court's orders or directions?

Under the CPR, the English courts have powers to compel recalcitrant parties to comply with their orders and directions, the most widely used amongst which is the power to award cost orders. Disobeying a court order (or assisting a party to breach an order) may also be a contempt of court, punishable by imprisonment, fine and/or seizure of assets. The courts are also empowered to make a strike out order (see question 6.4 below) or draw adverse inferences in appropriate circumstances.

6.4 Do the courts in England & Wales have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Under the CPR, the courts are empowered to strike out the whole or any part of a statement of case of their own motion or upon application by one of the parties. More specifically, the court may strike out a statement of case if it appears to the court that:

- the statement discloses no reasonable grounds for bringing or defending a claim;
- the statement constitutes an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- there has been a failure to comply with a rule, practice direction or court order.

Generally, an application for an order striking out a statement of case will be made during the pre-trial stages of proceedings (and often together with an application for summary judgment). However, a court can exercise its power just before trial or even during the course of trial.

6.5 Can the civil courts in England & Wales enter summary judgment?

Under the CPR, the English courts can enter summary judgment in favour of the claimant without holding a full trial. This is possible where a claimant can show that the defence has no real prospect of success and there is no other reason why the case should go to trial.

The summary judgment procedure can also be invoked by defendants against weak or unfounded claims that lack any prospect of success and there is no other reason why the claim should be brought to trial.

The courts can further enter summary judgment of their own motion in order to prevent weak or unfounded cases from proceeding.

6.6 Do the courts in England & Wales have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A claimant may discontinue:

- the whole or only part of the claim; and
 - against all or only some of the defendants,
- by filing and serving a notice of discontinuance.

Permission from the court is only required in exceptional circumstances, e.g. where an interim injunction has been granted in relation to a claim that is sought to be discontinued. There will be cost consequences if proceedings are discontinued.

The courts have case management powers to the effect of staying the whole or part of the proceedings on application of a party or of their own motion to ensure the efficient conduct of the proceedings. Proceedings are stayed on the acceptance by one of the parties of a "Part 36 offer" (i.e. an offer to settle which – if rejected – can have adverse cost consequences if not beaten at trial).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in England & Wales? Are there any classes of documents that do not require disclosure? Is it possible to obtain disclosure pre-action?

Under the CPR, the parties to proceedings are under a duty to give advance notice to each other of any material documentation in their respective control. This process is commonly referred to as "disclosure" and historically consisted of exchanging a list of relevant documents ("standard disclosure"), which are or have been in each party's control.

Standard disclosure requires the parties to disclose the following documents:

- those on which a party relies for making its case;
- those which adversely affect its own case or another party's case; and
- those which support another party's case.

Documents that are not material to the case at hand do not require disclosure.

However, since the implementation of the Jackson reforms on 1 April 2013 (discussed in question 1.5 above), claims allocated to the "multi-track" (see question 6.1 above) will no longer follow the "standard disclosure" process by default. Instead, CPR 31.5(7) provides six categories of order for disclosure, which the court may decide to make. These are:

- an order dispensing with disclosure;
- an order that a party disclose documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
- an order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis;
- an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
- an order that a party give standard disclosure; and
- any other order in relation to disclosure that the court considers appropriate.

Disclosure is followed by inspection of documents which are disclosed, are still in the parties' control and are not protected by privilege, whereby parties can request copies of those documents or physically inspect them (and their originals) where they are stored.

Parties to a dispute may be expected to disclose certain information prior to the commencement of proceedings as part of the pre-action procedures (see question 2.1 above). However, under certain circumstances, a party can also apply to court under CPR 31.16 to seek disclosure from a respondent who is likely to be a party to subsequent proceedings.

7.2 What are the rules on privilege in civil proceedings in England & Wales?

The three principal categories of privilege in civil proceedings are:

- legal advice privilege, covering any confidential communications between a solicitor and his client for the purposes of giving legal advice;
- litigation privilege, covering confidential communications between a client and a third party or a lawyer and a third party provided that litigation was contemplated or pending and the information was for the purposes of the litigation; and
- “without prejudice” privilege, according to which any “without prejudice” communications made orally or in writing with the intention of settlement are privileged and may not be disclosed to the court.

Documents that are classified as privileged must be “disclosed” by listing the existence of such documents (which may be and is most often done in a generic fashion, rather than by specific reference to the particular documents). However, they are not made available for inspection by the other side (if they are, privilege will be waived).

In addition, there is a privilege against self-incrimination, according to which a party may be able to object to the inspection of a document which may expose it to a criminal charge, that is not the object of the existing proceedings.

7.3 What are the rules in England & Wales with respect to disclosure by third parties?

A court may make an order for disclosure against a third party under the CPR, where:

- the documents of which disclosure is sought are likely to support the applicant's case or adversely affect the case of one of the other parties to proceedings; and
- disclosure is necessary to dispose fairly of the claim or to save costs.

A court may also order disclosure against a third party pursuant to the *Norwich Pharmacal* principle. The respondent must be a party who is involved in a wrong-doing, whether innocently or not, and

is unlikely to be a party to potential proceedings. An order can be obtained before or after proceedings have commenced and is often used as a means to identify the proper defendant to an action or to extract the necessary information to formulate the particulars of claim.

7.4 What is the court's role in disclosure in civil proceedings in England & Wales?

The court's main involvement is in supporting the disclosure process by making disclosure orders. These normally seek to compel a party to perform its disclosure obligations (see question 7.1 above). Under the CPR 31.12, the court may make an order for specific disclosure or specific inspection.

7.5 Are there any restrictions on the use of documents obtained by disclosure in England & Wales?

Under CPR 31.22, any documents disclosed in a particular set of proceedings may only be used in those proceedings and for no other purpose. The CPR makes provision for a number of exceptions, including where:

- the document has been referred to by the court in a public hearing, unless the court orders otherwise;
- the court gives permission for the subsequent use of the disclosed documents for purposes other than those for which they were originally disclosed; or
- the parties agree to the subsequent use of the disclosed documents for other purposes.

8 Evidence

8.1 What are the basic rules of evidence in England & Wales?

Under the CPR, the parties are required to make advance disclosure of all material documents before trial (see question 7.1 above). In addition, court directions may require the parties to exchange expert reports and statements of witnesses of fact they seek to rely on at trial. Hearsay evidence is admissible at trial if adequate notice identifying the hearsay evidence is given to the other party in advance.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Types of admissible evidence include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence (i.e. where the witness gives evidence of facts he has not personally experienced for the purpose of proving the truth of those facts), provided an appropriate notice is served prior to the trial (see question 8.1 above).

Under CPR 32.1, the court may control evidence by giving directions as to:

- the issues on which it requires evidence;
- the nature of the evidence which it requires to decide those issues; and
- the way in which the evidence is to be placed before the court.

Under CPR 35.4, leave of the court is required to adduce expert evidence and when a party applies for permission it must provide an estimate of the costs of the proposed expert and identify:

- the field in which expert evidence is required and the issues which the expert will address; and
- where practicable, the name of the proposed expert.

The order granting permission may specify the issues which the expert evidence should address.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Written witness statements for each witness of fact are normally exchanged by the parties before trial and stand as evidence-in-chief of the witnesses to be called. Witnesses presenting evidence at trial are traditionally cross-examined before the court.

Witness evidence via video link is admissible.

Reluctant witnesses may be served with a witness summons compelling them to appear before the court.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The Protocol for the Instruction of Experts (the “Protocol”) and the CPR contain various requirements for instructing experts, preparing expert reports and giving expert evidence in court. Leave of the court is required to adduce expert evidence, and any application for permission will have to comply with CPR 35.4 (see question 8.2 above).

The instructions given to the expert must be clear and set out the purpose of requesting the expert advice or report. The expert must be provided with the Protocol, the relevant provisions of the CPR and the accompanying Practice Direction. Material instructions to experts are disclosable to the other side. Once a party has appointed an expert and this expert has been named, permission will be required to change the expert and such permission will normally only be granted on the condition that any report obtained from the named expert is disclosed.

The requirements imposed by the CPR for expert evidence include that such evidence must be independent, objective, consider all material facts and be updated if the experts’ opinions/findings change.

The CPR also requires that expert evidence should be given in a written report (which will stand as the expert’s evidence-in-chief). There are various requirements for the form and content of this report under CPR 35.10 and the accompanying practice direction, for example it must give details of the expert’s qualifications and state the substance of all material instructions on the basis of which the report was written.

An expert witness has a duty to assist the court with his expertise. This duty overrides any obligation to the party instructing him.

An expert witness is not the same as an expert adviser. An adviser may be instructed by a party at any stage to advise on specialist or technical issues within his expertise. An expert adviser is not subject to the rules applicable to an expert witness. However, an expert adviser can then be appointed as an expert witness, as long as they are perceived to be independent.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in England & Wales?

The English courts have the power to make various orders to support the disclosure process, either upon application of a party or of their

own motion (see question 7.4 above). The English court may also order a witness to appear before the court and give evidence (as stated in question 8.3 above).

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in England & Wales empowered to issue and in what circumstances?

The court has the power to make summary and default judgments (see questions 4.4 and 6.5 above).

A court’s judgment can be for damages (for example, lost contractual profits) and/or an order that one of the parties perform its outstanding obligations under a contract (i.e. specific performance) and/or any other form of declaratory relief (for example, declaration/statement as to legal rights and obligations).

The English courts are empowered to adopt a wide variety of orders, including the following:

- injunction orders, prohibiting a party from doing a particular act (prohibitory) or compelling a party to perform a particular act (mandatory);
- consent orders, evidencing a contractual agreement between the parties;
- Tomlin orders (a type of consent order which stays proceedings on agreed terms recorded in a confidential schedule); and
- provisional damages orders, which are normally confined to personal injury cases.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The English courts are empowered to award damages for loss suffered, including economic loss. Damages awarded by the English courts are aimed at compensating the victim for the harm suffered, and not to punish the wrongdoer. Where the loss suffered is negligible, damages awarded by the court will be nominal only. As such, punitive damages, whilst permitted, are very rarely awarded.

Traditionally, the English courts have the power to award costs of the litigation in accordance with the “costs follow the event” principle, whereby the loser usually pays the costs (see question 1.5 above). Departure from this principle is justified where the winner has displayed unreasonable behaviour during the course of the proceedings. Cost orders are generally discretionary.

The English courts are empowered to award interest on both damages and costs awards.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic money-judgment can be enforced: (i) by means of a writ or warrant of execution granted by the court against the judgment debtor’s goods; (ii) by a third party debt order against the judgment debtor’s bank account; (iii) by attachment of earnings against the judgment debtor’s salary; or (iv) by obtaining a charging order.

A declaratory (non-money) judgment is complete in itself, since the relief is the declaration and does not need to be enforced.

A judgment from another EU Member State can be enforced in England under the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), or Regulation (EU) 1215/2012 (the Recast Brussels Regulation) for proceedings instituted on or after 10 January 2015.

The judgments of a number of Commonwealth and certain other countries can be enforced under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

In cases of those countries not covered by the above enforcement regimes (a notable example being the USA), enforcement will be governed by the common law regime. This requires the commencement of fresh legal proceedings (with the foreign judgment being sued upon as a debt). Permission to serve these proceedings out of the jurisdiction may be necessary (see question 3.1 above).

9.4 What are the rules of appeal against a judgment of a civil court of England & Wales?

Under the CPR, an appellant is generally required to apply for permission to appeal. Permission to appeal may only be given if:

- the court considers that the appeal would have a real prospect of success; or
- there is some other compelling reason for which the appeal should be heard.

The application for permission to appeal is normally made after judgment is delivered and if it is refused, the refusal to grant permission to appeal can itself be appealed (this is done on paper).

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in England & Wales? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods of alternative dispute resolution are arbitration and mediation.

The commonly cited advantages of arbitration over litigation in the English courts are privacy (meaning allegations made in the proceedings will not, as a matter of course, be known to the public), speed (due to the fact that the private arrangements made with arbitrators can mean that cases can happen as quickly as the parties and the arbitrators want them to – but this is very case- and party-dependant) and reduced cost (but this is not always the case). A further advantage is that an arbitral award may be easier to enforce in a foreign jurisdiction (under the New York Convention) than an English court judgment.

Mediation has become a widely accepted alternative dispute resolution mechanism in England, which is recognised by the CPR. At its most basic level, mediation is nothing more than a negotiation conducted through an intermediary. The mediation process is entirely confidential and benefits from the “without prejudice” privilege rule, according to which no communications made during the proceedings can be disclosed without the express agreement of the mediating parties in the event that no settlement is reached (save to the extent that there is a later dispute as to whether a settlement was actually reached). If successful, a mediation concludes with

a settlement agreement, which is enforceable as a contract (see question 1.5 below).

Expert determination is often used for disputes relating to matters such as rent reviews, valuation of shares in private companies, price adjustments on take-overs, construction contracts and information technology. An expert’s determination is final and binding but can be subject to an appeal to the courts on very limited grounds. As opposed to arbitrators, expert determiners render “non-speaking awards”, i.e. awards that do not set out (detailed) reasons for the final decision rendered.

Special tribunals exist for special purposes, such as employment and tax. The tribunals’ service is equivalent and parallel to the court structure. There are two types of tribunals (the First Tier Tribunal and the Upper Tribunal), which have generic rules of procedure and a coherent system of appeals. The First Tier Tribunal hears appeals from governmental/civil service decision-makers (for example, the Tax Tribunal will hear appeals from decisions of the UK tax authority). The Upper Tribunal is a sort of administrative Court of Appeal. For example, the decisions of the Financial Conduct Authority and Tax Tribunal can be appealed to the Upper Tribunal. Strictly speaking, these are not a form of ADR, but a court process and so shall not be mentioned further.

The services of an Ombudsman are increasingly required in sector-specific industries, for example within the context of the provision of financial services and utilities. An Ombudsman’s powers are provided by statute. He will usually be mandated to facilitate a settlement between the complainant and the relevant provider or in the alternative, where a settlement fails, make a final decision.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings are governed (“law of the seat”) by the Arbitration Act 1996, which applies to both domestic and international arbitration. Apart from the Arbitration Act, and depending on the parties’ arbitration agreement, various institutional arbitration rules may find application, such as the rules of the London Court of International Arbitration and the Chartered Institute of Arbitrators or those of various London-based trade associations (see part II, question 2.1 below).

Mediation is not governed by any particular set of laws or rules. However, the UK implemented the European Mediation Directive, which applies to cross-border disputes and seeks to protect the confidentiality of the mediation process and ensure that when parties engage in mediation, any limitation period is suspended.

The services of an Ombudsman are governed by the relevant statute that gives rise to his mandate.

1.3 Are there any areas of law in England & Wales that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In England, virtually all commercial matters are arbitrable. Disputes involving criminal and family law matters are generally considered non-arbitrable.

Similar considerations apply to mediation, except that mediation proceedings are often used to resolve family disputes.

As mentioned previously (see part II, question 1.1 above), the Ombudsman’s services are usually sector-specific and provided for by statute.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to England & Wales in this context?

The courts tend to enforce arbitration agreements. The courts tend to grant anti-suit injunctions against a party that has commenced court proceedings abroad in breach of an arbitration agreement, unless those proceedings have been commenced in the court of an EU Member State.

The courts further play a supportive role in arbitral proceedings seated in England (unless the parties to the arbitral proceedings agree otherwise), lending their assistance in relation to the preservation of evidence or assets, the granting of interim injunctions and issuing of witness summons if necessary. In particular, the court is often involved before the Arbitral Tribunal is constituted.

Arbitral Tribunals seated in England are empowered to grant interim relief (i.e. orders for parties to do or not to do something before the hearing has actually taken place) and make orders for security for costs.

Mediations generally require agreement by the parties to mediate. However, the court can order the parties to attend mediation. The Commercial Court has been encouraging mediation for the past 20 years and other courts also run schemes that promote ADR.

Where a dispute falls within the scope of a valid expert determination clause, a party will not have recourse to the courts to resolve such a dispute.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to England & Wales in this context?

An arbitral award is final and binding but a party can appeal to the courts on a point of law, unless the arbitration agreement excludes this ability. Leave of the court to appeal the award is severely restricted under the Arbitration Act (and can even be excluded by the arbitration agreement) and the applicant must show, among other things, that the determination of the question of law will substantially affect the rights of the parties and that it is just and proper for the court to determine the question/dispute.

The arbitral award may be also challenged on the basis that:

- the Arbitral Tribunal did not have jurisdiction to decide the dispute; or
- there was a serious irregularity affecting the Arbitral Tribunal, the proceedings or the award (for example, the Tribunal failed to deal with all the issues that were put to it or was biased).

The New York Convention, to which England is a party, allows the enforcement of an English arbitration award across all the Convention countries in accordance with those countries' own laws.

Likewise, the Arbitration Act provides for enforcement in England of an arbitration award rendered in another New York Convention country. The most common method of such enforcement is to seek a judgment of the English court in terms of the award (and that judgment can then be enforced as a judgment of the English court).

Settlement agreements which are reached through mediation are contracts and are therefore enforceable if the requirements for a valid contract are satisfied. Failure to at least consider mediation (or another form of ADR) is likely to lead to the court making a cost order that is detrimental to such a party.

An expert's determination is final and contractually binding on the parties, with very limited availability of an appeal. A court can order that an expert give reasons for the decision where the underlying expert determination clause in the agreement so provides.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in England & Wales?

The major arbitration institution in England is the London Court of International Arbitration (LCIA).

Other more specialised, industry-related arbitration institutions are:

- the London Maritime Arbitrators' Association;
- the Grain & Feed Trade Association;
- the Federation of Oils, Seeds & Fats Association;
- the Sugar Association of London and the Refined Sugar Association; and
- the London Metal Exchange.

The leading mediation institution in England is the Centre for Effective Dispute Resolution (CEDR), which provides mediation services. The Panel of Independent Mediators (PIMs) is an organisation of leading mediators across the country.

Expert determination services can be provided through the CEDR.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

Over the past 10 to 15 years, there has been an increasing use of multi-tiered dispute resolution clauses, which combine various methods of dispute resolution to be used as part of one and the same dispute resolution mechanism. Such a dispute resolution clause provides for an escalation of dispute resolution methods, ranging from amicable settlement via mediation to arbitration.

There has been a notable increase in mediation, encouraged by the courts. Two "styles" of mediation are now apparent. First, the traditional facilitative, "vanilla" mediation, where the mediator merely assists the parties in finding a creative and commercially viable solution to their dispute and does not attempt to evaluate the legal aspects of a case. Secondly, "evaluative" mediation (being the more recent approach), where the mediator will opine on the legal aspects of the parties' cases and evaluate the merit of their respective positions in order for settlement discussions to take into account the likely outcome of the case if it proceeds to trial.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Finland got? Are there any rules that govern civil procedure in Finland?

Finland is considered to have a civil law system and the Code of Judicial Procedure is the main statute that governs civil proceedings. Arbitration is governed by the Arbitration Act.

1.2 How is the civil court system in Finland structured? What are the various levels of appeal and are there any specialist courts?

There are three levels in the Finnish civil court system. District Courts are the first instance. A District Court judgment can be appealed to the competent Court of Appeal. After the judgment has been rendered in the Court of Appeal, a party may petition the Supreme Court for a leave to appeal the matter. Leave to appeal is granted under certain conditions, for instance, if the matter has value as precedent. In practice, only a fraction of cases are granted leave to appeal.

Specialist courts handling civil law matters are, for instance, the Market Court (e.g. Public Procurement and IPR), the Labour Court (applicability of collective bargaining agreements) and the Insurance Court.

1.3 What are the main stages in civil proceedings in Finland? What is their underlying timeframe?

Civil proceedings are divided into a preparatory stage and a main hearing. The purpose of the preparatory stage is to ensure that the main hearing may be conducted without interruption. During the preparatory stage, the parties will submit their written statements, specify their claims and announce the evidence they are intending to rely on.

Once the preparatory stage has been concluded, the case will be argued in a main hearing during which evidence will be presented and witnesses heard, usually taking from one to several days. The parties are not allowed to present any new claims or new evidence at this stage. The principles of orality, directness and concentration of the trial are of the essence.

On average, the duration of a full trial on the merits in the first instance is a little over one year, but average durations vary locally.

1.4 What is Finland's local judiciary's approach to exclusive jurisdiction clauses?

The main rule is that the parties may agree on the forum for their dispute. However, in some cases, the local courts have exclusive jurisdiction. In business disputes, the main rule applies.

1.5 What are the costs of civil court proceedings in Finland? Who bears these costs? Are there any rules on costs budgeting?

Trial costs vary based on the scope, type and complexity of the case. Attorneys' fees form the major part of litigation costs.

The main rule is that the losing party is obligated to bear the reasonable and necessary costs of the opposing (winning) party. However, if the matter is non-discretionary, parties bear their own litigation costs, unless there is a special reason to obligate either one to pay a part or all of the opposing party's costs.

There are no other rules on costs budgeting but costs that are deemed (on a case-by-case basis) too high or unnecessary for the purposes of the case in question cannot be recovered.

1.6 Are there any particular rules about funding litigation in Finland? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no specific rules as to funding litigation. However, if a claim for legal costs is submitted, the Court must be able to evaluate whether the costs have been necessary and reasonable. The Finnish Bar Association's Rules on Ethics apply to Attorneys at Law and they are obligated to follow the rules. Conditional fees and contingency fees are not prohibited by the Bar, but are nevertheless quite rare.

The claimant is usually ordered to deposit a security when applying for interim measures. However, there are no rules pertaining to security for costs in civil proceedings in general.

1.7 Are there any constraints to assigning a claim or cause of action in Finland? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Assignment of claims is possible in discretionary matters and it is subject to substantive law. There are some exceptions. There are no obstacles for a non-party to finance the proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

An action is initiated when a claimant submits a written application for summons to the registry of the District Court. If the application for summons does not comply with formal requirements set out in the Finnish Code of Judicial Procedure, the District Court will urge the claimant to supplement the application.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The general limitation period for initiating proceedings in civil cases is three years (may be interrupted by notice). Time limits are treated as a substantive law issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Finland? What various means of service are there? What is the deemed date of service? How is service effected outside Finland? Is there a preferred method of service of foreign proceedings in Finland?

In civil proceedings, service of legal documents is generally the responsibility of the Court. At the request of a party, the Court may entrust responsibility for the service to the party.

Service may be done by several means. The document may be served by mail or by using a process server, i.e. a bailiff. A process server is commonly used if service by mail has been unsuccessful. Ultimately, if the defendant is not reached by the process server, service by public notice may also be possible.

As Finland is a member of the EU, service to another EU country is regulated in Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Finland has also ratified the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965.

If service is performed by mail (without confirmation of receipt), the deemed date of service is the seventh day after the summons has been given to the postal service.

3.2 Are any pre-action interim remedies available in Finland? How do you apply for them? What are the main criteria for obtaining these?

There are interim remedies available before commencing the proceedings and during the proceedings. The applicant must deposit a security to enforce an interim remedy, if the Court deems it necessary. The executive official decides on the amount of the security, which is estimated considering the amount of probable damage caused to the opposing party, if the interim measure is deemed groundless. The applicant is liable for the damage caused to the opposing party if an interim measure is found unnecessary.

An applicant for an interim measure must convince the Court that it is probable that he or she holds a receivable that may be rendered payable by an enforceable decision or that he or she holds some other enforceable right, and that there is a danger that the opposing party might hide, destroy or convey his or her property or take any other action endangering the payment of the receivable or the other right.

For possible interim measures, please see question 6.2.

3.3 What are the main elements of the claimant's pleadings?

The following main elements need to be stated in an application for a summons:

- Claims and the grounds for the claims. Preliminary arguments on the merits are usually submitted at this point as well.
- The contract or other document(s) on which the claim is based on (appended).
- The claimant shall, if possible, state the evidence, for example, written evidence and/or witnesses he intends to rely on.
- A claim for the compensation of legal costs may also be made.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The main rule is that claims and the grounds for the claims may not be amended. However, there are exceptions to the rule. If other performance than what has been claimed in the original application for summons is claimed, it may be added if it is based on a change of circumstances during the trial or if the party has not been aware of the grounds for the claim earlier. A claim may also be added if it is essentially based on the same legal grounds as the original claim.

A party may not invoke new legal facts or new evidence in the main hearing, unless there has been a valid reason for the failure to invoke the facts in time during the preparatory stage.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

When responding to the application for summons, the defendant shall state the grounds for his objection and present the evidence, which he relies on in support of his defence.

Relevant documents, such as receipt of the payment, and other written evidence shall be appended, if possible. If the defendant considers it appropriate, he may submit a claim on legal costs. The defendant shall also at this point challenge the jurisdiction of the Court if there are grounds for such a challenge.

The defendant may claim set-off or bring a counter-claim. The defendant's claim has to be related to the same legal relationship. Consideration of the set-off or counter-claim may be performed in the same Court that has jurisdiction over the original matter, i.e. the claimant's pleading.

4.2 What is the time limit within which the statement of defence has to be served?

The Court will determine the time limit, and it depends on the matter and its circumstances. Usually a minimum of 14 days is provided to the respondent for his response. A party may petition the Court for additional time if necessary.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A claim for damages or a claim for recourse or a comparable claim may be presented against a third party if the outcome of a matter may lead to the defendant having a consequential right against a third party. The defendant may bring an action on such a claim to be heard in the same proceedings with the present case.

4.4 What happens if the defendant does not defend the claim?

In cases that can be settled out of court, the judge will decide the case according to the claims made by the claimant, if the defendant does not submit a statement of defence (default judgment).

A defendant against whom a default judgment has been issued has the right to petition for a retrial within 30 days of being served notice of it. The application for retrial may be presented under certain conditions. If the default judgment was based on the failure of the party to present a written response or to appear in court, the appeal for retrial shall include grounds for amendment of the judgment that could have been relevant when the case was decided. In this case, the matter is taken up for a hearing so that it can be dealt with in detail and all evidence can be admitted.

If the defendant has responded to the action, but does not appear in the Court, the opposing party shall also have the right to have the case decided by a judgment and the right to present the evidence necessary for this purpose. However, in this case, the Court will examine the matter instead of issuing a default judgment.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. The District Court may dismiss the matter, if a party submits objections as to the jurisdiction of the Court. The objection has to be made simultaneously when the respondent is exercising his right to be heard for the first time.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Right to intervention exists under certain conditions. A third party has to state that the original matter concerns his right, in which case, he may be granted the right to participate in litigation alongside the claimant or the respondent. The third party must also submit probable cause for his right. There is also a possibility for the third party to join the proceeding on the initiative of a party. Again, a third party must present probable cause for his right in the matter.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Consolidation is possible in certain circumstances, if the Court determines that it would be beneficial for the examination of the matters. Both actions have to be pending in the same Court. The Court must also be competent in both proceedings. The procedural rules applicable on both disputes shall also be the same.

In certain situations, consolidation is mandatory. For example, several actions brought by the same claimant against the same defendant simultaneously shall be heard in the same proceedings, if they are based on essentially the same grounds. Counter-claims made by the defendant, such as an action against the claimant on a debt that is admissible for set-off, shall also be consolidated with the original proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

It is under the discretion of the Court to decide on a split trial. Partial or intermediate judgments may be used in extensive cases, if the Court considers it necessary. Partial judgments may be rendered when there are several independent claims examined in the same trial. A partial judgment is beneficial due to the fact that the enforcement may be initiated separately based on the partial judgment. An intermediate judgment is rendered when the resolution of a claim is a prerequisite for the Court decision as a whole.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Finland? How are cases allocated?

There are no formal rules on case allocation within the District Courts. Usually judges are assigned cases at random. However, some Courts divide cases by type to certain departments.

The proceedings in all IP dispute and invalidation cases, as well as the related preliminary injunction issues, have been centralised to the Market Court as of the 1st of September 2013. Some particular matters, such as maritime law-related disputes, are settled within particular District Courts due to their subject matter.

6.2 Do the courts in Finland have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Courts have an active duty to manage the case. For example, during the preparatory stage of the trial, the Court may actively pose questions to clarify the contentious issues in parties' statements. The Court may, based on its discretion, give orders on limitations to the parties and set the hearing dates.

There are interim remedies available. The Court may order the attachment of the opposing party's property and grant injunctive relief, i.e. prohibit the opposing party to do something. The Court may also, under threat of a fine, order the opposing party to perform, or empower the applicant to do something or to have something done. The Court may order that property of the opposing party be placed under the administration and care of a trustee, or order other measures necessary for securing the right of the applicant.

The claimant needs to provide security for a potential claim for damages due to the interim remedy.

When the interim measure has been granted, the applicant shall, within one month, bring an action on the main issue before the Court.

6.3 What sanctions are the courts in Finland empowered to impose on a party that disobeys the court's orders or directions?

The Court may impose a fine on a recalcitrant party if the party was summoned to attend a hearing under threat of a fine and is nevertheless absent. The Court may have a party or a witness retrieved by the police if it finds it necessary. If a party does not comply with an order to produce a document, the Court may draw an adverse inference due to the non-compliance.

6.4 Do the courts in Finland have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Yes. The Court shall refrain from issuing a summons and, at once, dismiss the action on the merits if the claimant's claim is manifestly unfounded. The Court may strike out the claim partially or totally, discontinue pre-trial proceedings or refuse to serve the claim if the claimant does not provide necessary supplementation upon request, or if the claim is incomplete to the extent that it cannot form the basis for proceedings. Further, during the proceedings, the Court may also strike out irrelevant or excessive evidence.

6.5 Can the civil courts in Finland enter summary judgment?

In cases that can be settled out of court, the judge will render a judgment in accordance with the claims made by the claimant, if the defendant fails to submit a statement of defence (judgment by default). Also, if a party does not appear in the hearing where he is summoned, the Court can rule the matter in favour of the claimant. The defendant may apply for a retrial in case a default judgment has been rendered.

6.6 Do the courts in Finland have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The Court can decide to discontinue proceedings under certain conditions. For example, if the claimant was summoned to the main hearing under a threat of discontinuance in case of absence, the Court may act accordingly and discontinue the case. Also, if the claimant does not comply with the request of the Court to submit a written statement or does not attend a session, the case shall be discontinued by the Court.

Postponing the main hearing is possible under three conditions. The Court may stay the proceedings at this stage, if:

- a party or other person does not appear before the Court;
- new and important evidence has come to the attention of the Court, and it can only be admitted later; or
- an unforeseeable or important reason emerges which renders a stay necessary.

If it is important for the outcome of the case that an issue at another trial or in another proceeding is resolved first, or if there is another long-term impediment for the hearing of the case, the Court may order that the hearing be resumed after the impediment has ceased to exist.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Finland? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Formal discovery or disclosure as exercised in common law countries does not exist in the Finnish judicial system. The main rule is that parties are responsible for providing the Court with the relevant evidence for proving their claims.

However, the Court may, based on the request of a party, order the opposing party or a third party to produce specific documents. Prerequisites for ordering document production are the following: (i) the sought after document must be sufficiently specified; and (ii) its presumed relevance to the outcome of the case must be established. If a party does not present the documents ordered by the Court, the Court may impose a threat of fine or order an execution officer to enforce the production. Adverse inferences may also be drawn due to non-compliance.

The main rule is that document production by a court order requires that the respective legal proceedings are pending. Pre-action document production and preservation of evidence by a court order is usually available only in certain IPR matters.

7.2 What are the rules on privilege in civil proceedings in Finland?

The rules on privilege in disclosure are in most parts similar to the exemptions of giving a testimony in a main hearing.

A public official, a physician, a pharmacist or a midwife, or the assistant of such a person; an attorney or counsel, a court-appointed mediator or an auxiliary mediator; or a priest may not present a document if it can be assumed that the document contains something on which he or she may not be heard on as a witness.

In addition, a witness may refuse to give a statement which would reveal a business or professional secret unless very important reasons require that the witness be heard on the subject matter. In this case, the Court will examine the grounds for refusal. Partial production of a document may also be ordered.

7.3 What are the rules in Finland with respect to disclosure by third parties?

The Court may order third parties to disclose relevant documents upon the request of a party.

Please see questions 7.1 and 7.2 on the rules of document production, which apply to third parties as well.

7.4 What is the court's role in disclosure in civil proceedings in Finland?

The Court decides on the production of documents if a party has requested it and if the prerequisites for document production are

fulfilled. The Court may, if it deems this necessary, order the person under the obligation to present a document to present it under threat of a fine or order that it be delivered to the Court by an execution officer. Before the person is ordered to present the document in court, he or she shall be granted the opportunity to make an explanation, i.e. comment on the possible obligation.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Finland?

The Court may order a confidentiality obligation concerning the documents obtained by way of court-ordered document production. Otherwise documents submitted to court are publicly available and can be used by the parties and third parties.

8 Evidence

8.1 What are the basic rules of evidence in Finland?

No specific provisions on standard of proof exist. In each case, the Court will assess the relevance, materiality and weight of the evidence that the parties present during the proceedings. The Court determines the outcome by applying the relevant law to the facts that have been established by the parties. Thus, evaluation of the evidence is based on the principle of free evaluation of evidence. Oral testimonies of the parties and witnesses are heard in the main hearing. The main rule is that the claimant must bear the burden of proof concerning its claim.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Written evidence and oral testimonies are admissible. Expert evidence, written and oral, may also be relied on. The Court may organise an inspection upon request. A written witness statement drawn up for the purpose of a pending or imminent trial may not be admitted as evidence unless the Court admits it for a special reason.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

As a rule, witnesses may not refuse to give evidence, but there are some exceptions to this rule. Please see question 7.1 on such exceptions.

Evidence is presented at the main hearing. The statements made by witnesses are oral. Witnesses are not allowed to submit any written statements to the Court during their hearing.

If a case may be settled out of court, the party must list all the items of evidence during the preparatory stage of the proceedings. No additional evidence may be referred to once the main hearing has begun.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert evidence is usually presented in the form of a written statement issued by the expert during the preparatory stage of the

proceedings. An expert witness may be appointed by either a party or by the Court.

The expert is heard orally in the main hearing if a party insists on it and the hearing is obviously not insignificant. The expert is heard orally also in the case the Court considers it necessary.

An expert witness must testify truthfully.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Finland?

Usually parties are required to provide the evidence that they want to rely on. The law permits the Court to decide on obtaining items of evidence on its own initiative. The Court can hear a new witness or request other evidence on its own initiative if given permission by both parties in cases that can be settled out of court. The Court can also prohibit the presentation of evidence which it considers irrelevant. In certain non-discretionary matters, the Court is obligated to acquire sufficient evidence for an appropriate ruling to be made.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Finland empowered to issue and in what circumstances?

Civil courts can issue default judgments, injunctions, judgments granting affirmative relief, declaratory judgments and constitutive judgments. Partial or intermediate judgments can be rendered as well. Please see question 6.2 for interim measures.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Due to the prohibition of enrichment, punitive damages are not allowed. Therefore, compensation is made according to the actual damage incurred. Courts may award damages and interests on claims. The Court may also rule on legal costs and the allocation of legal costs between the parties involved.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment is enforced by the local executive officers after the decision has become final.

Foreign judgments cannot be enforced without an international convention or a national provision forming the basis of the enforcement action. Enforcement procedures vary depending on the international rules applicable.

For example, if a judgment has been rendered by a court in a Member State of the European Union, the recognition and enforcement is performed in accordance with the rules set out in Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In addition, there are conventions allowing for the enforcement of judgments within specific fields depending on the subject matter, such as the Luxembourg Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

Arbitral awards may be enforced on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

9.4 What are the rules of appeal against a judgment of a civil court of Finland?

The judgments issued by the District Courts are subject to appeal, unless appeal has been specifically prohibited. A party who wishes to appeal a judgment shall declare his or her intent to appeal. A declaration of intent to appeal shall be filed, at the latest, on the seventh day after the day when the decision of the District Court was rendered or made available to the parties. The deadline for lodging an appeal is 30 days from the day when the decision of the District Court was rendered or made available to the parties.

An appeal to the Supreme Court is subject to the Supreme Court granting leave to appeal. The Supreme Court may grant leave to appeal if the case has value as a precedent, if a procedural error has been committed in the proceedings or if there is another weighty reason for granting the leave to appeal.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Finland? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is widely used in the business sector. Arbitration must be based on an agreement between the parties.

Mediation has gained more attention as an alternative dispute resolution in the past few years.

The Average Adjuster, an official appointed by the Ministry of Trade and Industry, issues rulings which concern maritime insurance cases in the event of an average.

In disputes between enterprises and consumers, the Consumer Disputes Board can give non-binding recommendations on the matter.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration is regulated by the Arbitration Act of 1992. It was inspired by the UNCITRAL Model Law on arbitration of that time. In general courts a special mediation is used in civil disputes, which is regulated in the Act on Conciliation in Civil Disputes in General Courts.

Different alternative dispute resolution institutions in Finland also have their own rules which may become applicable, subject to an agreement by the parties.

1.3 Are there any areas of law in Finland that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

As a general rule, if a civil law case can be settled outside of court, arbitration and mediation may be utilised. A clause in a contract,

according to which a future dispute between a business and a consumer shall be settled in arbitration, will not be binding on the consumer. Arbitration is not applicable to non-discretionary matters.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Finland in this context?

The *lis pendens* rule applies on arbitration proceedings. If parties have agreed to arbitration in an agreement, and either party commences regular court proceeding, the Court can dismiss the case if a motion for dismissal is submitted by the opposing party. A party may petition the court to appoint an arbitrator if the other party does not cooperate.

Pursuant to the Arbitration Act, the Court may, before or during the arbitral proceedings, grant interim measures based on a request by a party.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Finland in this context?

An arbitration award is final and non-appealable in general courts. However, if the arbitration award may be considered invalid pursuant to the Arbitration Act, e.g. due to an arbitrator exceeding his mandate, a party may challenge the award in general courts. An arbitration award must also comply with *ordre public*.

Settlement agreements that have been reached in mediation outside of court can be confirmed by the Court under certain conditions. After confirmation, the settlement agreement is enforceable in the same manner as judgments or decisions made by the Court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Finland?

The Arbitration Institute of the Finland Chamber of Commerce administers arbitrations conducted under the auspices of its rules. The Institute appoints arbitrators and conciliators to both domestic and international cases.

The Arbitration Institute can also act as an appointing authority under the UNCITRAL Rules.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration is quite commonly used in the business sector. There is an on-going discussion on adapting new mediation procedures to the business sector due to the fact that mediation is not yet widely utilised. The efforts concerning mediation have not advanced significantly, even though new industry specific mediation procedures have, from time to time, been introduced.

The main centre for domestic or international arbitration is the Arbitration Institute of the Finland Chamber of Commerce. The Arbitration Rules of the Institute were recently updated to better conform to international best practice. The key objectives of the reform were to address issues such as expediency and cost efficiency, multi-party administration, arbitrator-ordered interim relief and increased confidentiality, as well as consolidation and bifurcation of proceedings. The new arbitration rules include detailed provisions on the constitution of an arbitral tribunal in multi-party cases, joinder of additional parties to pending arbitration proceedings, claims between multiple parties, claims under multiple contracts (including multiple arbitration agreements) and on the consolidation of two or more arbitrations into a single arbitration proceeding.

Although arbitration has been commonly used by large businesses, small to medium-sized businesses still seem to prefer traditional court proceedings. The preferences for court proceedings are, nevertheless, likely not based on informed decisions. Small to medium-sized businesses rarely have the necessary knowledge to evaluate which proceedings would be most beneficial and likely do not invest very much time and effort in negotiating dispute resolution clauses in their contracts.

Arbitration is nevertheless gaining ground in Finland. The Arbitration Institute of the Finland Chamber of Commerce received an average of 25 requests for arbitration during the years 1998-2000. Since then, the amount of arbitration requests has steadily increased and the institute received 80 requests for arbitration in 2013. Similarly, the value of disputes has increased significantly during 2014. The median duration of proceedings under the rules of the institute has been nine months and roughly 25% of the cases are international in nature.

The Arbitration Institute has made efforts to educate the market on the benefits of arbitration and train lawyers in arbitration law by establishing an Arbitration Academy, which conducted its first training modules during 2014. An association for young lawyers and other professionals interested in arbitration has also been established in connection with the institute (Young Arbitration Club Finland). All in all, arbitration is becoming increasingly popular as the dispute resolution mechanism of choice in the Finnish market.



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Attorneys at Law Borenium offers legal services in all aspects of domestic and cross-border dispute resolution, including conflict management and strategic planning.

The dispute resolution team is one of the largest and most respected in Finland and the Baltics. It combines wide experience with knowledge of various industry sectors.

In addition to civil proceedings, Attorneys at Law Borenium regularly represents Finnish and foreign clients in arbitration proceedings under various arbitration rules, as well as in *ad hoc* arbitration proceedings. Our experts frequently serve as arbitrators in domestic and international commercial proceedings.

France

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has France got? Are there any rules that govern civil procedure in France?

France is a civil law jurisdiction. Therefore, most of the rules governing civil procedure are set forth in the *Code de procédure civile* (hereafter the “CPC”).

1.2 How is the civil court system in France structured? What are the various levels of appeal and are there any specialist courts?

The French civil Court system is structured around three levels of jurisdiction.

At the level of first instance, there are general jurisdictions (i.e. the *Tribunal de grande instance* and *Tribunal d'instance*) and specialised jurisdictions (i.e. mainly, the *Tribunal de commerce* and *Conseil de Prud'hommes*).

- The *Tribunal de grande instance* and the *Tribunal d'instance* both have general jurisdiction over disputes involving private interests, save for disputes falling within the exclusive jurisdiction of another Court by virtue of law.

There are currently 161 *Tribunaux de grande instance* and 307 *Tribunaux d'instance* in France. The *Tribunal de grande instance* has a geographical jurisdiction which most of the time covers an entire *département*, whereas there may be several *Tribunaux d'instance* in the geographical jurisdiction of the same *Tribunal de grande instance*.

The allocation of matters between the *Tribunal de grande instance* and the *Tribunal d'instance* is based on the global amount of the claims according to the claimant request. Where claims are below the €10,000 threshold, then the *Tribunal d'instance* has jurisdiction over the dispute; where claims are above such threshold, then the *Tribunal de grande instance* has jurisdiction over the dispute.

Regardless of the amount of the claims, the *Tribunal de grande instance* has exclusive jurisdiction over certain specific matters, notably personal status and parental authority, citizenship, divorce, real estate disputes, successions, intellectual property and patent issues, commercial lease issues and *exequatur*. The *Tribunal d'instance* also has exclusive jurisdiction over certain specific matters, notably landlord and tenant disputes which do not relate to commercial leases, rural disputes, neighbourhood disputes and consumer credit disputes.

- The *Tribunal de commerce* has jurisdiction over commercial matters, which notably includes litigation between shareholders of a commercial company and insolvency proceedings.

There are currently 135 *Tribunaux de commerce* in France. Their main characteristic is that they are composed of non-professional judges called *juges consulaires*, who are elected among the professional community.

- The *Conseil de prud'hommes* has exclusive jurisdiction over individual labour law litigations, i.e. disputes opposing an employee and its employer and relating to the performance of the employment contract.

There are currently 210 *Conseils de prud'hommes* in France. They are composed of non-professional judges, two of whom are elected among the employee's community and two among the employer's community.

At the level of second instance, there are 36 *Cours d'appel*, which have jurisdiction over any appeal lodged against a decision rendered by a Court of first instance, except where the global amount of the claims is lower than €4,000. For these very minor cases, the sole remedy available against a decision of first instance is to bring proceedings directly before the *Cour de cassation*.

The Court of Appeal in Paris has exclusive jurisdiction over certain specific matters, notably proceedings filed against decisions issued by the *Autorité de la concurrence* (i.e. the competition authority), by the *Autorité des marchés financiers* (i.e. the financial markets authority), and by the *Autorité de régulation des communications électroniques et des postes* (i.e. the telecom authority).

At the top of the French civil Court system is a *Cour de cassation*. The *Cour de cassation* is divided into a criminal section and three civil sections: one commercial, economic and financial section; and one employment section. This Supreme Court is, however, not a third degree of jurisdiction, since it does not reassess the case on the merits. The discussion before the *Cour de cassation* relates only to points of law, which implies that proceedings before it are only initiated against decisions which wrongly applied the law. In cases where the decision is quashed by the *Cour de cassation*, the case can be referred back to a Court of Appeal (or a Court of first instance in minor cases where no appeal was allowed) to be heard again on the merits.

1.3 What are the main stages in civil proceedings in France? What is their underlying timeframe?

In France, a civil lawsuit is generally initiated by serving summons (“*assignation*”) on the defendant. The claimant is required to have such summons served by a bailiff (“*huissier de justice*”). Once served, these summons have to be filed with the tribunal in order to apply to the jurisdiction.

Before the *Tribunal de grande instance*, an instruction phase (“*mise en état*”) has to be conducted in order to prepare the case for the trial, unless the case is immediately ready to be heard by the tribunal, which is very rare. The purpose of this instruction phase is to enable the parties to exchange written briefs and evidence under the control of a magistrate. The role of this magistrate is to ensure that the case moves forward and that each party has had the opportunity to analyse and discuss the arguments raised and evidence produced by the other party. This magistrate is therefore empowered to settle disputes relating to the disclosure of evidence, to schedule hearings at which briefs will have to be filed and to issue injunctions if the preparation of the case does not move forward.

Once the case is ready for trial, a pleading hearing is scheduled. In view of this hearing, each party submits a pleading file (“*dossier de plaidoirie*”), which encompasses copies of all the procedural deeds (i.e. the summons, as well as all the briefs exchanged between the parties), and all the evidence produced.

The purpose of the pleading hearing is to put forward the main arguments raised by each party. Pleading hearings therefore usually do not last more than an hour. Although the CPC enables the tribunal to hear witnesses, this possibility is in practice never used by magistrates, who prefer written testimonies.

Once the tribunal has heard the case, it determines a hearing date at which its decision will be made available. The length of this period between the pleading hearing and the date on which the decision is rendered may vary, according to the complexity of the case and the workload of the tribunal, from one week to sometimes more than a month.

Once the judgment is issued, the party which intends to rely on its content must notify this to the opposing party by way of *signification* (service of process). To this end, an original copy of the judgment (called “*grosse*” or “*copie exécutoire*”) has to be obtained from the tribunal’s registry (“*greffe*”) and served on the other party by a bailiff. The purpose of this *signification* is to trigger the recourse delays and render the decision final and enforceable provided no appeal is lodged against it.

A judgment has to be served within a maximum period of 10 years as of the date on which it was rendered; otherwise, the claim is time-barred.

By way of exception, a judgment which was rendered *in absentia* qualifies as a default judgment, and has to be served within six months as of the date on which it was issued; otherwise, it becomes void. The defaulting party is granted a specific right of recourse against such judgment, which is called “*opposition*”. This recourse is brought before the same tribunal which hears the case once again. The *opposition* proceedings must be filed within a one-month period running from the date of its *signification*. However, any party which is domiciled abroad is granted an extension of such delay of two months. The defaulting party may also file an appeal before the *Cour d’appel*.

Accelerated proceedings, called “*à jour fixe*” (or “*à bref délai*” before the *Tribunal de commerce*), may also be used in certain circumstances of urgency. Prior to summoning the defendant, the claimant is required to file a unilateral writ called “*requête*” before a single judge called “*juge des requêtes*”, explaining the urgency and requesting an authorisation to benefit from these accelerated proceedings. Where the magistrate is satisfied of the urgency of the matter, it delivers an order (“*ordonnance*”), allowing the claimant to deliver summons to the opposing party to appear before the tribunal at a specific date on which the case will be heard. Since the case is supposed to be heard at that specific date, all arguments and claims have to be contained in the writ of summons, to which all supporting

evidence shall be attached so that the defendant may examine all elements and build up a “one shot” response in view of the hearing.

Summary proceedings (“*procédures de référé*”) are also available to claimants in order to obtain interim measures before or in view of a trial on the merits. These interim measures do not prejudice the merits of the claim which will be initiated afterwards. These summary proceedings are initiated by way of summons called “*assignation en référé*” to appear before a single magistrate called “*juge des référés*”.

All proceedings conducted before the other jurisdictions of first instance are similar to these standard proceedings which apply before the *Tribunal de grande instance*. Proceedings before the *Tribunal de commerce*, the *Conseil de prud’hommes* and the *Tribunal d’instance* are, however, less formal and, in principle, are conducted orally. However, parties generally tend to exchange written briefs. Given the excessive workload of most French jurisdictions, proceedings generally take one year in average before Courts of first instance.

Once a decision of first instance is rendered, either party may decide to file an appeal against it (provided the global amount of claims exceeds €4,000; otherwise only a direct recourse before the *Cour de cassation* can be lodged).

The time limit for appeal is one month, extended by two additional months where the party on which the judgment is served is domiciled abroad. It runs from the date on which the judgment was served.

The appeal has a suspensive effect, which means that the judgment may not be enforced until the end of the appeal proceedings, unless it is enforceable in nature (“*force exécutoire*”). A judgment may be enforceable in nature either by virtue of law in certain specific matters (such as insolvency or summary proceedings) or because a party asked the tribunal to have its judgment benefit from provisional enforcement (“*exécution provisoire*”). Where the judgment is enforceable in nature it can be enforced as of its *signification*, regardless of any pending appeal. In certain limited circumstances, summary proceedings (“*référé*”) may, however, be initiated before the First President of the *Cour d’appel* in order to obtain an order suspending the enforceability until the end of the appeal proceedings.

The *Cour d’appel* performs a complete re-examination of the factual, as well as the legal aspects of the case. The procedure is similar to the one that applies in first instance; the case is prepared for the trial during an instruction phase, which is conducted under the aegis of a *Conseiller de la mise en état*. The parties are only prohibited to file new claims which had not been expressed before the tribunal, **unless such claims tend to the same purpose**. Save for that limitation, the parties may produce new evidence and exchange written briefs until the case is ready to be heard. Then a pleading hearing is scheduled. The average length of proceedings before the *Cour d’appel* is around 18 months.

The ruling of the *Cour d’appel*, which is called “*arrêt*”, may be challenged before the *Cour de cassation*. However, this jurisdiction does not re-examine the entire case, but only the application of law made by the *Cour d’appel* (or by the tribunal in minor cases where appeal is not allowed). In addition, the recourse before the *Cour de cassation*, which is called a “*pourvoi*”, has no suspensive effect on the ruling issued by the *Cour d’appel*.

The recourse before the *Cour de cassation* has to be filed within a two-month period as of the *signification* of the ruling issued by the *Cour d’appel*. The proceedings before the *Cour de cassation* are conducted by a specific kind of attorney who have a monopoly of representation before this jurisdiction and are called “*Avocats aux conseils*”.

The filing of a *pourvoi* triggers a four-month period for the petitioner to file its briefs. Once these briefs are filed, the respondent has a two-month period to answer in writing. A *conseiller rapporteur* is then appointed by the *Cour de cassation*, whose task is to prepare a written analysis of both submissions. The case is then heard by a single chamber, a combined chamber or even by the plenary chamber of the *Cour de cassation*, depending on the complexity of the question of law raised by the *pourvoi*.

The *Cour de cassation* then issues a ruling which may either:

- i) dismiss the *pourvoi*, which renders the ruling of the *Cour d'appel* (or the judgment of the tribunal if no appeal was allowed) final; or
- ii) quash the ruling.

In case the ruling (or the judgment) is quashed, the case is referred back to another *Cour d'appel* (or tribunal if no appeal was allowed), before which the case is heard once again.

1.4 What is France's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are allowed in contracts entered into between merchants (“*commerçants*”). Any such clause contained in a contract entered into with a non-merchant party (“*non-commerçant*”), which includes consumers, is not valid. A non-merchant party can only be sued before the jurisdiction which is determined in accordance with the rules set forth by the CPC. The same principles apply to arbitration provisions.

Disputes relating to real estate shall in any case be brought before the jurisdiction where the property at stake is located.

1.5 What are the costs of civil court proceedings in France? Who bears these costs? Are there any rules on costs budgeting?

The legal costs of civil proceedings are classified by the CPC under two types of expenses:

- i) the *dépens*, which mainly include:
 - court's fees and taxes;
 - translation costs;
 - witnesses' indemnification;
 - experts' and technicians' fees;
 - bailiffs' fees; and
 - lawyers' fees for mandatory representation (“*postulation*”); and
- ii) the other expenses which are not included in the *dépens* (called “*article 700*”), which mainly include lawyers' fees (except fees incurred for mandatory representation).

Where it appears unfair to let a party bear the burden of these costs, the Court has the power to sentence the defeated party to bear all or part of these costs. It should, however, be noted, regarding lawyers' fees, that the party to which these costs are reimbursed is in practice never awarded the amount that it actually spent.

1.6 Are there any particular rules about funding litigation in France? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Any person residing in France and having insufficient resources to enforce or protect his/her rights may benefit from legal aid (“*aide*

juridictionnelle”). Such legal aid is also available to non-residents where international treaties so provide. It is not available to commercial companies.

The process for obtaining legal aid usually takes several months, although an accelerated procedure is available for urgent cases. Access to this procedure is means-tested (currently full legal aid is available to persons with a monthly income of less than €929). The applicant also needs to justify its chances of success, although in practice few applications are dismissed. When granted, the application is transmitted to the *Bâtonnier* (the chairman of the local Bar), who appoints a counsel to act on behalf of the party benefiting from legal aid. Legal aid covers the *dépens* and the costs of enforcement of any judgment. The counsel receives a lump-sum compensation from the State. If the party benefiting from legal aid is unsuccessful, it is not, based on lack of means, protected from an order to pay the successful party's costs.

Partial contingency or conditional fee arrangements are permitted under French law.

Disputes related to costs are brought before the local *Bâtonnier*, who must rule on the matter within three months. His decision may be appealed to the president of the relevant *Cour d'appel* within a further month.

Given the limited scope and effect of the rules on costs, there are no specific provisions in French law regarding security for costs. Claimants domiciled outside France are no longer required to provide security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in France? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Under French law, a claim may perfectly be assigned from a party to another. Other causes of action may not be transferred, since further to article 31 of the *Code de procédure civile* and to the principle “*nul ne plaide par procureur*”, the claimant is required a legitimate interest in the success or dismissal of a claim.

However, pursuant to article 1690 of the *Code civil*, the assignee is vested with regard to third parties, including the debtor, only once the assignment has been served upon the debtor. In addition, in the event that the claim assigned is subject to a pending litigation, the assignee must be wary of article 1699 of the *Code civil*, which provides that “*a person against whom a litigious right has been assigned may have himself released by the assignee by reimbursing him for the actual price of the assignment with the expenses and fair costs, and with interest from the day when the assignee has paid the price of the assignment made to him*”.

The financing of judicial proceedings by a third party encompasses two different situations: a loan or an investment rewarded only in the event these proceedings are successful. Pursuant to article L.511-11 of the *Code monétaire et financier*, “*it is prohibited for any entity other than a credit institution to carry out banking transactions on a regular basis*”, which includes credit operations such as a loan. Consequently, for non-credit-institutions, this type of financing can only be resorted to on an exceptional basis. On the contrary, there does not appear to be any constraints regarding a financing of judicial proceedings compensated by retribution conditioned upon the successful outcome of these proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

As a general matter, there is no specific formality to comply with before initiating civil proceedings in France.

By exception, prior to initiating a civil liability case against an *auxiliaire de justice* (i.e. a lawyer, a bailiff, a notary, a judicial administrator, etc.), the lawyer is bound to submit a draft writ of summons to the chairman of its order (which is called “*Bâtonnier de l’Ordre*”). However, a failure to comply with such “*ethic*” obligation will never invalidate the summons, but can only result in the professional liability of the claimant’s attorney being engaged.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

With the enactment of Law n° 2008-561 on July 17, 2008, a significant effort was made to simplify limitation periods applicable in France. Most of the various limitation periods which were applicable before said law was enacted have now been harmonised and set at a five-year term, which is now the common limitation period applicable before French civil Courts (for civil and commercial claims in both tort and contracts matters). However, different limitation periods remain which are applicable in certain circumstances, or in certain specific matters (see below).

Most of the limitation periods applicable before civil Courts are set forth in the civil code, article 2224 *et seq.* Some specific delays applying to commercial disputes (i.e. disputes relating to business transactions or arising between two merchants or commercial entities) are also provided for in the commercial code.

As a general principle, the statute of limitation starts running from the date on which the facts giving rise to the cause of action occurred. However, where the claimant was not aware of these facts, the statute of limitation starts running from the date on which said claimant became aware of these facts or should reasonably have been aware thereof.

The statute of limitation does not start running where the claimant is facing a legal, contractual or *force majeure* impossibility to file a claim. Where the claim is conditional upon a certain event, the statute of limitation is also suspended, for as long as such event does not occur.

The statute of limitation is interrupted where the debtor acknowledges the right of the claimant or where proceedings are initiated (even where these proceedings are summary proceedings or proceedings initiated before a Court which has no jurisdiction to hear the case), and for as long as such proceedings are still pending. It is also interrupted where enforcement measures are implemented.

The suspension of the statute of limitation does not cause the time period which has already lapsed to start anew; whereas at the end of an interrupted period, the whole statute of limitation starts running again.

The duration of a limitation period may be contractually agreed upon by the parties to a contract, provided that it is not less than one year and no more than ten years.

The main specific limitation periods applicable before civil Courts are as follows:

- claims relating to real estate issues and claims relating to the obligation to indemnify damages caused by the operation of a classified installation under the environmental code are time-barred after thirty years;
- claims relating to the cancellation of a matrimony are, **in principle**, time-barred thirty years after the wedding is pronounced;
- any enforceable judicial decision may not be enforced after ten years, unless the statute of limitation applicable to the claim which gave rise to such decision is more than ten years;
- liability claims initiated against constructors and their subcontractors are time-barred ten years after the final certificate of the work performed is issued;
- personal injury claims are time-barred ten years after the consolidation of the initial damage or the date upon which it aggravated;
- claims brought by a merchant against a consumer on the basis of a sale of goods are time-barred after two years; and
- claims brought by the purchaser of goods because of the existence of hidden defects (“*vices cachés*”) affecting the use of these goods have to be initiated within two years of the discovery of these hidden defects.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in France? What various means of service are there? What is the deemed date of service? How is service effected outside France? Is there a preferred method of service of foreign proceedings in France?

In France, a civil lawsuit is generally initiated by serving summons (“*assignation*”) on the defendant. However, in certain specific matters, the case may also be initiated by the voluntary presentation of both parties before the Court (i.e. this can be done before the *Tribunal de commerce*), by filing a joint request (this is, for example, the case in amicable divorce proceedings) or an application (this is the case for the voluntary opening of bankruptcy proceedings by the debtor). Before the *Conseil de prud’hommes*, the case is generally initiated by way of a letter which is sent to the Court and states the claims of the plaintiff.

However most of the time, serving a summons is required by law and service of process can only be performed by a bailiff (“*huissier de justice*”).

As a general principle, service must be personal on the defendant. Service on a corporate entity is deemed personal where the process is delivered to its legal representative, to the latter’s proxy, or to any other person empowered for this purpose.

Where personal service is impossible to perform, the summons may be delivered either at the domicile of the defendant or, if no place of domicile is known, at his place of residence, by leaving a copy of the summons to any person there (a member of the family, employee, neighbour or guardian). However, such copy may be left only on condition that the person present accepts it, gives his surname, first names and capacity. The bailiff must leave, in any event, at the place of domicile or residence of the addressee, a dated delivery notice informing him of the delivery of the copy and indicating the nature of the process and the identity of the claimant, as well as providing information relating to the person to whom the copy was left.

Where no one can or is willing to receive the copy of the summons and if it appears, from the inquiries made by the bailiff (which have

to be detailed in the writ of service), that the addressee lives at the address indicated, then the service will be deemed to have been made at the place of domicile or residence of the addressee. The bailiff must leave a similar dated delivery notice to that mentioned above at the place of domicile or residence of the addressee. This notice must also state that a copy of the process shall be collected as soon as possible at the bailiff's office by the interested party or by any person specially authorised. The bailiff is bound to keep a copy of the summons at his office for three months. At the expiry of this time-limit, the bailiff will be discharged from keeping this summons.

Service of process is deemed to have occurred on the date upon which the bailiff went to the domicile or residence of the addressee.

No service may be made before 6 o'clock in the morning or after 9 o'clock in the evening or on Sundays, public or non-working days, except where necessary with judicial permission.

Service on a foreign citizen who is residing or is present in France, or on the French branch of a foreign entity, is performed in the same manner as stated above.

Where the summons is directed to a person domiciled outside of France, it is served by the bailiff in accordance with the provisions of EU regulation 1393/2007, provided the defendant is residing or is present in another EU Member State. In any other case, and provided no specific international treaty is applicable, the summons is generally served by the bailiff to the *Parquet* (i.e. the public prosecutor). Service is deemed to have been performed on the date upon which the summons was remitted to the *Parquet*.

3.2 Are any pre-action interim remedies available in France? How do you apply for them? What are the main criteria for obtaining these?

Prior to initiating a civil trial on the merits, the claimant may apply for the authorisation to implement protective attachments (*mesures conservatoires*) over its debtor's tangible or intangible assets (i.e. attachments over bank accounts, shares, inventory, provisional registration of charge over the debtor's business, shares or property). The authorisation to proceed with such protective attachments is granted by a specific judge called "*juge de l'exécution*" (or by the president of the commercial Court where the claim relates to a commercial dispute), provided that the applicant is able to demonstrate on an *ex parte* basis ("*sur requête*"):

- i) that it has a claim against the debtor which is *prima facie* grounded; and
- ii) that there exists a serious risk not to be able to recover the amount of such claim.

Application for such interim measures is made before the Court of the jurisdiction of the defendant's domicile or in which the assets to be attached are located.

Where proceedings on the merits were not already initiated, they should be commenced within one month as of the date upon which protective attachments are implemented, failing which, such attachments may be cancelled. The debtor is granted a specific recourse called "*mainlevée*" before the *juge de l'exécution* which authorised the protective attachment.

Parties may also apply for a specific interim measure called "*référé probatoire*", the purpose of which is to preserve evidence or establish proof in view of a claim on the merits. Various investigation measures (such as the appointment of an expert, on-site investigations, injunction to third parties to provide documents) can be ordered by the *juge des référés* on the basis of article 145 of the CPC, provided the applicant is able to demonstrate that there

exists a serious risk of loss of evidence. Application for such an interim measure is made on an *ex parte* basis before the Court having jurisdiction to rule the case on the merits.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleadings are the summons ("*assignation*"), and subsequent written briefs ("*conclusions*"). The summons must clearly indicate the Court before which the case is brought, the identity of the defendant, a presentation of the facts giving rise to the dispute, the legal grounds on which the claim is based and the relief sought. The summons shall also contain a list of all evidence supporting the claim.

Subsequent written briefs must contain the factual and legal arguments of the parties. Each party is required to communicate to the other the documentary evidence which it intends to use in support of its arguments.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Each party may freely amend its briefs throughout all of the instruction phase ("*mise en état*"). Once the case is ready for trial and the instruction phase is closed, parties are in principle prohibited from raising new arguments or producing additional evidence. The Court which monitors the case schedule may, however, decide to reopen the instruction phase or to accept late evidence, provided the other party is given the possibility to examine such evidence or argument and to discuss it.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A defendant's written briefs ("*conclusions*") must contain all his factual and legal arguments, as well as a list of all evidence in support of his defence. The documentary evidence in support of such a defence has to be communicated to the claimant.

Counterclaims can be filed by the defendant. Set-off defence is available, except in certain situations such as insolvency proceedings, where such a defence is either prohibited or admitted only in certain very specific circumstances (i.e. claims must be reciprocal and arise from the same contract).

4.2 What is the time limit within which the statement of defence has to be served?

The defendant is not required to file its statement of defence prior to the first hearing before the Court. At this first hearing, the Court will ensure that the defendant has been provided with all of the claimant's documentary evidence mentioned in its statement of claim and then define the procedural schedule and set the date upon which the statement of defence has to be served. The Court may issue injunctions in order to force the parties to comply with such procedural schedule, failing which it may close the instruction phase, thus preventing the failing party to raise its arguments.

By exception, in accelerated proceedings called "*à jour fixe*" (see question 1.3 above), the case is supposed to be pleaded on the date

of the first hearing. The statement of defence shall therefore be prepared and served on the adverse party within a reasonable delay prior to the hearing date (the length of such delay depends on the date upon which the defendant was served the summons).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Where a contractual or legal guarantee exists or, where liability is joint and several, the defendant may serve a summons to a third person to join the proceedings as co-defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, a judgment may be rendered against him on the sole basis of arguments raised by the claimant and of the documentary evidence produced by the latter.

If the defendant does not appear in Court because the summons was not served upon him, then he may contest the default judgment rendered against him by filing an *opposition* (see question 1.3 above) within one month of the date he is served such judgment.

If, on the contrary, the defendant was duly summoned, then the latter may only appeal the judgment before the *Cour d'appel* (provided the amount at stake exceeds €4,000; see question 1.3 above).

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may challenge the Court's jurisdiction, provided such a defence is raised before any other argument on the merits; otherwise, it is not admitted.

The defendant is also required to indicate the Court which it considers to have jurisdiction over the case.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may voluntarily join a pending civil trial either in first instance or before the *Cour d'appel*. The purpose of such voluntary intervention can be to file a claim which is specific to the third party ("*intervention principale*") or to support the claim brought by one of the parties to the litigation ("*intervention accessoire*").

A third party may also be forced to join a pending litigation under certain circumstances (see question 4.3 above).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two sets of proceedings may be consolidated upon request of one of the parties or by the sole decision of the Court provided there is a close link between the two proceedings such that their consolidation renders the administration of justice more efficient.

Consolidation is, however, impossible where it may result in the violation of the exclusive jurisdiction of another Court.

The decision to consolidate, or the refusal to consolidate two sets of proceedings, relates to the administration of justice and may therefore not be challenged.

5.3 Do you have split trials/bifurcation of proceedings?

Splitting of proceedings may be ordered by the Court according to the same conditions as consolidation of two sets of proceedings (see question 5.2 above).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in France? How are cases allocated?

Cases are allocated between civil Courts by combining two sets of rules:

- **Subject-matter jurisdiction rules**, which determine whether the case should be brought before a general Court of first instance (*Tribunal d'instance* or *Tribunal de grande instance* depending on the global amount of the claims, see question 1.3 above) or before a specialised Court (*Tribunal de commerce* for commercial disputes, *Conseil de prud'hommes* for employment disputes, *Tribunal d'instance* or *Tribunal de grande instance* for their specific exclusive matters of jurisdiction, see question 1.3 above).
- **Territorial jurisdiction rules**, the principle being that the claimant must file its claim before the courts in the territorial area of the defendant's domicile (specific rules may, however, apply in real estate matters, succession disputes, contractual disputes, etc.).

6.2 Do the courts in France have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Cases are managed solely and entirely by the Court. Before the *Tribunal de grande instance*, a formal instruction phase ("*mise en état*") is conducted by a judge specifically appointed to prepare the case in view of the hearing ("*juge de la mise en état*"). Before other Courts of first instance, there is no such formal instruction phase. However, the Court proceeds with an informal instruction of the case by postponing hearings in order to allow parties to exchange their briefs, arguments and documentary evidence.

Parties may apply for summary proceedings ("*procédures de référé*") in order to obtain interim measures before or in view of a trial on the merits (see question 1.3 above).

Some protective attachments may also be obtained on an *ex parte* basis (see question 3.2 above).

6.3 What sanctions are the courts in France empowered to impose on a party that disobeys the court's orders or directions?

In order to ensure the efficiency of its order, a Court may sentence the disobeying party to the payment of an *astreinte*, which is basically a daily fine due to the Court until the order is complied with.

6.4 Do the courts in France have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The French CPC does not provide for the possibility to apply for a strike out of part of a statement before the case is ruled on the merits. As a consequence, all claims will be dealt with in the decision on the merits.

6.5 Can the civil courts in France enter summary judgment?

The CPC does not provide for the possibility for French Courts to enter into summary judgments. Where the case is rather simple, the instruction phase may be accelerated so that the Court may hear the case rapidly and issue a judgment.

Orders issued in the context of summary proceedings (“*référé*”) do not qualify as summary judgments, since they do not have *res judicata* and are therefore not decisions on the merits.

6.6 Do the courts in France have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The CPC provides for several hypothesis of suspension, some of which are mandatory (for instance, where an interlocutory question is raised and the answer depends on the exclusive jurisdiction of another Court).

Where criminal proceedings are pending and may have an influence over the outcome of civil proceedings, civil Courts may order a stay of proceedings.

Civil Courts are also vested with a general power to decide the suspension of the proceedings where they consider that it is necessary for a proper administration of justice.

The decision ordering a stay of proceedings may be appealed under very restrictive circumstances.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in France? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Under French law, each party is required to prove the facts on which its arguments rely. However, there is no duty of disclosure whatsoever. Each party therefore decides freely which evidence it wants to disclose or not. French civil proceedings are governed by the adversarial principle (“*principe du contradictoire*”), which implies that, where rendering their judgment, civil Courts may only take into account evidence that has been disclosed during the proceedings and that the adverse party could examine in time. The Court may therefore refuse any late disclosure, although most of the time it will prefer to postpone the hearing in order to allow the evidence to be produced and then let the other party examine it.

Upon request of a party, the Court may also conduct enquiries in order to obtain evidence that has not been disclosed by the other party. Evidence may also be obtained by the Court from third parties, provided no legal privilege applies. Parties, as well as any

third party requested to provide evidence by the Court, are legally bound to cooperate. In order to ensure the efficiency of its orders, the Court may sentence the disobeying party to pay an *astreinte* (see question 6.3 above).

7.2 What are the rules on privilege in civil proceedings in France?

Correspondence and documents exchanged between lawyers and between lawyers and their clients are strictly privileged. A client may therefore not release its counsel from legal privilege in order to be able to produce this kind of document, regardless of whether they may be useful to his case. Counsels may, however, waive this privilege in advance by exchanging letters marked as “official”. However, an official letter cannot refer to previous privileged correspondence or discussions.

Correspondence and documents exchanged between parties themselves are not confidential *per se*. Confidentiality agreements which may have been signed between the parties or between one of the parties and third parties may not prevent the Court from requesting the disclosure of documents, subject to these confidentiality agreements.

7.3 What are the rules in France with respect to disclosure by third parties?

The CPC contains no specific rules applying to the disclosure of evidence by third parties.

Article 11 of the CPC procedure provides that the judge “may, upon the petition by one of the parties, request or order, where necessary under [a periodic] penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so”.

Upon the request of a party and provided the documents requested are not privileged, the Court may therefore order disclosure of evidence by third parties, as an investigation measure.

7.4 What is the court’s role in disclosure in civil proceedings in France?

Given its power to request the disclosure of evidence by the parties and/or by third parties, and its power to sentence disobeying parties to pay an *astreinte*, litigants tend to frequently ask the Court for help in obtaining key documents which one of the parties or a third party refuses to disclose.

7.5 Are there any restrictions on the use of documents obtained by disclosure in France?

No specific restrictions apply to documents obtained in the context of civil proceedings. They may therefore be used by the parties afterwards.

8 Evidence

8.1 What are the basic rules of evidence in France?

Each party to a civil trial bears the burden of proving the facts on which its arguments rely by producing supporting evidence.

Evidence is mainly documentary. Although oral evidence is allowed, it is almost never used before French jurisdictions. Testimonies are usually produced in writing (“*attestations*”).

Each party must timely provide the other party with a copy of the documents on which it relies in order to allow the documents to be examined and discussed, and to allow for the production of counter-evidence.

These documents shall also be provided to the Court in the *dossier de plaidoirie* (see question 1.3 above), in order to allow the Court to examine evidence in view of the pleadings.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

With exception to the restriction relating to oral evidence mentioned above, any kind of evidence may be produced by the parties, regardless of its probative value. The strength of the evidence produced by the parties will be freely assessed by the Court when making its decision.

Parties tend to frequently use expert evidence, especially where the case is very technical. Parties may produce private expertise although they may prefer to request the appointment of a Court expert.

Expertise performed by a Court-appointed expert has generally a stronger probative value since an adversarial process is conducted to ensure that each party has the possibility to discuss the expert’s findings and make its observations in the course of the expertise (by way of *dirs à experts*, which are basically notes sent to the expert), as well as prior to the finalisation of the expert’s report.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

As mentioned above in question 8.1, witnesses’ depositions are permitted under the CPC. However, in practice, Courts never use this possibility and witness statements are produced in writing by way of a hand-written *attestation*, drafted according to specific forms established for that purpose.

Witnesses may also be heard by the Court-appointed expert, where an expertise is ordered.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Pursuant to the *Code de procédure civile*, an expert may be appointed by the Court prior to any proceedings or, once the proceedings have been initiated, in connection with a factual question which requires the insight of an expert. While carrying out his investigations, the expert must imperatively observe the adversarial principle, failing which, his report may be declared void. The observance of this principle confers to the report a particularly strong probative value. On the other hand, it is always possible for the parties to resort to a “private” expert in order to consolidate their position. Contrary to the judicial expert, the elaboration of his report is not subject to the adversarial principle which, necessarily, affects its probative strength. Generally, if one party resorts to a “private” expert, the other/others shall also do so in order to respond to the technical report filed before the Court.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in France?

See answer to question 7.4 above.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in France empowered to issue and in what circumstances?

Interim measures such as protective attachments, freezing injunctions and provisional payments are generally provided for by an order (“*ordonnance*”) issued by a single judge in the context of summary proceedings (“*procédures de référé*”) or on an *ex parte* basis (“*sur requête*”). Such order has no *res judicata* and therefore does not prejudice the merits of any claim which may be initiated afterwards.

Decisions on the merits generally take the form of a judgment (“*jugement*”) or an *arrêt* (where rendered by the *Cour d’appel*) issued by a Court at the end of regular or accelerated proceedings (*à jour fixe* or *à bref délai* before the *Tribunal de commerce*).

Judgments, as well as orders, may provide for the payment of an *astreinte* (see question 6.3 above) in order to ensure their efficiency.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Since punitive damages are not admitted under French law, French Courts may only sentence the losing party to pay compensatory damages.

Interest starts running at the legal rate from the date upon which the judgment is issued.

Contractual interest starts running at the contractual rate from the date upon which a formal letter requesting the payment due under the contract (*lettre de mise en demeure*) is sent to the debtor. If no such letter is sent, contractual interest starts running from the date upon which the summons is served on the debtor.

The Court can also sentence the losing party to pay the *dépens* and the lawyers’ fees (“*article 700*”) (see question 1.5 above).

9.3 How can a domestic/foreign judgment be recognised and enforced?

Judgments sentencing a party to pay an amount of money may be enforced by seizing and ultimately selling the property of the debtor (personal assets, bank accounts, real estate, shares, etc.). Seizures can only be carried out by a bailiff holding a *copie exécutoire* of the judgment.

Where the creditor holds a *copie exécutoire*, it may be useful for the enforcement of the judgment to first file a FICOBA request in order to obtain information on the banks in which the debtor holds bank accounts.

Should the debtor fail to pay the amounts owed, then insolvency proceedings may be triggered against him (specific proceedings apply to non-merchant persons/entities).

Foreign judgments may be enforced in accordance with the provisions of EU regulation 44/2001, provided the defendant is residing or present in another EU Member State. In practice, an application is made before the *Tribunal de grande instance*, on an *ex*

parte basis in order to obtain a declaration of enforceability, which is almost always automatically granted. Once the foreign judgment is declared enforceable, it is considered as a domestic judgment. Any French bailiff may therefore proceed with enforcement measures.

Where the foreign judgment is not rendered against a defendant domiciled in an EU Member State and no enforcement treaty exists, then proceedings should be brought before the *Tribunal de grande instance* in order to obtain the *exequatur* of said judgment. Such proceedings are *inter partes* proceedings and the Court has wider powers to appreciate whether *exequatur* should be granted or not.

9.4 What are the rules of appeal against a judgment of a civil court of France?

Once a decision of first instance is rendered, either party may decide to file an appeal against it (provided the global amount of claims exceeds €4,000; otherwise only a direct recourse before the *Cour de cassation* can be lodged).

The time limit for appeal is one month, extended by two additional months where the party on which the judgment is served is domiciled abroad. It runs from the date on which the judgment was served.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in France? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is frequently used in France and has been for a long time. The CPC sets forth rules applicable to both institutional (under the aegis of an institutional entity such as the ICC or the *Chambre arbitrale internationale de Paris*) and *ad hoc* (where the procedure governing the arbitration is determined by the arbitrators) arbitration.

Conciliation and mediation are actively promoted in France as alternative dispute resolution methods. Both methods are based on voluntary submission of the parties. Conciliation may be conducted under the aegis of a *conciliateur*, but also between the parties without intervention of any third party. Contrary to conciliation, mediation necessarily involves a third party called “*mediateur*”, whose role is more active than the *conciliateur*, where the parties to conciliation decided to appoint one. Conciliation and mediation can be conducted either on a contractual basis or under the aegis of an institution. They can also be initiated in the context of a pending trial, or before any civil trial has been commenced, thus qualifying as judicial conciliation or mediation.

A recent decree, n° 2012-66, enacted on January 20, 2012, provides for a new alternative dispute method called “*procédure participative*”, inspired by North-American participatory justice. In practice, the parties may contractually agree upon a framework for the exchange of briefs, arguments and evidence within a fixed-term in order to try to reach a partial or global settlement. This decree provides for the mandatory assistance of lawyers through which evidence and briefs are transmitted. The *procédure participative* ends upon the expiration of the agreed fixed-term, its termination by mutual consent of the parties or upon reaching a global or partial settlement agreement.

Where a settlement is reached, parties may ask the Court to homologate the settlement agreement in order to render it enforceable.

Where the agreement is partial, parties may refer the remaining issues to the Court, so that litigation may be initiated regarding these issues.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

French arbitration rules are set forth in the CPC, article 1442 and *seq.* The CPC provides for rules applicable to domestic as well as international arbitration. French arbitration rules have been recently modified by decree n° 2011-48 enacted on January 13, 2011.

French rules relating to conciliation and mediation are also set forth in the CPC, article 127 and *seq.* They were recently modified by decree n° 2012-66 enacted on January 20, 2012, which also created the *procédure participative*, which is governed by article 2062 and *seq.* of the *Code civil*.

1.3 Are there any areas of law in France that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Article 2058 of the French civil code provides that “*All persons may agree to arbitration in relation to rights of which they have free disposal*”. According to article 2061 of said code, “*Except where there are particular statutory provisions, an arbitration clause is valid in the contracts concluded by reason of a professional activity*”. Arbitration provisions are therefore valid when concluded between merchants or commercial entities. However, certain disputes may not be dealt with by way of arbitration. This is notably the case for:

- disputes relating to civil status, capacity of individuals and divorce;
- disputes involving local public entities and public establishments;
- insolvency and bankruptcy proceedings; and
- disputes relating to the validity of patents.

There are no such specific limitations regarding conciliation, mediation and *procédure participative*.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to France in this context?

French Courts may provide assistance to parties that wish to use alternative dispute resolution.

For example, the assistance of the President of the *Tribunal de grande instance* may be sought as the *juge d'appui* of the arbitration when the parties face difficulties in constituting the arbitral tribunal. French Courts may also be asked to issue interim measures or protective attachments, regardless of a pending arbitration.

Conciliation is sometimes mandatory before initiating a civil trial (notably before the *Conseil de prud'hommes*). When the attempt

to conciliate is mandatory, and a civil trial is initiated without first proceeding by conciliation, then the Court may declare the claim inadmissible. The Court has the same power to declare a claim inadmissible when parties contractually agreed to try to conciliate or mediate prior to initiating any litigation and fail to do so.

In order to facilitate conciliation or mediation attempts, the CPC provides that the statute of limitations for bringing a civil suit is suspended during the said alternative dispute resolution proceedings.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to France in this context?

International arbitration awards may not be appealed, whereas domestic arbitration awards may be appealed before the *Cour d'appel*. Annulment is, however, a possible recourse against both domestic and international awards on very limited grounds, namely where: the arbitral tribunal lacks jurisdiction; the tribunal was not duly constituted; the tribunal exceeded its mission; the tribunal breached the adversarial principle ("*principe du contradictoire*"); and the award is contrary to public order.

Unless conciliation is mandatory by law, mediation and conciliation are generally conducted on a voluntary basis. There is therefore no specific sanction against a party which refuses to enter into a mediation or conciliation. By exception, where the parties contractually agree to mediate or conciliate prior to initiating litigation, the Court may declare their claim inadmissible where no conciliation or mediation attempt was performed.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in France?

The Court of the International Chamber of Commerce, which has its headquarters in Paris, is one of the major international institutions active in the field of international arbitration. Several other arbitration institutions exist, mainly in Paris, such as *Euroarbitrage* or the *Chambre Arbitrale Internationale de Paris*.

The *Centre de Mediation et d'Arbitrage de Paris* deals with arbitration proceedings, mainly domestic. It is also the main mediation and conciliation institution in France.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Recent trends are illustrated by decrees n° 2011-48 enacted on January 13, 2011 and n° 2012-66 enacted on January 20, 2012, both aimed at promoting the use of alternative dispute resolution methods in order to ease the work of French Courts, which are overloaded.

Parties to a pending litigation are frequently invited by the Court to try mediation during the course of such litigation. This is usually the case when the litigation is pending before the *Tribunal de commerce*.

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Chantal Cordier-Vasseur began her career with the firm Shearman & Sterling in Paris where she practised, in particular, international arbitration in the team headed by Emmanuel Gaillard. She then joined the firm Moquet Borde & Associés, where she widened her know-how to the judicial sphere; she practised there for eight years and worked, under the supervision of Dominique Borde and André Moquet, on litigation cases dealing with contract law, the civil and criminal liability of managers and the civil and criminal liability of statutory auditors, etc. Chantal joined Latournerie Wolfrom & Associés in March 2000.

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Founded in 1995, Latournerie Wolfrom & Associés is a French firm specialising in business law that has distinguished itself over the years through its strong public-private relationship culture. With a continuous development strategy built firmly on the interests of its clients, Latournerie Wolfrom & Associés has acquired multidisciplinary expertise (Mergers & Acquisitions, Private Equity, Public Corporate Law, Environment, Tax Law, T.I.M.E.D./Intellectual Property, Economic Law, Employment Law, Business and White Collar Litigation, Restructuring and Insolvency).

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Germany

Michael Christ



Claudia Krapfl



Gleiss Lutz

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Germany got? Are there any rules that govern civil procedure in Germany?

Germany is a civil law country based on the Roman law tradition. Statutes are the predominant source of law.

Civil procedure is governed by the Code of Civil Procedure (*Zivilprozessordnung, ZPO*), containing, *inter alia*, the rules governing civil and commercial court proceedings and the general rules on the execution of judgments.

1.2 How is the civil court system in Germany structured? What are the various levels of appeal and are there any specialist courts?

There are four different levels of courts competent to hear cases in civil and commercial matters:

- the local courts (*Amtsgerichte*);
- the regional courts (*Landgerichte*);
- the higher regional courts (*Oberlandesgerichte*); and
- the Federal Court of Justice (*Bundesgerichtshof*).

Generally, first instance judgments of the local courts can be appealed to the regional courts, and first instance judgments of the regional courts to the higher regional courts and on to the Federal Court of Justice.

Special chambers exist for commercial matters (*Kammer für Handelssachen*). In addition, larger regional courts have specialised chambers for certain kinds of legal disputes, for example, unfair competition, intellectual property, maritime, and banking.

1.3 What are the main stages in civil proceedings in Germany? What is their underlying timeframe?

The main stages in civil proceedings are:

- filing a statement of claim with the court;
- service of the statement of claim on the defendant;
- filing of the statement of defence;

- exchange of further briefs;
- oral hearing and taking of evidence; and
- judgment or settlement.

The average length of time of civil proceedings before the regional courts (excluding appeals) is between eight and 12 months. While complex commercial cases may take longer, it is nonetheless realistic to obtain a first instance judgment within one to two years after commencing an action.

1.4 What is Germany's local judiciary's approach to exclusive jurisdiction clauses?

Both European law and German domestic law acknowledge agreements on jurisdiction between the parties as to international jurisdiction (*internationale Zuständigkeit*) and local jurisdiction (*örtliche Zuständigkeit*). If the court determines that it lacks international jurisdiction due to an exclusive jurisdiction clause prescribing a foreign forum, it will dismiss the action in Germany as inadmissible. If the court lacks local jurisdiction, but there is another court in Germany which has local jurisdiction, the claimant may motion to have the case transferred to the competent court.

German courts do not grant anti-suit injunctions against proceedings commenced outside Germany in breach of an exclusive jurisdiction clause. Similarly, German courts do not give effect to anti-suit injunctions rendered by foreign courts.

1.5 What are the costs of civil court proceedings in Germany? Who bears these costs? Are there any rules on costs budgeting?

Court and lawyers' fees are regulated by statute. Under these statutes, fees are primarily calculated on the basis of the value of the matter in dispute. However, it is possible and common practice for German lawyers and their clients to enter into negotiated fee arrangements (see Part I, question 1.6 below).

As a general rule in German civil litigation, all fees and expenses arising from the lawsuit, including the opponent's lawyers' fees (to the extent they do not exceed the statutory fees), have to be borne by the defeated party. If the claimant wins only part of its case, the fees and expenses will be divided between claimant and defendant on a *pro rata* basis. Each court decision will determine the allocation of fees and expenses among the parties.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Germany? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

A party that cannot afford to pay court fees and lawyers' fees can apply for legal aid (*Prozesskostenhilfe*) with the court. Legal aid will generally only be granted if the claim has a reasonable prospect of success.

German lawyers and their clients are allowed to enter into negotiated fee arrangements. However, a German lawyer is generally prohibited by law from working for less (but not for more) than the fees provided by the statutory lawyers' fee scale or from agreeing on contingency fees or any other kind of "no win, no fee" arrangement. However, there is a rather narrow exception from this general ban of contingency fees for cases in which the financial situation of a potential claimant would deter him from bringing an action.

Claimants who have their habitual residence outside a Member State of the European Union or outside a state which is a party to the Agreement on the European Economic Area must deposit a security for the court and lawyers' fees at the defendant's request. This rule is, however, subject to a number of exceptions.

1.7 Are there any constraints to assigning a claim or cause of action in Germany? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are certain limitations as to the assignability of claims under German substantive law. For instance, claims that are personally connected to the assigner, ancillary rights or claims that are unseizable cannot be assigned. The same applies to claims resulting from a contract with an obligation to confidentiality unless the other party explicitly consents to the assignment. Parties to a contract may also agree on the exclusion of assignability. However, such exclusion of assignability may be void among merchants, partnerships and corporations.

After commencing an action, the claimant is still allowed to assign the claim. The assignment does not affect the legal proceeding. Usually, the assignee does not assume the action. Instead, the assigner pursues it as a representative action. In this case, the judgment takes effect for and against the assignee.

Third party funding is possible. An increasing number of private companies offer third party funding (*Prozessfinanzierung*) in exchange for a share of the amount received in a successful claim. A party's lawyer is not allowed to fund the proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no particular formalities to be complied with before initiating proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The general limitation period for bringing an action is three years.

However, limitation periods can vary depending on the subject matter of the dispute, ranging from three months to 30 years. The standard three-year limitation period applies to all civil law claims, except those to which special statutory limitation periods apply. It notably applies to most contractual and tort claims.

As a general rule, limitation periods start running at the end of the year in which the claim arises and in which the claimant becomes aware, or but for its gross negligence should have become aware, of both the circumstances giving rise to the claim and the identity of the defendant.

Limitation periods are considered to be part of the substantive law.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Germany? What various means of service are there? What is the deemed date of service? How is service effected outside Germany? Is there a preferred method of service of foreign proceedings in Germany?

Court proceedings are initiated by filing a statement of claim with the court. The statement of claim will be served on the defendant by the court.

The most common method of service is by registered mail with return receipt (*Einschreiben mit Rückschein*). Alternatively, the court may commission the postal service or a bailiff to deliver the documents to the defendant and to complete the form on return of service (*Zustellungsurkunde*).

For a foreign defendant on which no domestic service can be effected, the court will institute proceedings to serve the statement of claim in the jurisdiction where the defendant is domiciled or has its residence. Service of process within the European Union is largely governed by the EU Service Regulation (Council Regulation (EC) No. 1393/2007). With regard to service to other countries, the 1965 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters or one of the bilateral treaties to which Germany is a party may apply. In the absence of a treaty, service of process will be made in accordance with the international principles relating to reciprocity in granting judicial assistance.

Under the EU Service Regulation, the two common methods of service of foreign proceedings in Germany are service through designated agencies (i.e. the local courts where the service is to be effected) and service by registered mail with return receipt. Under the 1965 Hague Service Convention, service in Germany is generally effected through the central authority designated by the relevant German state.

3.2 Are any pre-action interim remedies available in Germany? How do you apply for them? What are the main criteria for obtaining these?

There are two types of pre-action interim or provisional remedies:

- The creditor of a monetary claim can apply for an attachment order (*dinglicher Arrest*) to preliminarily secure the future enforcement of a judgment to be obtained in the main proceedings. The application must contain the facts establishing jurisdiction, an attachment claim, and an attachment reason. The claimant must provide the court with *prima facie* evidence of all three requirements. This evidence can be provided by sworn affidavits of the claimant.

- A preliminary injunction (*einstweilige Verfügung*) secures the future enforcement of non-monetary claims or temporarily regulates a legal relationship in order to avoid substantial disadvantages. In rare cases, the claimant can also seek performance of a claim by way of injunction. The requirements for obtaining a preliminary injunction are similar to those for obtaining an attachment order.

Attachment orders are usually issued *ex parte* without an oral hearing. In proceedings for a preliminary injunction, a decision without an oral hearing can only be issued in urgent cases. Attachment orders and preliminary injunctions in urgent cases are usually issued within one or two days, and sometimes even within a few hours.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim must specify the competent court, the parties, and the relief sought.

In terms of particulars, the statement of claim must, at a minimum, specify the subject matter and the grounds for the claim raised. It should also include a statement of the value of the matter in dispute. In practice, a statement of claim in large commercial disputes is usually a full brief offering or providing evidence and often accompanied by exhibits.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Amendments of a claim are allowed without any restrictions before the claim has been served on the other party. An amendment in an already pending matter requires either the consent of the defendant or that the court deems such amendments to be appropriate. However, extending or restricting the original motions for relief or supplementing or correcting the original statement of fact are not deemed to be amendments.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In the statement of defence, the defendant is required to deal with the factual and legal contentions of the statement of claim. The statement of defence must name the court where the action is pending and the parties involved. It must further contain a specific motion, usually to dismiss the action in full or in part.

The defendant can file a counterclaim (*Widerklage*) against the claimant provided the subject matter of the counterclaim is sufficiently connected with the subject matter of the original action. In addition, or in the alternative, a defence of set-off is available.

4.2 What is the time-limit within which the statement of defence has to be served?

Upon receipt of the statement of claim, the court orders either an early first hearing (*früher erster Termin*) or written preliminary proceedings (*schriftliches Vorverfahren*). If the latter is the case, as frequently is in commercial proceedings, the court will set a time limit of two weeks from the service of the statement of claim, within which the defendant must notify the court in writing whether the defendant intends to defend against the claim. At the same time, a

time limit of at least two further weeks will be set for filing a written statement of defence. If the court chooses an early first hearing, it schedules a date for the hearing and usually fixes a time for the defendant to file a written statement of defence. Upon motion of the defendant, the court can extend the filing periods.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

German civil procedure does not allow a defendant who has a claim for reimbursement, contribution or indemnity against a third party to simply add the third party to the lawsuit. Rather, the defendant must commence separate proceedings against the third party in the event of an unfavourable outcome.

A defendant in such a position can, however, file a third party notice (*Streitverkündung*), which will be served by the court, inviting the third party to participate as a third party intervener. The third party may then join the proceedings either on the side of the claimant or on the side of the defendant, or may refuse to join the proceedings at all. The third party will be bound by the outcome of the proceedings and will, therefore, be precluded from asserting that the judgment rendered against the party giving the notice is incorrect. A third party notice has this effect regardless of whether the third party chooses to join the proceedings or not.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to indicate its intention to defend itself against the claim within the time limit set by the court (see Part I, question 4.2 above), a default judgment may be rendered prior to the oral hearing upon motion by the claimant. A default judgment may also be rendered if the defendant “fails to appear” in the oral hearing either in a physical sense or in a legal sense by choosing not to plead before the court or by not being represented by an attorney admitted to the court when representation is mandatory.

If the defendant does not object to the default judgment within two weeks as of service of the judgment, the judgment becomes legally binding.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may object to a court's jurisdiction. If preliminary written proceedings are adopted (see Part I, question 4.2 above), the defendant has to explicitly object to the court's jurisdiction in its first written submission, as otherwise a court can assume jurisdiction by (deemed) submission. Likewise, in an early first hearing the defendant has to explicitly clarify that its appearance is only made for the purpose of objecting to the court's jurisdiction to avoid jurisdiction by submission.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

It is possible for several claimants or defendants to join in one civil action, provided that the asserted claims are legally or factually

related. If the court considers the claims not to be sufficiently related, it may order separate trials, but will not dismiss the claims.

For the principles on third party notice, see Part I, question 4.3 above.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The court may on its own motion order the consolidation of several pending proceedings involving the same or even different parties if the claims are closely connected in legal and not only factual respects, or if the claims could have been asserted in one legal action. Consolidation is only possible at the same jurisdictional level and if the same court is competent to hear all claims.

5.3 Do you have split trials/bifurcation of proceedings?

The court must split trials in cases where the prerequisites for a consolidation are not met (see Part I, question 5.2 above). In addition, the court has discretion to order that factually and legally separate claims which were raised in one action be dealt with in separate proceedings. The same applies if the defendant filed a counterclaim and the counterclaim has no legal connection with the claim asserted in the action.

It is possible for the court to bifurcate proceedings, for example, by first deciding on the basis of the claim and leaving the amount of damages for a later phase of the proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Germany? How are cases allocated?

At first instance, all civil and commercial matters with a value in dispute of up to EUR 5,000 are under the jurisdiction of the local courts. The regional courts are competent for litigation exceeding this threshold.

Every court has an organisational chart to determine which judge or which chamber is competent to hear and decide the case. The organisational chart is set up on the basis of general characteristics of the claim, such as date of receipt, subject matter, initial letter of the claimant's surname, domicile of the claimant, etc. Organisational charts are essential in Germany and have to be followed strictly as they implement the constitutional right to be heard by the statutorily determined judge.

6.2 Do the courts in Germany have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

In German civil litigation, a court has the duty to conduct the case in a manner to reach a prompt, economical and just resolution of the dispute. Although the parties, by their submissions and actions, govern the proceedings according to the principle of party autonomy, German judges are bound to manage the case actively.

Furthermore, the court has the duty to provide indications and feedback to the parties relating to factual, as well as legal, issues. It may also point out possible deficiencies of the statement of claim, such as lack of jurisdiction, inconclusiveness of the pleadings, etc.

Interim applications by the parties include:

- application for interim remedies (see Part I, question 3.2 above);
- application for specific document production orders (see Part I, section 7 below); and
- motion for security for the costs of the proceedings (see Part I, question 1.6 above).

With the exception of interim remedies, interim applications of the parties generally do not trigger additional court costs.

6.3 What sanctions are the courts in Germany empowered to impose on a party that disobeys the court's orders or directions?

German civil courts have no power to impose coercive measures on a party that disobeys the court's orders or directions. However, if one of the parties disobeys the court order to appear in an oral hearing, the party risks losing the case by default judgment upon motion by the other party (see also Part I, question 4.4 above). Furthermore, if a party fails to comply with a time limit set by the court and is not able to excuse its failure sufficiently, the court is empowered in appropriate cases to reject and disregard late submissions.

6.4 Do the courts in Germany have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

There is no specific rule providing for the court's power to strike out a claim. However, if a claim is found to be clearly unfounded based on the facts alleged in the statement of claim, the court may dismiss the case on the merits after a short hearing and without taking evidence.

6.5 Can the civil courts in Germany enter summary judgment?

In order to expedite the proceedings, a claimant can bring an action for summary proceedings based on documentary evidence or on a bill of exchange. In these proceedings, the parties are allowed to rely only on documents and party testimony for evidence. Such summary proceedings only lead to a judgment subject to a reservation. This judgment is enforceable, but can be overturned at a later stage at which all types of evidence are allowed.

6.6 Do the courts in Germany have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A claimant may discontinue all or only part of a claim for any reason at any time prior to the first oral hearing. Thereafter, the claim may only be discontinued with the consent of the defendant. Permission of the court is not needed. If proceedings are discontinued, the claimant is generally required to bear the defendant's costs as well as the court fees.

The court may, at its discretion, stay the proceedings in certain cases. Commonly, the courts order a stay if the decision on the pending claim depends on the outcome of another pending lawsuit, or on questions of fact or law which are the subject of administrative or criminal proceedings.

Upon motion of the parties, the court may also, at its discretion, suspend the proceedings, if, for example, an out-of-court settlement is likely.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Germany? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There is no disclosure process in German court proceedings. If a party wishes to rely as evidence on a document in the possession of the other party, it must describe such document to the court with reasonable particularity and show why it is relevant to the outcome of the dispute. The court may then order the production of such specific documents from the other party. Such requests for document production may be raised in the statement of claim or statement of defence or at any of the further stages of the proceedings (see Part I, question 1.3 above). There is no pre-action disclosure. If a party wishes to obtain a document from another party prior to initiating court proceedings, it can only do so in separate court proceedings if it has a substantive right to request the production of such document, for example if a party has the right to receive information from another party.

7.2 What are the rules on privilege in civil proceedings in Germany?

Parties to civil proceedings, as well as third parties, are protected by a number of privileges, such as:

- family privilege;
- professional privilege (e.g. lawyers, certified auditors, tax advisers or notaries);
- privilege against self-incrimination; and
- trade secrets.

Parties and third parties need not testify or provide documents on issues protected by such privilege.

7.3 What are the rules in Germany with respect to disclosure by third parties?

The court may order a third party to produce specifically described documents relevant to the dispute, which are in its possession and to which one of the parties has referred, unless such a production order would be unreasonable or privileges apply.

7.4 What is the court's role in disclosure in civil proceedings in Germany?

Only the court may order production of documents from parties or third parties. If a party refuses to produce documents upon a court order, the court may draw adverse inferences against that party. If a third party refuses to produce documents, the court may order fines or, in severe cases, detention to enforce its order against the third party.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Germany?

Since there are no disclosure proceedings in German civil procedure, there are no specific restrictions limiting the use of produced documents.

8 Evidence

8.1 What are the basic rules of evidence in Germany?

As a general rule, each party carries the burden of submitting and proving those facts upon which its claim or defence is based. Everything that remains uncontested by the other party is considered as proven, and only contested facts are subject to the taking of evidence. If a fact is contested by the opponent, the other party must describe the evidence upon which it intends to rely to prove that fact. If necessary, the court will then render an order for the taking of such evidence and evaluate the outcome.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Five forms of evidence are available: (i) witnesses; (ii) experts; (iii) documents; (iv) inspection by the court; and (v) party testimony.

Experts are typically appointed by the court (see Part I, question 8.4 below).

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witnesses domiciled or residing within the jurisdiction of the German courts have the duty to appear when summoned, to testify truthfully, and to give testimony under oath when required by the court. If a witness fails to appear, the court may order fines or even detention.

Written witness statements are not common in Germany. Typically, witnesses testify orally in court in the presence of the parties and their attorneys.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Generally, the rules applicable to witnesses apply *mutatis mutandis* to expert witnesses unless otherwise stated in the Code of Civil Procedure.

Experts are appointed by the court if the determination or the proper assessment of specific facts requires special expertise. A court-appointed expert is required to be impartial and qualified. Therefore, the expert owes his/her duties to the court and not to the parties. The parties are free to submit expert opinions issued by party-appointed experts. However, such expert opinions are not treated as expert evidence, but rather as part of the respective party's pleadings.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Germany?

The offer of evidence is submitted by the party bearing the burden of proof. It is then up to the court to decide whether the taking of evidence is necessary and which measures to order (see Part I, question 8.1 above).

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Germany empowered to issue and in what circumstances?

German courts are empowered to issue contested and uncontested judgments, such as default judgments, judgments by consent, and judgments by waiver.

Corresponding to three different types of relief, there are three categories of contested judgments:

- judgments for affirmative relief, issued in claims for specific performance, as well as for all kinds of monetary claims;
- declaratory judgments, aimed at the declaration of the existence or non-existence of a legal relationship between the parties; and
- judgments for altering a legal relationship or status.

The court may also order interim measures (see Part I, question 3.2 above).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

German courts have the power to award damages for any loss suffered. However, the concept of punitive damages is alien to German civil law. With regard to all monetary claims, interest is payable at a rate fixed by statute. The debtor owes interest at least from the date the litigation is legally pending. On costs see Part I, question 1.5 above.

9.3 How can a domestic/foreign judgment be recognised and enforced?

For the enforcement of a domestic judgment, the party seeking execution must apply to the competent local court or the bailiff at the local court for execution measures.

The recognition and enforcement of foreign judgments is governed by the law of the European Union, multilateral and bilateral treaties, and domestic procedural rules. In relation to the Member States of the European Union, under Council Regulation (EC) No. 44/2001, a judgment rendered in a Member State is declared enforceable in Germany upon motion by the interested party, without a re-examination of the judgment, unless, for example, German public policy is violated.

In the absence of international treaties, domestic statutory law applies. Recognition of foreign judgments depends on a number of requirements, such as no violation of German public policy, proper service of process on the defendant, no incompatibility of the judgment with an earlier judgment of a foreign or German court in the same matter, the safeguarding of the principle of reciprocity, and of proper jurisdiction of the foreign court.

9.4 What are the rules of appeal against a judgment of a civil court of Germany?

Two levels of appeal exist:

At the first level, there is the general appeal. Judgments of the local courts can be appealed to the regional courts, whereas first instance judgments of the regional courts can be appealed to the higher regional courts. The grounds for a general appeal may either be

the wrong application of procedural or substantive law by the lower court or the incorrectness or incompleteness of the lower court's factual findings. An appellant is obliged to file the appeal within one month as of service of the judgment of the lower court.

Judgments delivered on a general appeal are subject to a second appeal. A second appeal is only admissible if the matter is of fundamental significance or if a decision is required in order to further develop or to maintain the consistency of the law. The scope of re-examination is strictly limited to issues of law. The second appeal has to be filed with the Federal Court of Justice within one month after service of the judgment of appeal.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in Germany? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods of dispute resolution in Germany (other than litigation) are arbitration and mediation.

Germany is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which facilitates the enforcement of foreign arbitral awards. German courts are generally arbitration-friendly and tend to enforce arbitration agreements. German courts may order interim measures and assist with the taking of evidence in arbitral proceedings, regardless of whether the seat of the arbitral tribunal is in Germany or elsewhere. Challenges to an arbitral award are limited to New York Convention grounds.

Mediation is slowly becoming more popular for commercial disputes in Germany. Mediation can take place out of court or be court-annexed. In principle, procedural law requires the court to try to reach an amicable settlement of the dispute at each stage of the proceedings, and courts use various types of mediation procedures to achieve this goal. Where mediation is used in larger commercial disputes, out-of-court mediation upon agreement of the parties is more common.

Other forms of dispute resolution include expert determination (*Schiedsgutachten*) and conciliation (*Schlichtung*).

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings in Germany are governed by the German Arbitration Act, which is part of the German Code of Civil Procedure. The German Arbitration Act is based on the UNCITRAL Model Law, with only a few minor differences.

As of 26 July 2012, a new Mediation Law came into effect, containing a broad framework for all types of mediation, including court-annexed mediation, and providing for more legal certainty in the relationship between the mediator and the mediating parties. However, the parties still need to agree on the specific type and rules of the mediation. It is expected that this new law will further promote the use of mediation in Germany, as well as in cross-border disputes.

1.3 Are there any areas of law in Germany that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In Germany, generally any claims involving an economic interest are arbitrable. Claims not involving an economic interest are arbitrable to the extent that parties are entitled to conclude a settlement on the issue in dispute. Examples of disputes which are not arbitrable include questions involving criminal law and most family law matters. Patent, competition and intra-company disputes are arbitrable.

Similar considerations apply to mediation; however, mediation is also used in family law matters.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Germany in this context?

At the request of a party before or during arbitral proceedings, a local court may grant an interim measure relating to the issue in dispute in the arbitral proceedings.

If a party initiates court proceedings despite a valid arbitration agreement, the court will reject the action as inadmissible upon objection of the respondent unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. If the respondent does not raise such objection prior to the beginning of the oral hearing on the substance of the dispute, it is precluded from raising such objection. Under German arbitration law, the arbitral tribunal may rule on its own jurisdiction. Insofar as it rules in favour of its own jurisdiction, any party may request the court to decide the matter within one month of receipt of the arbitral tribunal's ruling.

For court-ordered mediation see Part II, question 1.1 above. There is no mechanism for a court to order parties to seek expert determination.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Germany in this context?

Arbitral awards are binding and enforceable under the New York Convention. There are no rights of appeal from arbitral awards. A challenge to an arbitral award is limited to the grounds for setting aside an arbitral award under the New York Convention.

Settlement agreements reached in mediation are binding on the parties and enforceable in accordance with ordinary contract law principles in German courts. There are no sanctions for refusing to mediate.

An expert determination is binding upon the parties. It may only be challenged on the basis of a "manifest error".

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Germany?

The major dispute resolution institution, providing rules for arbitration and mediation proceedings, is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit, DIS*, www.dis-arb.de).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

In 2014, the dispute between Eureko BV (now Achmea) and the Slovak Republic (PCA Case No. 2008-13, UNCITRAL), which raises important questions with regard to the validity of intra-EU bilateral investment treaties, continued to engage the German courts. On 18 December 2014, the Higher Regional Court of Frankfurt confirmed the arbitral award rendered at the end of 2012, awarding damages in the amount EUR 22 million to Achmea. It is expected that this decision will be appealed to the Federal Court of Justice, which will then have an opportunity to deal with the question of the "intra-EU jurisdictional objection" raised by the Slovak Republic.

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Ghana

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Ghana got? Are there any rules that govern civil procedure in Ghana?

Ghana operates an adversarial system under the Common Law system. There are various rules of civil procedure that govern the venue of litigation. The rules applicable in the District Court are the District Court Rules of 2009, C.I. 59; in the High Court the applicable rules are the High Court Civil Procedure Rules of 2004, C.I. 47. The procedure rules in the Court of Appeal are the Court of Appeal Rules, 1997, C.I. 19 and its amendments in 1998, C.I. 21 and C.I. 25. The applicable rules in the Supreme Court are C.I. 16 of 1999 and its amendment, C.I. 2. There has been a proposal to amend the High Court rules such that it is compulsory to take witness statements by deposition but the amendment has not yet been effected.

1.2 How is the civil court system in Ghana structured? What are the various levels of appeal and are there any specialist courts?

The Judicial System is structured into the Lower Courts, which comprise the Circuit Court and the District Court, and the Superior Courts, which consist of the High Court, the Court of Appeal and the Supreme Court.

The Circuit Court has jurisdiction over causes or matters which fall within its area of jurisdiction where the amount or value of the claim is not over GHS 10,000. The District Court has jurisdiction over claims not exceeding GHC 5,000.

Rights of appeal lie with the High Court, the Court of Appeal and the Supreme Court.

There are a number of specialised courts, which include the Commercial Courts, the Land Court, the Human Rights Court, the Industrial Court and the Financial Court.

1.3 What are the main stages in civil proceedings in Ghana? What is their underlying timeframe?

The main stages in civil proceedings as provided for under the High Court Civil Procedure Rules C.I. 47 are as follows:

- subject to any enactment which provides for a specific procedure, all proceedings are commenced by the filing of a writ of summons;

- filing of an entry of appearance (eight days after the service of a writ of summons);
- filing of a Statement of Defence and counterclaim, if any (14 days after filing appearance);
- filing of a reply to the Statement of Defence or counterclaim (seven days after service);
- if the action is in the Commercial Courts, then Pre-Trial Conference (30 days, with the possibility of an extension for a further 30 days);
- trial (no set timeline);
- written address by both counsel (determined by judges);
- rendering of judgment (six weeks after the close of the case); and
- filing a notice of appeal (within three months after the judgment is delivered).

1.4 What is Ghana's local judiciary's approach to exclusive jurisdiction clauses?

The Courts in Ghana recognise exclusive jurisdiction clauses and give effect to them.

However recognition will be refused where it is contrary to public policy or statute.

1.5 What are the costs of civil court proceedings in Ghana? Who bears these costs? Are there any rules on costs budgeting?

The costs associated with civil proceedings in Ghana include filing fees and professional legal fees. Filing fees are assessed by Court Officials and are based on the nature and value of the claim or the court process to be filed.

Legal fees are negotiated between the legal practitioner and the litigant. The Ghana Bar Association has provided guidelines for fees in its Proposed Scale of Fees.

Costs are initially borne by the parties, however when judgment is given the judge normally awards costs to the victorious party.

There are no rules relating to costs budgeting.

1.6 Are there any particular rules about funding litigation in Ghana? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no rules governing the funding of litigation in Ghana.

Contingency fee/conditional fee arrangements are permissible and provided for under the Ghana Bar Association Scale of Fees.

An application has to be made for an order for security for costs. This has to show the following:

- that the plaintiff is outside Ghana;
- that the plaintiff is suing on behalf of some other person and will not be able to pay the costs of the defendant; or
- that the plaintiff's address has changed and there is evidence that the change is with a view to evade the consequences of the suit.

1.7 Are there any constraints to assigning a claim or cause of action in Ghana? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

A party cannot assign a claim or cause of action to another in Ghana. Whilst it is possible for a party to take a loan to pay for litigation proceedings, it is not possible for a third party to take the responsibility of financing litigation proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Although there are generally no requirements that must be fulfilled before an action is initiated, some statutes, like the State Proceedings Act, impose formalities like the notification of a government agency before a formal claim is filed in court.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Actions barred after two years:

Actions claiming damages for slander or seduction; recovering a contribution against one or more concurrent wrongdoers; or recovering a penalty, forfeiture or a sum by way of penalty or forfeiture, recoverable under any enactment.

Actions barred after three years:

Actions claiming damages for negligence, nuisance or breach of duty.

Actions barred after six years:

Actions founded on tort, simple contract or quasi-contract; enforcing a recognisance; enforcing an award where the arbitration is under any enactment other than the Arbitration Act, 1961 (Act 38); or recovering any sum recoverable by virtue of any enactment.

Actions barred after 12 years:

An action upon an instrument under seal; enforcing an award where the arbitration agreement is under seal; recovering a sum due to a registered company by any member thereof under the company's Regulations; or recovering tax due and payable to the Commissioner of Income Tax or duty due and payable to the Controller of Customs and Excise.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Ghana? What various means of service are there? What is the deemed date of service? How is service effected outside Ghana? Is there a preferred method of service of foreign proceedings in Ghana?

Civil proceedings are commenced by either a writ of summons, an originating motion or a petition. Service of processes is by either personal service, service out of the jurisdiction or by substitution after obtaining leave of the Court.

The deemed date of service is the date in the affidavit of service.

Service of processes outside Ghana can only be done with leave of the Court but must comply with the mode of service of the country of interest. There is no preferred mode of service.

3.2 Are any pre-action interim remedies available in Ghana? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies include interlocutory or interim injunctions. A formal application has to be made to the Court and the main criteria are as follows:

- that it is urgent;
- that any delay will cause irreparable damage; or
- that it is in the interests of justice.

3.3 What are the main elements of the claimant's pleadings?

The main elements in a Statement of Claim are found under Order 11 rule 6 of C.I. 47 and include the following:

- the suit number and the year in which the writ was issued;
- the title of the action;
- the court, region and town in which the action will be commenced;
- a description of the pleading;
- the date and time filed;
- the particulars of the claim; and
- the reliefs claimed.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended at any time, even on appeal. It should be noted, however, that in an appeal an amendment relates to the grounds of appeal only.

Instances in which amendments are not granted include:

- if the amendment will result in an entirely new case that has to be litigated anew;
- if the amendment causes undue delay;
- if the amendment causes surprise;
- if the amendment introduces a new party in a manner that is not in conformity to the rules of joinder;
- if the amendment changes the nature of the case; or
- where the amendment seeks to correct complications encountered during trial.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of a Statement of Defence are:

- the suit number and the year in which the writ was issued;
- the title of the action;
- the court, region and town in which the action will be commenced;
- a description of the pleading;
- the date and time filed;
- the particulars of the defence; and
- the particulars of the counterclaim or set-off.

4.2 What is the time limit within which the statement of defence has to be served?

Under C.I. 47, a Statement of Defence has to be filed 14 days after the entry of appearance has been filed.

Service of the defence is done by Court bailiffs and the rules do not provide any specific timelines.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

C.I. 47 provides for a third party to be joined to an action. Such an application is made *ex parte* and is supported by an affidavit stating the following:

- “The nature of the claim made by the plaintiff;
- The stage of proceedings;
- The nature of the claim made by the applicant;
- The facts on which the third party notice is based”; and
- the name and address of the third party.

4.4 What happens if the defendant does not defend the claim?

Default judgment can be taken against the defendant upon its failure to file a defence within the stipulated time.

If the reliefs sought include a claim for damages, an interlocutory judgment is entitled and the plaintiff will have to submit evidence in proof of its claim.

4.5 Can the defendant dispute the court’s jurisdiction?

A defendant can dispute a Court’s jurisdiction and can raise it at any time before taking a step in the action.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may be joined together in the same action as plaintiffs or as defendants without leave of the Court where, if separate actions were brought by or against each of them, some common question of law or fact would arise in all the actions and all rights to relief claimed in the action whether they are joint, several or in the alternative are in respect of, or arise out of, the same transaction or series of transactions.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Consolidation is allowed to save time and multiplicity of actions. The Courts are empowered to consolidate two or more matters where there are some common questions of law or fact in the actions even if the issues to be tried are not precisely the same or the right to the relief claimed in each action arises out of, or is in respect of, the same transaction or series of transactions in each action or for some other reason it is desirable to consolidate.

5.3 Do you have split trials/bifurcation of proceedings?

If claims in respect of two or more causes of action are included by a plaintiff in the same action, or if two or more plaintiffs or defendants are parties to the same action and it appears to the Court that the joinder of causes of action or parties may embarrass, delay the trial or is otherwise inconvenient, the Court will split/order separate trials.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Ghana? How are cases allocated?

Yes, cases are allocated using a computerised system.

6.2 Do the courts in Ghana have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The trial judges are empowered to use the application for directions proceedings to define and specify the issues that are admitted for trial. This streamlines the trial process and prevents a long and tedious litigation.

Interim applications a party may make include applications for interlocutory injunctions, joinder, summary judgment and judgment in default of defence and appearance, amendment of pleadings or any preliminary legal objections. Costs are granted at the discretion of the Courts to a successful applicant.

6.3 What sanctions are the courts in Ghana empowered to impose on a party that disobeys the court's orders or directions?

Where a party wilfully disobeys a Court Order, the Court may award costs against a party or hold that party in contempt of Court.

6.4 Do the courts in Ghana have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

A Court has the power to strike out part of a statement of case or to dismiss it entirely if it does not disclose a reasonable cause of action, is scandalous, frivolous, vexatious or an abuse of the process of the Court.

6.5 Can the civil courts in Ghana enter summary judgment?

Civil Courts in Ghana can enter summary judgment where the plaintiff, on application to the Court, demonstrates that the defendant has no defence to the claim or part of the claim except as to the amount of any damages claimed.

6.6 Do the courts in Ghana have any powers to discontinue or stay the proceedings? If so, in what circumstances?

During the pendency of an appeal, the Court has the power to stay proceedings in the Court below from which the appeal emanated lest the appeal, if successful, becomes nugatory. Applications for a stay of proceedings pending appeal are made in interlocutory appeals. Ultimately the Court must take into consideration the position of the proceedings sought to be stayed if the appeal is successful. A Court also has power to discontinue proceedings on application by a party or on its own motion, discontinue proceedings which are an abuse of its process, are frivolous, vexatious and harassing proceedings or which are manifestly groundless or in which there is no cause of action.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Ghana? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Disclosure legitimately relates only to a document that is relevant in the action and is in the possession, custody or power of a party. Documents in the public interest or vital to the security of the state do not require disclosure.

7.2 What are the rules on privilege in civil proceedings in Ghana?

A party has a right at law to refuse to disclose any document containing privileged information. Privileged information extends to the right against self-incrimination, the lawyer-client relationship, mental health treatment, trade secrets and religious advice.

7.3 What are the rules in Ghana with respect to disclosure by third parties?

The Court can subpoena a third party to disclose and tender in documents during a trial.

7.4 What is the court's role in disclosure in civil proceedings in Ghana?

A Court may supervise mutual disclosure of documents. A Court may also order any party to produce documents to the Court for inspection.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Ghana?

There appear to be no restrictions to the use of documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Ghana?

All relevant evidence is admissible except as otherwise provided for by other enactments.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All relevant evidence is admissible. Relevant evidence means evidence including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Irrelevant evidence and hearsay evidence is not admissible subject to certain exceptions.

Expert evidence is admissible to assist the Court or tribunal in understanding evidence in the action or in determining any issue which is sufficiently beyond common experience.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Under our rules of procedure, every person is competent to be a witness and no person is disqualified from testifying to any matter. However, a person is not qualified to be a witness if he is incapable of expressing himself so as to be understood either directly or through interpretation by one who can understand him or incapable of understanding the duty of a witness to tell the truth. A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter, subject to certain exceptions.

As a general rule, witnesses are to be examined orally and in open Court. However where it appears necessary in the interests of justice, the Court may make an order for witness statements or depositions to be received as evidence in a trial.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

A person is qualified to testify as an expert if he satisfies the Court that he is an expert on the subject to which his testimony relates by reason of his special skill, experience or training. At any stage of proceedings, the Court may, on its own motion or on application by one or both of the parties, appoint a court expert. A court expert must prepare and submit a report to the registrar of the Court in sufficient copies as the Court may require and on receipt the registrar shall send a copy to each party. The expert owes his duties to the Court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Ghana?

The parties are responsible for providing their evidence in Court, however a Court may, on its own motion, call a court witness or appoint an expert to assist the Court in the determination of issues before it. The Court may also, on application by a party, issue a subpoena for the attendance in Court of a witness.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Ghana empowered to issue and in what circumstances?

The Courts of Ghana may enter summary, default, interlocutory and final judgment. The Courts may also enter consent judgments where parties agree to terms of settlement.

The Court may make injunction orders, interim orders, declaratory orders and perpetual orders.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Generally, the Courts have power to order for damages to be paid to a party where that party has proven the damages.

The award of costs is discretionary, though parties may address judges on costs during assessment of costs by the Courts.

Regarding interests, the Court may make an order for the payment of interest on a sum of money due to a party in the action.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments may be enforced by any of the following:

- a writ of *feri facias*;
- garnishee proceedings;
- a charging order;
- the appointment of a receiver;
- an order of committal or a writ of sequestration in some circumstances; or
- a writ of specific delivery.

For a foreign judgment to be enforceable in the High Court of Ghana, the judgment must be a judgment of the Superior Courts of

the country and must be final and conclusive between the parties. There must also be payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty.

For countries that do not enjoy reciprocity, one must institute a fresh action.

9.4 What are the rules of appeal against a judgment of a civil court of Ghana?

An appeal from a decision of the High Court to the Court of Appeal is as of right where the case commenced at the High Court. However, no appeal shall be brought after the expiration of 21 days in the case of an appeal against an interlocutory decision or three months in the case of an appeal against a final decision unless the Court below or the Court of Appeal extends the time.

An appeal from the Court of Appeal to the Supreme Court is as of right where the case commenced from the High Court. A civil appeal shall be lodged at the Supreme Court within 21 days in the case of an appeal against an interlocutory decision or three months in the case of an appeal against a final decision unless the Court below or the Supreme Courts extends the time.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Ghana? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration: is the reference of a dispute by parties to a neutral person(s) known as the arbitrator(s), who, after listening to both parties in a judicial manner, delivers an award which is final and binding between parties.

Mediation: is a voluntary and informal process whereby parties refer a dispute to a neutral person(s) called the mediator(s) who assist parties to talk through their disputes to reach a mutually satisfactory resolution.

Customary arbitration: is quite similar to arbitration. The arbitrator in this instance resolves the dispute based on the customs of the relevant geographical area.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Alternative Dispute Resolution Act of Ghana 2010, Act 798. This Act makes provisions for arbitration, mediation and customary arbitration.

1.3 Are there any areas of law in Ghana that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Section 1 of Act 798 provides that this Act applies to matters other than those that relate to:

- (a) national or public interest;
- (b) the environment;

- (c) the enforcement and interpretation of the Constitution; and
 (d) any other matter that by law cannot be settled by an alternative dispute resolution method.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Ghana in this context?

Ghanaian Courts support and lean favourably towards ADR and compel parties to arbitrate where they have agreed to do so (Sections 6 and 7 of Act 798). The Courts may, in certain circumstances, refer parties to mediation or customary arbitration (Sections 64 and 91 of Act 798 respectively). The District Courts provide for court-connected ADR i.e. mediation for specified disputes.

The Commercial High Court provides for mandatory pre-trial settlement negotiations (reference is Order 58 rules 4-9 of the High Court Civil Procedure Rules 2004, C.I. 47). The case only goes for hearing when the settlement attempts break down.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Ghana in this context?

Any settlement reached during mediation and an award delivered by an arbitrator or customary arbitrator is as good as a judgment of the Court and may be enforced in the same manner as a judgment of the Court. An arbitral award may not be appealed against but may only be set aside under strict circumstances.

Mediation is voluntary. However, where a party frustrates the mediation process, though there are no sanctions, such frustration may influence the Court in its final judgment in terms of costs.

In Ghana, the ADR Act 2010 regulates arbitration, mediation and customary arbitration. The Act also contains ethical provisions on ADR as well as sample arbitration clauses. The Act further incorporates the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in the First Schedule.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Ghana?

- Ghana Arbitration Centre, Accra.
- Ghana Association of Certified Mediators and Arbitrators (GHACMA).
- The Marian Conflict Resolution Centre, Fiapre-Sunyani.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

ADR has gained prominence in Ghana as a preferable alternative to litigation due to the costs, delays and alienations associated with litigation. The Courts in Ghana, pursuant to the Courts Act and the newly passed ADR Act 798, are empowered to propose amicable settlement of disputes among litigants and this has been widely received. Where parties also agree to any of the ADR mechanisms as a preferred mode of dispute resolution, the Courts enforce this dispute clause in such agreements.

The lower Courts as well as the Commercial Courts of Ghana (due to the compulsory pre-trial settlement stage) have chalked up considerable successes in ADR as reported by the ADR Coordinator in its yearly reports.

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Esine has performed due diligence for several international clients, advising these clients on mergers and acquisitions in Ghana. She played a leading role in a Fortune 500 company's acquisition of Unilever PLC's oil palm business in Ghana. Esine was also the lead transactional advisor for the creation of a joint venture public-private partnership to set up a cargo hub, warehouse and handling service at Kotoka International Airport, including the establishment of a subsidiary company to manage the warehouse facility. In the aforementioned transactions, Esine was instrumental in the negotiation and drafting of licensing agreements, shareholders agreements, leases, company regulations and contracts, and the registration of trademarks and leases, as well as providing legal advice on tax and labour issues.



Sam Okudzeto & Associates, one of the pioneers in corporate and commercial legal practice in Ghana, is made up of partners and associates who constitute the *crème de la crème* in legal practice in Ghana.

Founded in 1971, the firm's managing partner, Sam Okudzeto, is a stalwart in the Ghanaian and international law arena. The 17 lawyers who currently form the firm have acquired wide international exposure and increased the firm's standing on the international scene.

The firm advises and provides consultancy services in corporate and commercial areas such as mining and mineral law, industrial and labour law, international trade and investment, petroleum oil and gas, intellectual property, patents and trademark, corporate banking, securities, debt recovery, property and real estate transactions, mergers and acquisition, tax advisory services, aviation and maritime law.

The firm has a highly competent civil and commercial litigation department and an international reputation in alternative dispute resolution.

Japan



Atsushi Izumi



Yuya Masamoto

Iwata Godo

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Japan got? Are there any rules that govern civil procedure in Japan?

Japan basically follows a civil law system. In addition to the Code of Civil Procedure (Act No. 109 of 1996, CCP, *minji-soshō-hō*) and Rules of Civil Procedure (RCP, *minji-soshō-kisoku*), various laws and treaties (e.g. the Court Act, the Act on Costs of Civil Procedure, and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), etc.) govern civil procedure. Judges are not technically bound by judicial precedents; however, courts are likely to follow Supreme Court precedents because the contravention of a precedent is a reason for appealing to the Supreme Court.

1.2 How is the civil court system in Japan structured? What are the various levels of appeal and are there any specialist courts?

The Japanese judicial system has a three-tiered court system. In addition to the Supreme Court, there are lower courts, including eight high courts and one intellectual property high court, and 50 district courts, 50 family courts and 438 summary courts.

1.3 What are the main stages in civil proceedings in Japan? What is their underlying timeframe?

The main stages of civil proceedings are:

- Receipt of complaints by courts and service of process to defendants.
- Submission of answers by defendants (by the date determined by a court).
- Oral hearings, which are normally held once every 1 to 1.5 months, although there is no limitation on the number of times until a court determines that all the claims of parties and documentary evidence has been provided and a summing up has been completed. Oral hearings can be held more than 10 times in complicated cases. In contrast to common law jurisdictions, there is no discovery phase.
- Examination of testimony of witnesses. A court sets the date(s) of witness examination, and a court intensively conducts witness examinations during that period.
- Submission of final briefs by the parties.

- Judgment.
- Appeal.

First instance proceedings can last about eight months on average. Statutes seek to ensure that all first instance proceedings are concluded within two years; however, this period is only a target and proceedings at first instance can take as long as two years or more for complex cases.

1.4 What is Japan's local judiciary's approach to exclusive jurisdiction clauses?

Art. 11 of the CCP provides that parties can determine the court having exclusive jurisdiction at first instance by a written agreement. However, if an action is filed with another court and the defendant defends such action without raising any objection, such court will have jurisdiction over the action notwithstanding the agreement made between parties.

Even if parties have agreed to a specific jurisdiction, if a court deems it necessary to avoid a significant delay in dealing with an action or based on equity, a court may refer an action to another court.

1.5 What are the costs of civil court proceedings in Japan? Who bears these costs? Are there any rules on costs budgeting?

Although litigation expenses (e.g., filing fees, fees paid to witnesses, expert witnesses and interpreters, and travel expenses paid to such persons) are to be borne by the defeated party, it is important to note that attorneys' fees, the primary cost of litigation, are not included in the "litigation expenses".

Therefore, the parties generally bear their own attorneys' fees unless there is reasonable causal relationship between a tort and the attorneys' fees, and the court deems it reasonable to order the losing party to bear attorneys' fees.

1.6 Are there any particular rules about funding litigation in Japan? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Attorneys' fees may be freely agreed upon between attorneys and their clients; however, many law firms still determine their fees by referring to, or basing them on, retainer fees and success fees listed in the now abolished legal fee table of the Japanese Federation of Bar Associations.

Contingency and conditional fee arrangements are permissible in Japan.

As for rules pertaining to security for costs, the parties must pay in advance litigation expenses to cover the cost of handling the case to be incurred by a court, as well as a *per diem* expense allowance and transportation costs needed for witnesses, experts and interpreters, etc. A court may, upon a petition, decide a person is exempted where a person has no money and cannot afford to pay for those legal costs necessary for the preparation and prosecution of an action or where a person would have significant financial difficulties to pay such costs (Art. 82 of the CCP), although such person must show there is some likelihood of winning the case.

A party seeking interim measures may also have to pay a security deposit.

1.7 Are there any constraints to assigning a claim or cause of action in Japan? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Japan generally permits the assignment of claims or causes of action. However, Art. 10 of the Trust Act (Act No. 108 of 2006) prohibits the entrustment of a claim for litigation purposes.

There is generally no prohibition on the financing of litigation proceedings by someone who is not a party to the dispute; however, there are very few court precedents on this issue. Therefore, it may be advisable to wait for further clarification by the courts.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In general, plaintiffs need not comply with any formalities before initiating proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods are treated as a substantive law issue, and a party seeking to rely on the expiration of a limitation period must plead accordingly and prove that the claim is time-barred. The limitation period on extinctive prescription of claims is 10 years in principle (Art. 167 of the Civil Code (Act No. 89 of 1896)), and the extinctive prescription starts running as and when the right can be exercised. If an early stabilisation of rights is required, shorter limitation periods apply under the Civil Code and the Commercial Code. For example: (i) five years for trade receivables (Art. 522 of the Commercial Code (Act No. 48 of 1899)); (ii) three years for tortious claims running from the time at which the claimant becomes aware of the damage and identifies the tort-feasor (Art. 724 of the Civil Code); (iii) two years for claims regarding the duties of agents (Art. 172 of the Civil Code); and (iv) for seller's warranty for hidden defects, one year (Art. 566 of the Civil Code) or six months under the Commercial Code. The limitation period for claims based on a payment default starts from the date on which the creditor can demand payment of the debt and not from the due date.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Japan? What various means of service are there? What is the deemed date of service? How is service effected outside Japan? Is there a preferred method of service of foreign proceedings in Japan?

A plaintiff submits a written statement of claim ("Complaint") to a court to commence civil proceedings. The court in charge of the case reviews the description made in the Complaint, and serves a copy of the Complaint and a writ of summons specifying the date of the first hearing on the defendant. In Japan, service is within the power of the national authority and is performed under the court's authority. (Therefore, service via courier or direct delivery by a plaintiff is not valid.) (Art. 98 of the CCP). Normally a post office clerk instructed by a court delivers documents to a representative or an employee of the defendant company. If a defendant unreasonably refuses to accept documents, and if the post office clerk leaves the envelope at the place of delivery, service shall be deemed effective (Paragraph 3, Art. 106 of the CCP).

Service outside Japan is performed by a competent authority (court) or a Japanese consul stationed in the relevant foreign country (Art. 108 of the CCP). Even if – like Japan – the relevant foreign country is a party to the Hague Service Convention, and central authority service is allowed, it normally takes between six months and more than a year to complete service. Service by a consul is normally achieved in 3.5 to 6 months; however, if a person on whom documents are served refuses to accept the documents, service cannot be completed.

If there is no diplomatic relationship between Japan and the relevant foreign country and service under Art. 108 of the CCP cannot be performed, or if the competent authority of the foreign country fails to send a report of service for more than six months, documents may be served by publication (Art. 110 of the CCP). However, in practice, courts seldom conduct service by publication.

3.2 Are any pre-action interim remedies available in Japan? How do you apply for them? What are the main criteria for obtaining these?

Provisional seizure (*kari-sashiosae*) or provisional disposition (*kari-shobun*) are available under the Civil Provisional Remedies Act (Act No. 91 of 1989; *minji-hozen-ho*). An application is filed with the court having jurisdiction over the action or the court having jurisdiction over the asset to be attached by giving evidence of the existence of the right to be protected and the need to seek remedy.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim generally sets out the following matters (basically the facts necessary to identify the claim): the parties' identities; the cause of action and relevant obligations which the plaintiff claims to have been breached; the material facts and necessary evidence in support of the breach; the losses suffered by the plaintiff due to the breach; and the relief claimed by the plaintiff.

3.4 Can the pleadings be amended? If so, are there any restrictions?

It is possible to amend pleadings until the end of the hearing if there is no amendment to the basis of the claims or the proceedings are not significantly delayed.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defendant can make a statement of defence against a claim, specifying whether or not the defendant accepts the facts described in the statement of claims and setting out his defence arguments in detail. Important indirect facts and evidence are generally also included to deal with anticipated issues. It is also necessary to provide a copy of important documentary evidence to contest each separate claim.

As long as a counterclaim is related to a relevant claim or method of defence against such claim, the defendant may make a counterclaim. A statement of counterclaims contains details similar to those contained in a statement of claims. Hearing of counterclaims is performed at the same time as the hearing of the original claims. The defendant may include a defence of set-off in the answer.

4.2 What is the time limit within which the statement of defence has to be served?

The period during which the defendant has to submit answers is not determined by law. Generally, the courts schedule the initial oral hearing within 1 to 1.5 months after the plaintiff has submitted a statement of claims and require the defendant to submit an answer about one week before the hearing takes place at the latest.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant is entitled to send a formal court notice (*sosho kokuchi*) to a third party having an interest in a relevant action through a court while an action is pending. A third party that has received such notice may intervene in the action. Even if a third party that has received such notice fails to intervene in the action, the effect of judgments regarding the action would extend to such third party.

4.4 What happens if the defendant does not defend the claim?

The defendant shall be deemed to have admitted the facts set out in the Complaint and the court will grant a default judgment for the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction so long as it is raised before the arguments on the merits.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

If a third party has a legal interest in the result of an ongoing legal action, such third party may notify the court of its intention to intervene and do so in a relevant action to help a party to win a case (Art. 42 of the CCP). Having a legal interest in the result of an action means: (i) having a relationship such that the rights, obligations or other forms of the legal status of the intervening party would be dependent on decisions on major issues of the relevant action; or (ii) having a relationship such that decisions of a relevant action may actually have an adverse impact on the legal status of said third party.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Filing a motion to obtain a judgment for claims filed by more than one plaintiff or to have claims filed against more than one defendant dealt with in a single action, or asking for a consolidation (*heigo*) of actions pending between two parties while actions are pending between a third party and either party are allowed as long as the following requirements are satisfied: (i) there are relations and commonality between claims sufficient to justify a common judgment (Art. 38 of the CCP); and (ii) claims will be processed through similar proceedings or other objective consolidation requirements are satisfied (Art. 136 of the CCP).

5.3 Do you have split trials/bifurcation of proceedings?

In principle, courts may discontinue the consolidation of hearings over more than one claim and order to follow different procedures to present an argument and examine evidence for a certain claim. Courts may also render an interlocutory declaratory judgment.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Japan? How are cases allocated?

Courts allocate cases after receiving a statement of claims from a plaintiff in accordance with internal rules without hearing the parties' views.

6.2 Do the courts in Japan have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Courts are given great authority and power to conduct the proceedings. Therefore, the courts may undertake various acts for case management purposes. The parties have the authority and power to require the courts to undertake certain actions to the extent that such authority and power are clearly laid down by law.

6.3 What sanctions are the courts in Japan empowered to impose on a party that disobeys the court's orders or directions?

Courts may have a negative impression about a party that disobeys orders or directions and this may impact a court's decision. There is, however, no specific sanction for contempt of court, etc.

6.4 Do the courts in Japan have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

There is no concept corresponding to strike out in Japan. The court may dismiss an action without a hearing if the action is unlawful and such defect cannot be corrected.

6.5 Can the civil courts in Japan enter summary judgment?

There is no concept corresponding to summary judgment in Japan.

6.6 Do the courts in Japan have any powers to discontinue or stay the proceedings? If so, in what circumstances?

If either party needs to be changed for statutory reasons (disappearance of a company by merger, death of a litigant, etc.) or a court becomes unable to perform its duties due to accidents during pending actions, the proceedings will be automatically suspended or discontinued without waiting for a decision of the court. The court may discontinue proceedings if it is impossible for a party to continue taking part in proceedings due to a problem which may last for an uncertain duration.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Japan? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

In contrast with common law jurisdictions, there is no discovery system in Japan and documents submitted as evidence by parties are basically collected by parties through their own efforts. It is possible to petition a court to issue an order to submit documents after an action has commenced by providing evidence of the fact there are valid reasons to compel a person holding certain documents, listed in Art. 220 of the CCP, within its power or control to submit any of said documents if either party desires to access documents in the possession of the other party (Art. 221 of the CCP). Reasons listed in Art. 220 of the CCP relate to cases in which: (a) a party owns documents used in an action; (b) it is possible to require the owner of documents to provide or permit access to such documents; (c) documents have been created for the benefit of a person filing a petition or in relation to a legal relationship between a person filing a petition and the owner of documents; or (d) documents are not documents that may be exclusively used by their owner and do not contain confidential technical or vocational information. Prior to the filing of an action, where a person intending to file an action (the "Notice Provider") has given to the person to act as the defendant ("Recipient") advance notice of the filing of an action,

the Notice Provider may, within four months of the date of the notice, make inquiries to the Recipient on matters necessary for the Notice Provider to substantiate allegations or collect evidence (Art. 132-2 of the CCP). In addition, the court may issue orders including as to the submission of documents and the commissioning of examinations when a petition is filed by a Notice Provider or a Recipient and it is difficult for the petitioner to collect evidentiary materials that would be clearly necessary as instruments of proof by himself (Art. 132-4 of the CCP).

7.2 What are the rules on privilege in civil proceedings in Japan?

In Japan, there is no concept of attorney-client privilege. Attorneys, doctors and other experts to whom confidential information of others has been disclosed may refuse to give evidence (Item 2, Paragraph 1, Art. 197 of the CCP) or refuse to submit documents (Art. 220 of the CCP) regarding facts that have come to their knowledge in the course of the performance of their duties.

7.3 What are the rules in Japan with respect to disclosure by third parties?

A petition for an order to submit documents may be filed against the parties involved in an action as well as an owner of documents who is a third party (Art. 221 of the CCP). However, courts rarely order a third party that refuses to voluntarily submit documents to submit such documents.

7.4 What is the court's role in disclosure in civil proceedings in Japan?

A court against which a petition for an order to submit documents is filed gives judgment after listening to the written or oral opinions of an owner of the documents. Please also see question 7.1.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Japan?

Basically, there are no special restrictions. If a confidentiality order is given by a court regarding intellectual property or trade secrets, such documents shall not be used or disclosed for any purpose other than pursuit of an action.

8 Evidence

8.1 What are the basic rules of evidence in Japan?

The basic rules of evidence are set forth in "Chapter IV Evidence" of the CCP.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In principle, there is no restriction on the admissibility in evidence. Any person or item, including hearsay evidence and expert opinions, can be provided as evidence, and judges determine whether or not evidence is admissible at their own discretion. Evidence that violates confession agreements executed between the parties or an agreement restricting methods of evidence is not admissible.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Examination of witnesses is performed in open court after the parties have filed petitions with the court and after the court has designated witnesses to be admitted and called the witnesses to be examined on the date of examination (Art. 180 and Art. 181 of the CCP). In principle, under the law, persons subject to the jurisdiction of Japan are obliged to be witnesses (Art. 190 of the CCP). However, examination is normally filed after the consent of candidates for witness has been obtained in advance for administrative reasons. Courts rarely give sanctions to persons who refuse to be witnesses. Although there is no law or ordinance regarding witness statements, written witness statements submitted in advance are substituted for direct examination for administrative reasons. There are no depositions existing in common law jurisdictions.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are no particular rules regarding instructing expert witnesses. Courts appoint persons who are unlikely to give unfair appraisals as appraisers, and such persons are required to swear that they will tell the truth in court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Japan?

Parties in civil proceedings have the authority and power, as well as the responsibility, to submit evidence, and, in principle, examination of evidence based on the court's own authority is not permitted. However, methods of examination of evidence and whether or not evidence is admissible are determined at the court's own discretion.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Japan empowered to issue and in what circumstances?

Judgments (*hanketsu*) are employed for final or interlocutory judgments regarding important matters, especially actions. Judgments are divided into final judgments and interlocutory judgments depending on whether or not a hearing has been completed in a court of any instance. Decisions (*kettei*) and Orders (*meirei*) are issued regarding matters relating to control of court proceedings, resolution of incidents, civil execution and preservation regarding matters other than those for which judgments are issued.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Damages are admitted by a court if a party that claims for damages proves such damages and no reasonable doubts are raised by courts regarding such damages. If the occurrence of damage has been proved with evidence and if it is difficult to prove the amount of such damage with evidence, the court may approve an amount of

damage deemed reasonable by the court (Art. 248 of the CCP). Courts must approve interests in accordance with the consent of the parties or a legal rate. Regarding costs, please see question 1.5.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Settled domestic judgments are enforced against the individual property of a debtor in accordance with the Civil Execution Act. If a court determines that the requirements for approval stipulated in Art. 118 of the CCP have been satisfied and a judgment of execution is separately obtained in a Japanese court, foreign judgments may be enforced based on such judgment of execution in accordance with the Civil Execution Act. The requirements for approval stipulated in Art. 118 of the CCP mean: (i) jurisdiction of a foreign court is admitted; (ii) opportunities for a defeated defendant to defend an action are guaranteed; (iii) the details of judgments and proceedings are not contrary to the public policies of Japan; and (iv) there is mutual guarantee regarding judgments between Japan and the relevant foreign country.

9.4 What are the rules of appeal against a judgment of a civil court of Japan?

It is basically possible to appeal judgments of first instance courts twice. The first appeal is called "*kouso*". The first appeal is for *ex post facto* review of judgments of first instance courts, and whether claims made in first instance courts are right or wrong is not directly reviewed.

Basically, an appeal against "*kouso*" judgments (*joukoku*) may be made to the Supreme Court as a second appeal. Appeal concerning issues related to facts is not allowed in a second appeal. A second appeal is allowed only if such appeal is made on the grounds of breach of the constitution, other laws or ordinances. Courts subsequently review the procedures of original judgments and the process of determination accepting the facts admitted in original judgments.

Both "*kouso*" and "*joukoku*" are performed against the original court by submitting documents within 14 days from the date on which the relevant original judgment document was served.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Japan? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

ADR, which is most frequently used in commercial disputes, is a form of civil mediation processed by courts. Unlike actions, the purpose of civil mediation is to resolve disputes with the consent of the parties, taking actual situations into consideration by encouraging compromise in accordance with the equitable rule of reason, based on legal evaluation after a mediation committee consisting of a judge and more than two mediators selected from the public has listened to the opinions of parties and investigated the facts if necessary. Civil mediation procedures are simple compared to those of actions; the costs are fixed and the procedures are not disclosed. Mediation reports describing the

details of compromises have the same validity as final judgments, and compulsory execution may be performed based thereon.

Although commercial arbitration has not been used actively as a means to resolve domestic disputes in Japan, it has gradually become an important means to resolve disputes, and international disputes in particular.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Arbitration Act (Act No. 138 of 2003) and the Civil Mediation Act (Act No. 222 of 1951).

1.3 Are there any areas of law in Japan that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Resolution by ADR is permitted unless the positions of the parties are completely different and there is no chance of reconciliation, or in the case resolution by reconciliation between the parties is not permitted because the rights of a third party would be affected by such reconciliation, or in criminal cases, etc.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Japan in this context?

In accordance with Paragraph 1, Art. 35 of the Arbitration Law, an arbitral tribunal or parties may file a petition against a court to require entrustment of investigation, examination of witnesses, appraisal, documentary evidence, and inspection set forth in the CCP, as deemed necessary by an arbitral tribunal. Unless it is otherwise set forth in the Arbitration Law, courts are not permitted to intervene in arbitration. A court dismisses an action if it determines that there is an effective arbitration agreement.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Japan in this context?

Arbitral judgments have the same binding effects as final judgments (Paragraph 1, Art. 45 of the Arbitration Law). Appeal against

arbitral judgments may not be filed with a court; however, arbitral judgments may be set aside for reasons stipulated in the UNCITRAL Model Law. Mediation reports describing the details of concluded reconciliation have the same validity as final judgments in civil mediation at courts (Art. 16 of the Civil Mediation Act, and Art. 267 of the CCP); however, no other settlement agreement has the same validity as a final judgment, unless such settlement agreement is in the form of a document notarised by public notary which contains a statement to the effect that the obligor will immediately accept compulsory execution. There are no sanctions for refusing to mediate by the court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Japan?

Arbitration:

- Japan Commercial Arbitration Association (JCAA).
- Japan Shipping Exchange.

Mediation:

- Courts.
- Financial Instruments Mediation Assistance Centre (FINMAC).
- Japan Bankers' Association.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

As a result of the recent continuous active expansion of Japanese companies and Japanese law firms into the ASEAN region, there is a trend toward growing legal needs with respect to transactions and disputes in the ASEAN region. Japanese companies strongly prefer to avoid resolution of disputes by national courts in the ASEAN region, and they have a tendency to desire to resolve disputes by ADR, and arbitration in particular. There is a trend towards choosing Hong Kong or Singapore as a place of arbitration.

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IWATA GODO
Established 1902

Iwata Godo, established in 1902, is the oldest law firm in Japan. Iwata Godo has traditionally focused on dispute resolution, including litigation and arbitration, etc., which is the most important field for the firm, and has accumulated significant experience and know-how in the area. Iwata Godo has dealt with all types of disputes, including litigations relating to the environment, injunctions of the operation of nuclear power generation plants, commercial litigations, litigations related to the Antimonopoly Act, litigations related to intellectual property, and litigations related to financial products, and has acted as counsel for financial institutions, manufacturing companies, electric power companies and other listed companies. Recently Iwata Godo has been actively dealing with international commercial arbitrations and litigations conducted in and outside Japan.

Kazakhstan

Sergei Vataev



Roman Nurpeissov



Dechert Kazakhstan Limited

LITIGATION

1 Preliminaries

1.1 What type of legal system has Kazakhstan got? Are there any rules that govern civil procedure in Kazakhstan?

Kazakhstan is a civil law country. Rules of civil procedure are contained in the Civil Procedure Code of the Republic of Kazakhstan (“CPC”). Regulatory resolutions of the Supreme Court and Constitutional Council as well as applicable ratified international treaties also form part of the body of mandatory rules governing the sphere of civil procedure.

1.2 How is the civil court system in Kazakhstan structured? What are the various levels of appeal and are there any specialist courts?

Kazakhstan has a four-tiered judicial system: (1) trial courts; regional courts, which are divided into (2) an appellate chamber and (3) a cassation chamber; and (4) the Supreme Court.

Any complaint is initially filed with a trial court. Trial courts comprise district courts, specialised interdistrict economic courts, specialised interdistrict juvenile courts, or military courts. A party may appeal the trial court’s decision with the appellate chamber of the respective regional court within 15 days from the day the trial court’s decision was handed to the party. If the decision is not appealed within this period, it becomes enforceable.

The appellate court’s resolution becomes enforceable the moment it is announced. Though the parties have to comply with the binding appellate court’s resolution, they may appeal it further with the pertinent cassation panel within six months.

The cassation panel’s resolution may further be appealed with the Supreme Court. The Supreme Court may review any lower court’s decision within one year of the date the lower court’s decision becomes enforceable. The petitioner requests the Supreme Court to reconsider the case in what is called “the supervisory manner”. The Supreme Court’s review, however, is discretionary.

The Supreme Court first conducts a preliminary hearing by a panel of three Supreme Court judges; if it decides to initiate supervisory proceedings, then the supervisory panel, consisting of at least five judges, is convened to review the case.

In very rare instances (i.e., when the supervisory panel’s ruling could lead to severe and irreversible effects on the lives and health of people, or economy and security of the state), the ruling of the Supreme Court’s supervisory panel can be further reviewed by a panel consisting of at least seven judges of the Supreme Court.

1.3 What are the main stages in civil proceedings in Kazakhstan? What is their underlying timeframe?

The main stages in civil proceedings are as follows: (1) plaintiff filing the complaint; (2) the court’s preparation of the case to the hearing (i.e., issuing subpoena, rules on injunctive relief sought (if any), holding preliminary consultations with the parties, etc.); (3) defendant filing a response to the complaint or counterclaim; and (4) the hearing.

Under the general rule, trial courts must resolve civil disputes within two months after the preparatory stage is complete. Reduced deadlines apply to disputes involving mandatory hospitalisation into a psychiatric facility, cases involving restructuring of financial companies, and claims of illegal strikes. Certain employment cases, claims for alimony support, and complaints against the decisions or actions of state bodies or officials must be reviewed within one month after the preparation is complete.

An appeal must be reviewed within one month after the appeal is received; if there is a need for additional scrutiny, the term may be increased to two months. A cassation appeal must be reviewed within one month of receipt of the cassation appeal. A supervisory petition to the Supreme Court is previewed within one month and then if the supervisory panel is convened, it has one month to rule on the petition.

1.4 What is Kazakhstan’s local judiciary’s approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are generally enforceable unless they change the exclusive jurisdiction rules of the CPC, including, *inter alia*, rules that lawsuits with regard to real property must be filed with a court in the district where such real property is located, and that lawsuits of testator’s creditors must be filed with a court in the district where the estate or its main part is located.

1.5 What are the costs of civil court proceedings in Kazakhstan? Who bears these costs? Are there any rules on costs budgeting?

Costs of civil litigation include the state filing duty and various other expenses including, *inter alia*, payments to experts, witnesses,

attorneys' fees, etc. The state filing duty is either expressed in Monthly Calculation Indexes (1 MCI equals approx. \$10.8 at the current exchange rate) or as a percentage of the claimed amount of money or claimed value of property, e.g., companies pay 3% and individuals pay 1% of the claimed amount of money or of the value of claimed property.

The court orders the losing party to cover the prevailing party's expenses, including attorneys' fees (capped at 10% from the granted part of the complaint in cases of monetary claims). If the court partially satisfies the complaint, litigation costs shall be distributed between plaintiff and defendant proportionately.

All costs must be properly documented in order to be accepted as evidence.

1.6 Are there any particular rules about funding litigation in Kazakhstan? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no specific rules or restrictions on funding litigation. Any fee arrangements are allowed, including contingency/success/conditional fee arrangements. There are no formal rules on attorneys' security for costs of litigation.

1.7 Are there any constraints to assigning a claim or cause of action in Kazakhstan? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The general rule is that a claim may be assigned unless it is inherently tied to the identity of the claimant. A non-party to litigation may finance the proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For certain claims (e.g., claims under the law on Merchant Sea Shipping, consumer lawsuits), before resorting to the judiciary, the claimant must first submit its claim to the defendant.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Under the general rule, a period of limitation is three years from the date the plaintiff became aware or should have become aware that his rights or interests were violated. However, in certain instances, the period of limitation is shorter (e.g., a claim against a passenger railway or water carrier must be brought within six months of the occurrence of the event that gave rise to the claim; claims against a cargo or mail railway or sea carrier must be brought within one year; claims that a contract is void may be filed within one year from the date the plaintiff became aware or should have become aware of grounds for invalidating the contract), or longer (the statute of limitations in tax and customs cases is five years). Certain claims (e.g., copyright, payment of housing utilities) are not subject to the period of limitations.

According to certain resolutions of the Supreme Court, time limits are treated as a substantive law issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Kazakhstan? What various means of service are there? What is the deemed date of service? How is service effected outside Kazakhstan? Is there a preferred method of service of foreign proceedings in Kazakhstan?

If the complaint meets all the prescribed requirements, the judge issues a ruling on initiating the civil proceedings. The subpoena is usually served either by mail (regular or with the "return receipt requested" service), text message, or other means of communication. Subpoenas are served on the defendant with a copy of the plaintiff's complaint and any other documents that were attached to the complaint.

Subpoenas must be served personally on a party, and if a party is a company, then a person with management functions at the company should be served (and such person should sign the return slip, and state his name and position on it). If the intended addressee is absent from his place of abode or at his business address then the serving party may leave the subpoena with adults living together with the missing individual if they do not object to that, or with the respective administration within the missing individual's housing block or office. The person receiving the subpoena on the missing individual's behalf should fill in the return slip, and as soon as it becomes possible, give the subpoena to the intended recipient. In these cases, the intended party would be deemed to have been notified of the need to appear before the court on the date the subpoena was left with another adult or administration, as directed by the CPC. A party's refusal to accept the subpoena does not block the court from proceeding to reviewing the case on the merits or performing other procedural acts.

There are no specific rules regarding service outside of Kazakhstan and there is no preferred method of service of foreign proceedings in Kazakhstan.

3.2 Are any pre-action interim remedies available in Kazakhstan? How do you apply for them? What are the main criteria for obtaining these?

In its pleadings the plaintiff may request the court for injunctive relief in cases when a failure to grant the injunction may hinder enforcement or make it impossible to enforce the court decision. Injunctive measures may include, *inter alia*, a freeze on the defendant's assets, prohibition to perform certain activity, prohibition for third parties to transfer property to the defendant, etc. The injunctive relief shall be commensurate with the plaintiff's claims.

3.3 What are the elements of the claimant's pleadings?

The plaintiff's written complaint must state:

- 1) the name of the court with which the complaint is filed;
- 2) the plaintiff's personal details, address (for individuals) or the business name, place of registration, factual business address (for businesses), identification number, bank account and the representative's name, and his address – if the representative files the complaint – and cell phone number and email (if any);

- 3) the defendant's personal details and address (for individuals) or the business name, factual business address (for businesses), and its identification number, cell phone number and email – if the plaintiff is aware of these details;
- 4) the gist of the violation or threat to plaintiff's interests, and the relief sought;
- 5) arguments on which the claims are based, and supporting evidence;
- 6) the amount of claim (if one exists); and
- 7) a list of attached documents.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes, the pleadings may be amended before the court has finished reviewing the case on the merits and turned to concluding arguments. In its concluding oral arguments a party may not point to circumstances or evidence that the court did not examine previously as part of reviewing the case on the merits.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

After receiving the subpoena with a copy of plaintiff's complaint, the defendant must file his response. The defendant's response must contain:

- 1) the plaintiff's details;
- 2) the defendant's details;
- 3) the defendant's counterarguments with respect to the essence of the raised claims, with references to the applicable law and evidence supporting the defendant's position; and
- 4) a list of attached documents.

At any time before the court issues its decision, the defendant may also file his counterclaim to be reviewed jointly with the plaintiff's complaint. Set-off defence is allowed.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant's response shall be served within the time period set by the court, which time period shall ensure that the plaintiff can review the defendant's response prior to the start of the hearing.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

If the defendant believes that he should not be the only party held accountable, he may join co-defendant(s), or if he believes that he is not the proper defendant, he may file a claim against a third party that he believes to be the proper defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant who was duly notified of the court hearing does not appear in court to defend the claim, the court may proceed to hear the matter even without the defendant, if the cause of defendant's absence is unknown or the court finds it inexcusable, or believes that the defendant is wilfully procrastinating.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, if, for example, the lawsuit was filed with the court located outside of the district where the defendant dwells, or if the lawsuit concerns real estate but is filed with the court outside of the district where the disputed real estate is located, or when the plaintiff and defendant agree to litigate at a different court in their contract, or their contract has an enforceable arbitration clause.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In civil cases, two categories of third parties can be joined into ongoing proceedings:

- (a) third parties with independent claims to the subject matter of dispute; and
- (b) third parties without independent claims to the subject matter of dispute.

A third party with independent claims to the subject matter of dispute may join into ongoing proceedings only by filing a statement of claim against one or all of the parties to the proceedings.

A third party without independent claims to the subject matter of dispute is entitled to join into ongoing proceedings if a court decision may affect the third party's rights or obligations to any of the parties to the ongoing proceedings. The court may decide to join such a third party (i) at the court's own initiative, or (ii) on a motion by the third party or any of the parties to the ongoing proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If the court finds it expedient to do so, the court may consolidate into one set:

- (a) sets of proceedings between the same claimant and defendant;
- (b) sets of proceedings related to claims of the same claimant to different defendants; or
- (c) sets of proceedings related to claims of different claimants to the same defendant.

5.3 Do you have split trials/bifurcation of proceedings?

If the court finds it expedient to do so, the court may split into several sets of proceedings:

- (a) one set of proceedings related to different claims between the same claimant and defendant;
- (b) one set of proceedings related to claims by several claimants; or
- (c) one set of proceedings related to claims against several defendants.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Kazakhstan? How are cases allocated?

Detailed rules on jurisdiction govern allocation of cases between different courts.

The allocation of cases between different judges of the same court is automated using a computer program. The program takes into account several criteria including availability of judges (workload, temporary absence, etc.), their areas of expertise, language of the statement of claim, complexity of cases, etc.

6.2 Do the courts in Kazakhstan have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have various case management powers, including the following powers: to stay or terminate proceedings; to adjourn or bring forward a hearing; to consolidate or split proceedings; to set a time period for submission of a statement of defence; to order a defendant, witness, expert, specialist or translator to attend the court; or to order inspection of evidence outside of court premises.

Parties can make interim applications, including motions to impose security measures, to involve third parties, to involve an expert or specialist, to retrieve evidence, or to call witnesses.

Only some of such applications entail cost consequences. A party making the application that entails costs covers the relevant costs. When finalising the proceedings the court allocates, or approves allocation of, costs between the parties.

6.3 What sanctions are the courts in Kazakhstan empowered to impose on a party that disobeys the court's orders or directions?

Courts may impose various sanctions. Non-compliance with a court act is punishable by an administrative fine from 10 to 50 MCI or arrest up to five days; protracted non-compliance is a criminal offence punishable by imprisonment up to seven years. Contempt of court is punishable by an administrative fine of up to about 30 MCI or an administrative arrest of up to 10 days, while gross contempt of court leads to criminal liability. The court may also order to forcibly bring a defendant, witness, expert, specialist or translator to court.

6.4 Do the courts in Kazakhstan have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts do not have the power to strike out a part of a statement of claim. If a statement of claim or its part is defective (e.g., if

the statement of claim does not contain some required information, or if a document confirming payment of a court fee or confirming authority to sign the statement of claim is not filed together with the statement of claim), the courts issue a ruling to leave the statement of claim motionless and give the claimant time to correct indicated defects. If the defects are not corrected in time, the court refuses to admit the statement of claim and returns it to the claimant.

Once the court has admitted the statement of claim and started proceedings, the court may dismiss the case entirely ("leave the statement of claim without consideration") in several circumstances, including, but not limited to, the following:

- (a) the claimant has not complied with preliminary dispute resolution procedures (mandatory for some types of claims) and it is still possible to engage in such procedures;
- (b) the statement is filed by a legally incapacitated person;
- (c) the statement is signed and filed by a person who lacks authority; or
- (d) the claimant has not attended the proceedings after second summons and has not requested the court to consider the case in his absence.

6.5 Can the civil courts in Kazakhstan enter summary judgment?

For some categories of claims, the law provides for simplified procedures under which the court can issue a court order under expedited and simplified proceedings without a trial.

6.6 Do the courts in Kazakhstan have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Courts have such powers in Kazakhstan. A court *must* stay the proceedings if:

- (a) a legal entity that is a party to the proceedings is reorganised or liquidated, and can be succeeded with respect to the rights and/or duties which are the subject matter of the dispute;
- (b) an individual who is a party to the proceedings dies and can be succeeded with respect to the rights and/or duties which are the subject matter of the dispute;
- (c) an individual who is a party to the proceedings loses its legal capacity;
- (d) an individual who is a defendant in the proceedings is drafted for military service;
- (e) it is impossible to proceed until another civil, criminal, or administrative case is resolved;
- (f) if the court finds that an applicable legal act violates constitutional rights, and seeks a determination by the Constitutional Council on the constitutionality of that legal act;
- (g) the court addresses a foreign court with a request for legal assistance; or
- (h) if parties to the proceedings conclude an agreement to mediate.

At the court's own initiative or based on a motion by any of the parties or participants of the proceedings, a court *may* stay the proceedings if:

- (a) an individual who is a party to the proceedings is drafted for military service or for other state service;
- (b) an individual who is a party to the proceedings is on a business trip that is longer than the duration of the proceedings;
- (c) an individual who is a party to the proceedings is in a medical institution due to an illness because of which he/she is not able to attend the proceedings;
- (d) the court appoints an expert review;

- (e) the court addresses a Kazakhstan court with a request for legal assistance; or
- (f) there are some other narrowly defined specific reasons.

A court *must* terminate the proceedings if:

- (a) a case is not subject to proceedings under civil procedure rules;
- (b) there is a court decision that is in effect and concerns the same dispute (i.e., the same subject matter and the same grounds) between the same parties;
- (c) there is a court resolution terminating other proceedings that is in effect and concerns the same dispute between the same parties;
- (d) there is an arbitral decision that is in effect and concerns the same dispute between the same parties;
- (e) the claimant abandons its claim and such abandonment is approved by the court;
- (f) the parties have concluded a settlement agreement and it is approved by the court;
- (g) the parties have concluded a settlement agreement on the basis of mediation procedures and it is approved by the court;
- (h) an individual who is a party to the proceedings dies and *cannot* be succeeded with respect to the rights and/or duties which are the subject matter of the dispute; or
- (i) a legal entity that is a party to the proceedings is reorganised or liquidated, and *cannot* be succeeded with respect to the rights and/or duties which are the subject matter of the dispute.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Kazakhstan? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There are no rules of disclosure in civil proceedings in Kazakhstan. Any party to the proceedings may file with the court a motion to retrieve evidence from another party or third party to the proceedings, or from persons or entities who are not parties. A party filing the motion must: (a) specify what piece of evidence should be retrieved; (b) indicate the location of the evidence; (c) explain what relevant facts can be confirmed or refuted by the evidence; and (d) explain why the party filing the motion cannot obtain the evidence on its own. If the motion is approved, a court issues a binding ruling ordering the evidence to be retrieved. The court may provide other assistance.

7.2 What are the rules on privilege in civil proceedings in Kazakhstan?

Kazakhstan law protects “*advocates’ secrets*”, a rather limited form of attorney-client privilege that applies only to legal services rendered by *advokats* (attorneys with special status).

7.3 What are the rules in Kazakhstan with respect to disclosure by third parties?

See the answer to question 7.1 above.

7.4 What is the court’s role in disclosure in civil proceedings in Kazakhstan?

See the answer to question 7.1 above.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Kazakhstan?

Any party that receives confidential documents in the course of court proceedings is under a statutory obligation not to disclose such documents.

8 Evidence

8.1 What are the basic rules of evidence in Kazakhstan?

The general principle of evidence is that any lawfully obtained factual information, on the basis of which the court can establish the existence or absence of circumstances which support the allegations and objections of the parties, as well as any other circumstances relevant for proper resolution of the case, shall be deemed evidence.

The CPC provides a non-exhaustive list of evidence examples: explanations of parties; witness testimony; material evidence; expert conclusions; records of procedural actions and court hearings; and other documents.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The rules on admissibility are quite broadly worded: the evidence is admissible if it is obtained in the manner provided for in the CPC. However, there is a reservation: if the law requires proving of specific circumstances by specific means, no other evidence would be admissible.

The CPC also provides that evidence must be recognised inadmissible if it was obtained through violation of the legal rights of parties, or the violation could affect the credibility of evidence.

Expert conclusions are admissible, and if they are used, they play a significant role in proceedings.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Any party who has any knowledge of the circumstances that have significance for the matter may be called as a witness; however, the witness is supposed to specify the source of his/her knowledge of the circumstances. If he/she cannot do so, the testimony would not be accepted.

Certain individuals cannot be called as witnesses: minors and those incapacitated by age or other conditions from adequately perceiving the facts or providing testimony; attorneys and advocates representing clients in civil cases and criminal cases, respectively, cannot be questioned about facts they learned in connection with such representations; judges cannot be questioned about deliberations about a judicial decision or a verdict; arbitrators and mediators cannot be questioned about facts they learned as a result of performing their duties; clergymen cannot witness about information received in confession; and anyone can refuse to testify against himself/herself, their spouse or close relatives.

If a witness is called by the court at the request of a party, he/she is obligated to appear and testify. Evasion of appearance, refusal to testify and perjury are criminal offences.

The CPC provides that a witness who cannot appear in the court due to age, health problems or other good causes may be questioned in his/her location. The CPC does not establish detailed rules on taking such testimony other than that the taking of testimony is made in the form of a court hearing, and the records of that hearing must be immediately sent to the requesting court.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

An expert witness is appointed by the court. The parties have a right to recommend a specific institution or an individual whom it would like to be appointed the expert, as well as provide the court with the set of questions which it wishes the expert to answer. The court is not bound by the party's recommendations as to the expert, and has broad discretion in appointing the expert. The list of questions is decided by the court and if it excludes any of the questions proposed by a party, it must provide reasoning for doing so.

There is a government-specialised institution under the Ministry of Justice called the "Judicial Expert Centre" whose experts are typically used by the courts in Kazakhstan. There are also private licensed experts, and the courts may appoint any other person on a one-off basis in certain situations. The expert activity is governed by the law "On judicial expert activity in the Republic of Kazakhstan" and other regulations developed in furtherance of this law. The experts owe their duty to the court and bear criminal liability for providing knowingly false conclusion. It is prohibited to influence the expert or otherwise interfere with expert activity.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Kazakhstan?

The rules of the CPC are that the court does not have any obligation to collect evidence, and the burden of proof is borne by the parties to the proceedings. However, the court may render assistance to a party at its request if the party cannot obtain certain evidence on its own, and can issue an order requiring a third party to provide the sought evidence to the court.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Kazakhstan empowered to issue and in what circumstances?

The courts can issue orders, decisions, rulings and resolutions. A court order is issued in expedited and simplified proceedings (similar to summary judgment). A decision is issued when the trial court decides the case on merits. Any court act that does not decide the case on merits is issued in the form of ruling. Resolutions are issued by appellate and cassation courts.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court has full authority to award damages to the affected party, should it find that the defendant is liable for those. Although the

Civil Code definition of damages includes both actual loss and lost profit, in certain cases, as defined by law, only actual loss may be recovered.

The courts may award statutory interest on the monetary amounts for the time these amounts were not in the rightful owner's possession.

The courts can award the costs of litigation (see the answer to question 1.5 for details).

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment must be recognised and enforced by all entities and individuals in Kazakhstan. Incompliance with a court act may result in criminal liability.

A foreign court decision may be enforced in Kazakhstan only if there is a treaty between Kazakhstan and the country whose court issued that decision.

9.4 What are the rules of appeal against a judgment of a civil court of Kazakhstan?

A trial court decision may be appealed, as described in greater detail in the answer to question 1.2.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Kazakhstan? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The Kazakhstan CPC recognises mediation and arbitration as methods of ADR. There are special laws on mediation and arbitration.

Parties may use mediation before court proceedings and they can resort to it in the course of the court proceedings. Settlement agreements as a result of mediation approved by the court are considered final and a dispute cannot be tried in the court if it is settled in mediation. The statute of limitation is suspended for the time of mediation proceedings.

Arbitration is a lawful method of resolving disputes arising out of civil law relationships. Bankruptcy, family, labour and non-property related disputes cannot be subject to arbitration. Arbitration in Kazakhstan is regulated by laws on domestic arbitration and international arbitration. The general principles are the same for both types. There are certain differences in the scope of eligible parties and arbitrable issues. Disputes that concern the interests of government or government entities, or involving services or goods of natural monopolies or dominant entities, cannot be resolved through domestic arbitration. International arbitration may be used if at least one party is a foreign entity/individual, and no restrictions pertaining to the government affiliation or status of a monopoly/dominant market player are applicable.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

There are laws of the Republic of Kazakhstan “On Mediation”, “On Arbitral Tribunals”, and “On International Arbitration”.

1.3 Are there any areas of law in Kazakhstan that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Any dispute involving the interests of a minor or incapacitated person cannot be resolved by any of the ADR methods.

A dispute involving a state body cannot be resolved by means of mediation.

For limitations on arbitration please see the answer to question 1.1.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Kazakhstan in this context?

Before starting the court proceedings the court must explain to the parties their right to resolve the dispute through mediation or arbitration. If the parties choose to arbitrate, the court must terminate the judicial proceeding. Should the parties opt for mediation, the court should suspend the judicial proceeding. The courts approve settlement agreements resulting from the process of mediation. The courts issue the execution writ in relation to the arbitral awards issued by arbitral tribunals. The court can impose (and lift) interim measures on the request of the parties to arbitral proceedings.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Kazakhstan in this context?

Arbitral awards are enforced by means of issuance of an execution writ by a court. In that regard their force is equal to that of court decisions.

An arbitral award may be challenged by a party or a third party whose interests it affects in the court in limited circumstances (such as procedural violations and public policy considerations).

The settlement agreements reached in mediation are subject to the court’s approval if the decision to mediate was made in the course of a court proceeding.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Kazakhstan?

The most active ADR institutions in Kazakhstan are the:

- Kazakhstan International Arbitrage;
- International Arbitration Court “IUS”;
- IAC (the Independent Arbitration Center);
- International Commercial Arbitration Court of Eurasian Mediation Center; and
- Unified Center of Mediation and Peacemaking “Mediation”.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Mediation is currently being popularised throughout the country by the judicial bodies as a more peaceful method of dispute resolution compared to litigation.

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Liechtenstein



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Liechtenstein got? Are there any rules that govern civil procedure in Liechtenstein?

Liechtenstein is a civil law country. The laws are codified in several acts. The relevant acts for litigation are the following:

- the Liechtenstein Code of Civil Procedure (“*Zivilprozessordnung*”; hereinafter: LCCP), which governs contentious matters in front of civil courts;
- the Liechtenstein Jurisdiction Act (“*Jurisdiktionsnorm*”; hereinafter: LJA), which governs the jurisdiction of courts; and
- the Liechtenstein Enforcement Code (“*Exekutionsordnung*”; hereinafter: LEC), which governs the enforcement of judgments as well as of arbitral awards and contains provisions regarding preliminary injunctions.

In addition, non-contentious procedural rules are contained in the Liechtenstein Code of Non Contentious Matters (“*Ausserstreitgesetz*”; hereinafter: LCNM) for certain civil matters in front of civil courts.

Liechtenstein has concluded a treaty with Switzerland on the recognition and enforcement of judgments and arbitral awards in civil matters. A similar treaty exists with Austria. Liechtenstein is also part of the Convention on Enforcement of Judgments regarding maintenance obligations towards children and the Convention on Recognition and Enforcement of foreign arbitral awards (New York Convention). Liechtenstein is not a party to the Lugano/Brussels Conventions.

1.2 How is the civil court system in Liechtenstein structured? What are the various levels of appeal and are there any specialist courts?

On the first level, civil proceedings are initiated before the Princely Court of Justice (“*Fürstliches Landgericht*”; hereinafter: PCJ). The PCJ is competent for all civil matters. There are no specialist courts. The decision of the PCJ may be appealed to the Princely Court of Appeals (“*Fürstliches Obergericht*”) on points of facts and law. The decision of the Court of Appeals can be appealed to the Princely Supreme Court (“*Fürstlicher Oberster Gerichtshof*”) on points of law only.

1.3 What are the main stages in civil proceedings in Liechtenstein? What is their underlying timeframe?

The statement of claim (“*Klage*”) is filed with the PCJ and passed by the court on to the defendant. In the case of a foreign claimant, the court fixes a first hearing, which exclusively serves to determine the amount to be provided by the claimant in order to secure the defendant’s legal costs. This is not the case for a domestic claimant. Once the security has been lodged with the court, the proceeding starts with the court’s order to file an answer to the complaint. The length of the proceedings in the first instance depend entirely on the number of witnesses to be heard and whether they appear before the PCJ or need to be heard via letters rogatory abroad. Under normal circumstances a judgment of the PCJ should be available within one year after the filing of the complaint. To acquire a final judgment, which normally requires three instances, it might take up to three years.

1.4 What is Liechtenstein’s local judiciary’s approach to exclusive jurisdiction clauses?

Parties who have no link to Liechtenstein may agree in writing to submit to the jurisdiction of the PCJ. Normally lawsuits are filed based on the rules of competence contained in the LJA.

1.5 What are the costs of civil court proceedings in Liechtenstein? Who bears these costs? Are there any rules on costs budgeting?

Legal costs comprise court fees and – if necessary – fees for experts, interpreters and witnesses. The court fees are governed by the Court Fees Act (“*Gerichtsgebührengesetz*”). Lawyers’ fees are reimbursed according to the Lawyers’ Fees Act (“*Rechtsanwaltstarifgesetz*”). The court states who has to bear the costs or the proportion in which the costs of the proceedings are to be shared. The court fees and lawyers’ fees are calculated on the basis of the amount in dispute.

As regards fee arrangements between lawyers and clients, hourly fees are quite common. The hourly rates usually range between CHF 400.00 and CHF 600.00.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Liechtenstein? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Lawyers' fees are subject to the Lawyers' Fees Act, and in the decision the court only awards the amount based on the Lawyers' Fees Act as part of the court fees.

Apart hourly fee agreements are usual. Lump sum fees are not prohibited as is the case for success fees. Contingency fee agreements are not allowed if the attorney shall be remunerated with a share of the amount in dispute.

If parties who cannot afford to pay costs and fees prove that their financial means are insufficient, legal aid ("*Verfahrenshilfe*") is granted to them. Consequently, they are exempt from paying court fees and provided with a lawyer free of charge. This person is legally obliged to pay back the legal aid if she/he is able to do so without an impact on the necessary maintenance within three years after having been granted the legal aid.

As stated above, foreign claimants have – upon a defendant's request – to deposit security for legal costs, unless international agreements provide otherwise. This does not apply if the cost decision is enforceable in the claimant's home jurisdiction or if the claimant disposes of sufficient immovable assets in a country in which it can be enforced (this is either Austria or Switzerland). Furthermore, there are certain civil law matters which exclude such an obligation (e.g. matrimony disputes).

1.7 Are there any constraints to assigning a claim or cause of action in Liechtenstein? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no rules in place which would prohibit third party financing of a lawsuit.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Except for some special proceedings, a hearing at the mediation office in each municipality is required before a claim may be filed.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The substantive law governs the limitation periods.

Liechtenstein knows an absolute (long) limitation period of 30 years and a short limitation period of three years (e.g. for damage claims). The absolute limitation period always applies whenever other provisions do not apply otherwise. There is a special limitation period of five years for certain claims. The statute of limitation generally commences when a right could have been first exercised. If a claim is statute-barred, it is not enforceable anymore. The Liechtenstein Civil Code contains a special absolute limitation period for damage claims in connection with financial services. The period expires 10 years after the service was rendered.

The law explicitly states that the court has no obligation to take the statute of limitation into consideration unless a party has explicitly argued so.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Liechtenstein? What various means of service are there? What is the deemed date of service? How is service effected outside Liechtenstein? Is there a preferred method of service of foreign proceedings in Liechtenstein?

The proceedings are initiated by the submission of the statement of claim ("*Klage*") with the court. Upon receipt by the court, the claim is officially submitted. The court then sends the claim, together with a summons for the first court hearing, to the defendant at the address provided by the claimant. The date of service is the date on which the defendant actually receives the claim and summons or has the possibility to fetch it from the post office in case of consignment.

The service of a statement of claim abroad is usually done via letters rogatory.

3.2 Are any pre-action interim remedies available in Liechtenstein? How do you apply for them? What are the main criteria for obtaining these?

Liechtenstein law does not provide for rules of pre-trial discovery.

Prior to filing a statement of claim, the claimant may ask the court for interim relief through various measures such as the seizure of assets, order to abstain from certain actions, etc. These measures are usually granted in case a claim whose realisation is endangered by the defendant's actions can be shown to the court.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim needs to comprise a specific claim, to state the facts which build the basis of the claim and to declare the supporting evidence.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The pleadings can be amended within the framework of the relief sought. An amendment of the relief sought is only possible under specific circumstances. A restriction lies in the rule that facts have to be included in the pleadings once they are known to the party. It is not admissible to wait with an amendment to the pleadings for tactical reasons. The court may reject those pleadings as dilatory.

As regards the statement of claim, the claimant may amend the statement of the claim as long as it has not been served on the other party. After service, the claimant can only amend the claim with the consent of the other party. However, the court of first instance can grant an amendment even without the other party's consent if the amendment does not result in a major restriction or delay of the proceeding.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The term “statement of defence” is not defined in the LCCP, but it nonetheless exists in practice. Thus, a statement of defence needs to present the facts, provide the court with the evidence and contain a specific request (mainly to dismiss the claim).

The defendant can also raise a counterclaim (“*Widerklage*”) or claim a set-off (“*Aufrechnungseinrede*” or “*Kompensation*”).

4.2 What is the time limit within which the statement of defence has to be served?

The law does not provide for a deadline but if no statement of defence is filed, the court will fix a hearing until which – at the latest – a statement of defence has to be filed or stated orally to the court. Otherwise the defendant is likely to lose the lawsuit. The LCCP does not know the possibility to apply for a default judgment in the case no statement of defence is filed.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The LCCP does not know such a mechanism. In a scenario where a defendant thinks that a third party is ultimately liable for the claim brought against it, the defendant can apply to court that the third party shall be informed about the lawsuit and that it is invited to join the suit on the defendant’s side (“*Streitverkündung*”). The rationale behind this instrument is that in the case the defendant loses and takes redress on the third party, the latter is prevented from stating that the defendant did not use all efforts to win the original lawsuit and that the judgment is incorrect.

4.4 What happens if the defendant does not defend the claim?

If the claim remains “unanswered” by the defendant, but the defendant appears at all court hearings, it is highly likely that it will lose the lawsuit.

4.5 Can the defendant dispute the court’s jurisdiction?

The first formal hearing serves (amongst others) to discuss the plea on incompetence. Thus, the defendant can dispute the court’s jurisdiction but has to do so at the first hearing or with his statement of defence.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, third parties may join an on-going proceeding if they have a legal interest that one party wins the case. The circumstances are described in question 4.3 above.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, it is possible to consolidate two or more proceedings involving the same parties in order to save time and costs.

5.3 Do you have split trials/bifurcation of proceedings?

Yes, the courts can split proceedings and hear claims separately which have been raised in one statement of claim. Likewise, counterclaims may be heard in a split trial.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Liechtenstein? How are cases allocated?

The courts in all instances allocate the cases in accordance with the principles stated in the law on court’s organisation (“*Gerichtsorganisationsgesetz*”). At the PCJ 10 judges sit over civil matters.

6.2 Do the courts in Liechtenstein have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The judge has the power to control the proceeding and thus opens, gives specific instructions to the parties and closes the lawsuit. He is in charge of the time schedule, has the power to order the parties to submit briefs and decides about the schedule concerning the production of evidence. If needed, he also nominates experts.

Parties may file motions concerning e.g. time extensions of hearings, the interrogation of a witness or the stay of proceedings. Usually such motions do not have cost consequences on the parties.

6.3 What sanctions are the courts in Liechtenstein empowered to impose on a party that disobeys the court’s orders or directions?

The judge is responsible for maintaining order during hearings. Persons who disturb a hearing may be warned. If the disturbance is repeated, the judge has the power to exclude this person from the hearing. If the person is a party, a default judgment could be the consequence of the exclusion. If someone insults e.g. a party or a witness, he/she can be punished with a fine. If a lawyer violates the proceeding or insults someone during the hearing, he can either be excluded or punished with a fine. If he repeats the disobedience or opposes the court’s order, the party has to name another representative either during the hearing or after the hearing has been extended.

If a witness fails to show at a hearing a fine is imposed. If a witness fails to testify at all without a valid excuse, he is punished with an administrative penalty. A witness can also be taken under oath.

6.4 Do the courts in Liechtenstein have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

No, as a general rule the courts have to decide over all arguments in a properly filed claim.

6.5 Can the civil courts in Liechtenstein enter summary judgment?

Upon the request of a party, a default judgment is rendered if the other party fails to show at the first hearing.

If the claim is about an order for payment, the claimant may also ask the court to issue a payment order. If the defendant does not file an objection to this order within the time limit, the claimant receives an enforceable title and can proceed to the enforcement stage. If, on the other hand, the defendant replies with an objection within time, the regular litigation takes place.

Liechtenstein law provides for rules which may facilitate the execution of certain claims. If a monetary claim is based on a public document in which the defendant recognises his/her debt, it can be filed as a motion for summary judgment (“*Rechtsöffnungsverfahren*”).

6.6 Do the courts in Liechtenstein have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A proceeding is stayed if both parties agree and accordingly inform the court or if neither party appears at a hearing.

A proceeding is discontinued either by law, e.g. if a party becomes insolvent or by court order based on various reasons the judge can consider as appropriate.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Liechtenstein? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

If a party maintains that a document that is relevant for the evidence is in the hands of the opponent, the court can, upon request, ask the opponent to disclose the document if:

- the opponent has expressly referred to the document in question as evidence;
- the opponent is under a legal obligation to hand it over; or
- the document was made in the legal interest of both parties or certifies a mutual legal relationship between the parties or contains written statements between the parties during their negotiations of a legal act (mutual document).

The opponent can refuse to present the documents if:

- the disclosure concerns documents which affect family life;
- the opponent violates obligations of honour by the delivery of documents;
- the disclosure of documents leads to the disgrace of the party or of any other person or involves the risk of criminal prosecution;

- the disclosure violates any state-approved obligation of secrecy of the party from which it is not released or infringes a business secret; or
- for any other reasons similar to the above.

The LCCP also provides for the possibility to require a third party to disclose documents (under specific) circumstances (see question 7.3). The handover of a mutual document can also be pursued in a specific lawsuit. Pre-action disclosure is not provided for in the LCCP.

7.2 What are the rules on privilege in civil proceedings in Liechtenstein?

Based on the confidentiality rules, an attorney is not obliged to produce documents and facts which he learned due to his/her professional activity and which have to stay secret in the interest of his party. As a witness, an attorney has the right of refusal to give oral evidence if the information has been made available to him in his professional capacity.

7.3 What are the rules in Liechtenstein with respect to disclosure by third parties?

The court may order third parties to disclose if either the third party is under a legal obligation to hand over the document to the requesting party or if the document was drafted in the legal interest of the third party and the requesting party or it certifies a legal relationship between them, or it contains written statements that were made between them during the negotiation of a legal act.

7.4 What is the court's role in disclosure in civil proceedings in Liechtenstein?

Please see question 7.1 above. The judge is in charge of evidentiary proceedings. If the court finds that the motion to oblige the other party to disclose documents is justified, he will issue an according order.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Liechtenstein?

No, there are no restrictions regarding documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Liechtenstein?

Evidence is taken during the proceeding, not before. The parties need to produce the evidence supporting their allegations or where, according to the law, the burden of proof is on them. The judge is free to ponder the evidence and is only obliged to come to sound findings which correspond to life experience. The LCCP does not provide for strict rules of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The types of evidence are documents, party and witness testimony, expert testimony and judicial inspection.

Due to the principle of immediacy, written witness statements are not admissible.

However, expert testimonies are normally contained in written statements. Experts are usually summoned to the hearing to further explain and answer additional questions orally.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Based on the principle of immediacy, there are no depositions and written witness statements are considered as mere documents. Witnesses are obliged to appear at the hearing and to testify. Restrictions exist as e.g. priests may refuse to testify. Specific rules are in place regarding the question when a witness may refuse to answer questions.

Witnesses are first interrogated by the judge and later by parties' legal counsel for additional questions.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

An expert witness assists the court and owes his/her duties to the court. Expert testimony is requested either by the parties or by the judge. The court also orders for the bearing of the expert's costs. The expert witness substitutes the court's lack of knowledge in the specific matter. If summoned, the expert needs to testify orally.

Private expert reports have the status of a private document and are not considered to be expert reports according to the LCCP. However, practice has seen cases in which the opinion of a private expert was decisive.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Liechtenstein?

Due to the fact that the judge is responsible for the conduct of the litigation, he takes evidence which he considers relevant and orders the production of documents (see section 7 above).

He appoints an expert witness if he considers it as necessary, e.g. if the allegations of one party make it necessary.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Liechtenstein empowered to issue and in what circumstances?

Court decisions on the merits about a claim are referred to as judgments ("*Urteil*"). Judgments are in writing.

Decisions of a procedural nature which do not – according to the LCCP – need to be handed down as judgments are referred to as orders ("*Beschluss*"). In specific types of procedures, orders may have the same quality and content as judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The cost decision has to be included in the court's final decision (be it an order or a judgment). If a party fully prevails, it is reimbursed

for the court fees and the lawyers' fees, which are calculated on the basis of the Liechtenstein Lawyers' Fee Act. If the party only prevails partly, it is accordingly reimbursed to the extent it has prevailed. The decision on the cost can be challenged separately.

The awarding of damages is not subject to the cost decision. The court may rule that even the prevailing party has to reimburse costs in case of dilatory behaviour.

9.3 How can a domestic/foreign judgment be recognised and enforced?

If the losing party fails to satisfy the claim, the other party may apply to the court for enforcement of the judgment. Judgments become enforceable if they are final and binding. In this case, the judgment is also referred to as a "title" for the use of enforcement.

The procedural conditions and rules for the enforcement of a judgment are governed by the LEC.

Liechtenstein has bilateral treaties on enforcement and recognition of judgments with Switzerland and Austria (see question 1.1 above).

Apart from these, Liechtenstein is not part of any other convention on enforcement and recognition of foreign judgments.

If the foreign judgments derive from a country other than Switzerland and Austria and is not about maintenance, tutelage and child custody, there is another possible way of procedure by which foreign money judgments can get enforced in Liechtenstein. The judgment creditor needs to file an application for payment order ("*Zahlbefehl*") against the debtor resident in Liechtenstein. If the debtor does not object the payment order within the given time by the court, the payment order becomes final and enforceable and execution can be initiated. If the debtor states an objection to the order, the judgment creditor has to file an application with the PCJ enclosing the foreign money judgment to initiate the so-called summary legal procedure ("*Rechtsöffnungsverfahren*"). After (usually) one court hearing a decision is rendered as to whether the objection against the payment order is being removed or the application is being dismissed. The debtor is obliged to put forward all evidence to sustain his application of dismissal of the claim. In the case that the court rules that the objection is being removed, the debtor has the possibility to file an action with the aim of eliminating the title again. The creditor can ask the court in such a case to secure any assets belonging to the debtor up to the sum of his claim until the final decision is rendered. If a disallowance suit is filed, the whole proceeding is re-opened and the witnesses need to be heard again. The court will render its judgment on the claim on the merits. The great advantage for the judgment creditor in such a disallowance suit is the fact that the debtor has to commence this procedure as claimant, thus, the burden of proof is on him and he therefore has to establish that the original claim is not justified.

9.4 What are the rules of appeal against a judgment of a civil court of Liechtenstein?

There is an appeal against the judgment of the PCJ ("*Berufung*") and an appeal against the judgment of the Princely Court of Appeal ("*Revision*").

Procedural court orders ("*Beschlüsse*"; see question 9.1) can be challenged by recourse ("*Rekurs*"). Recourse proceedings are less formal but follow in general the principles of the appeal procedure.

Within the limits of the LCCP, new allegations, facts and evidence may be introduced in the appeal and recourse procedure.

Other remedies are an action for annulment or an action for the reopening of the proceedings.

If the Princely Court of Appeal follows the appeal, it can either set aside the judgment, refer the case back to the Princely Court of First Instance or alter or confirm the judgment.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Liechtenstein? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The main alternative dispute resolutions provided by law are arbitration and mediation. The Liechtenstein arbitration law contained in the LCCP substantially reflects the UNCITRAL Model Law on International Commercial Arbitration and is based on the Austrian arbitration law. However, in comparison with the Austrian arbitration legislation, Liechtenstein offers a more attractive legislation. The reasons to challenge the arbitral award before state courts are more limited and the procedure itself is faster as there is only the court of appeal as the one and only instance.

In case of disputes between financial intermediaries and their clients, an ombudsman was installed in Liechtenstein in April 2005. The ombudsman can try to broker an amicable solution. If no solution can be reached, the parties may seek the court's help to resolve the issue.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Liechtenstein arbitration law is stipulated in Art. 594-635 LCCP. This provides a general framework for arbitration proceedings if the arbitral tribunal is domiciled in Liechtenstein. Specific rules apply for consumers and employees. In addition, the Liechtenstein Industry and Commerce Chamber and the Liechtenstein Arbitration Association ("*Liechtensteiner Schiedsverein*"; LIS) created the "Liechtenstein Rules", an autonomous framework which focuses on the characteristics of the arbitration procedure regarding company, foundation and trust law in Liechtenstein.

Mediation is governed by the Liechtenstein Mediation Act ("*Zivilrechts-Mediations-Gesetz*"). The law does not limit the types of disputes that may be solved by mediation.

1.3 Are there any areas of law in Liechtenstein that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

All pecuniary claims can be submitted to arbitration. Family differences and disputes in connection with claims arising from apprenticeship contracts cannot be solved by arbitration.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Liechtenstein in this context?

The LCCP stipulates that an arbitration clause does not exclude the court's competence to issue interim measures before and during arbitration proceedings.

If a claim is filed with the PCJ and the underlying agreement contains an arbitration clause, the court will declare itself as not competent for the dispute if one party raises an according objection.

A special feature of Liechtenstein law is to be seen in the fact that, prior to initiating a lawsuit, it is in most cases obligatory to attend a conciliatory hearing before a mediation office ("*Vermittlungsverfahren*"). It is a requisite for 90% of the lawsuits to show that this hearing took place (and no settlement was reached).

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Liechtenstein in this context?

A domestic arbitration award is equally enforceable in Liechtenstein as is the case for a (final) court judgment.

An arbitration award can only be challenged for major mistakes of the arbitration procedure and in case the award infringes Liechtenstein public policy.

A settlement reached via a mediation process has no legal force. However, if concluded before a conciliatory office it acquires the status of a court judgment.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Liechtenstein?

The only arbitration institution in Liechtenstein is the Liechtenstein Chamber of Industry and Commerce (LIHK), which offers to conduct an arbitration proceeding according to the newly issued "Liechtenstein Rules" ("*Liechtensteiner Schiedsordnung*").

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

On May 16 2012, the Liechtenstein Chamber of Commerce and Industry issued its specific Rules of Arbitration to strengthen

Liechtenstein's appeal as a venue for international arbitration. These rules deal with similar topics to those of, for example, the International Chamber of Commerce in Paris, and will apply where: 1) the parties have thus agreed; or 2) the rules are mentioned already in the respective arbitration clause of a contract or the articles of association of a company or foundation. The rules contain specific provisions for the determination of costs by an arbitral tribunal. According to Article 25 and following, the arbitral tribunal is entitled to determine not only the costs for legal representation and assistance of the parties, but also the fees that will apply to the tribunal. The latter must be determined in conformity with Appendix A of the rules (i.e., the schedule of the costs of arbitration). This provision aims to avoid higher costs being applied to an arbitral tribunal than those mentioned in the aforementioned schedule. Furthermore, the schedule contains arbitrator's fees. In general, such fees are lower than those applied in arbitration proceedings with three highly qualified arbitrators. The rules also govern confidentiality – one of the reasons why parties usually choose arbitration proceedings and thereby avoid public court hearings. Article 29 of the rules explains explicitly that the parties, their representatives, experts, the arbitrators, any commissioner, the secretariat and auxiliary persons must keep confidential all awards and orders, as well as all materials submitted and facts made available by other participants in the framework of the arbitral proceedings. This provision also introduces penalties for violations of this rule. Under Article 29(7), a party, its representative, an expert, an arbitrator, any commissioner or any auxiliary persons that breaches the confidentiality obligation must pay a contractual penalty of CHF 50,000 to the injured parties. It is hoped that this fine will prevent participants from giving any information to third parties that are not entitled to receive it. All of the other rules can be viewed online at www.lis.li.



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WGB is one of the leading firms in Liechtenstein in the fields of litigation and arbitration, which is regularly reflected by band 1 rankings in the major legal guides. In addition, WGB offers a full service in all respects of commercial law in Liechtenstein. WGB's client base ranges from multinational enterprises to local SMEs. A strong focus is also on private clients.

Lithuania

Ramūnas Audzevičius



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Lithuania got? Are there any rules that govern civil procedure in Lithuania?

The Lithuanian legal system is based on the continental civil law tradition; therefore, the main legal sources are statutes passed by the Parliament. The fundamental statute governing litigation of civil cases is the Code of Civil Procedure of the Republic of Lithuania of 28 February 2002, which has, since then, been subject to various amendments ('the CCP'). However, the doctrine of judicial precedents has been explicitly established in Lithuania by the decision of the Constitutional Court of the Republic of Lithuania of 28 March 2006. This shows an increasing influence of common law in Lithuania.

1.2 How is the civil court system in Lithuania structured? What are the various levels of appeal and are there any specialist courts?

The civil court system in Lithuania is comprised of three levels of civil courts. The civil judiciary consists of first instance courts (district courts and regional courts depending on the subject matter and value of the dispute), appellate courts in the second instance (regional courts hearing appeals against the judgment of district courts and the Court of Appeals of Lithuania hearing appeals against the judgment of regional courts) and cassation court in the third instance (the Supreme Court of Lithuania hearing cassation appeals against the appellate judgments of regional courts and, provided that certain conditions are met, the Court of Appeals of Lithuania).

There are no specialist courts in Lithuania to which civil cases are assigned.

1.3 What are the main stages in civil proceedings in Lithuania? What is their underlying timeframe?

The main stages in civil law proceedings before the Lithuanian courts of the first instance are: commencement of the civil proceedings; preparation for trial; and trial.

The average duration of civil proceedings before the Lithuanian courts varies greatly and it may take from six months to two years for the court of first instance to reach a decision. Courts of appellate

instance reach a decision in roughly one year. The appeal procedure is shorter, mainly because no new evidence is allowed (with some exceptions).

If the appeal is admissible for the cassation proceedings (the court of cassation instance deals exclusively with matters of law), the decision is usually rendered by the Supreme Court within a period of six months. This is due to the fact that the proceedings in the Supreme Court are mostly written.

The CCP lays down temporal and procedural requirements for the aforementioned stages that have to be observed. These will be discussed in the relevant sections of the chapter.

1.4 What is Lithuania's local judiciary's approach to exclusive jurisdiction clauses?

The Lithuanian judiciary takes a favourable approach to exclusive jurisdiction clauses. Therefore, in accordance with EC Regulation No. 44/2001 on Jurisdiction and the Recognition and the Enforcement of Judgments, Lithuanian courts will decline jurisdiction if a claim is based on a contract that contains an exclusive jurisdiction clause identifying a foreign litigation forum.

If a particular court is not vested with local jurisdiction, but another Lithuanian court has jurisdiction over the dispute, the case is transferred to the latter court.

It is noteworthy that exclusive jurisdiction set forth by the CCP cannot be altered by the parties' agreement.

1.5 What are the costs of civil court proceedings in Lithuania? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil proceedings before Lithuanian courts consist of the state fee and other costs incurred in relation to a court hearing. The CCP establishes the amount of the state fees, depending on the claim amount and the type of the dispute, and sets forth what can be regarded as the costs related to the court proceedings.

The losing party has to indemnify the other party for its costs. If only part of the claim was satisfied, the fees and expenses will be attributed proportionally.

As a general rule, the court will order the losing party to indemnify the other party for its lawyers' costs. It is noteworthy that the court will fix such indemnity in accordance with a scale provided in the recommendations adopted by the Minister of Justice, which results in an amount far less than the one actually spent.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Lithuania? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

To begin with, natural persons who have insufficient financial resources to fund litigation are entitled to State-Guaranteed Legal Aid. Moreover, these persons may be exempt from payment of the state fees.

In addition, according to the Law on the Bar, contingency fee/conditional fee arrangements are allowed in Lithuania provided that these do not contradict professional principles of attorneys.

Furthermore, when the claimant is a foreigner, the CCP establishes that the defendant is entitled to request the claimant to provide security for costs in certain cases.

It is noteworthy that no specific regulation concerning the funding of litigation by a disinterested third party has been enacted. Nonetheless, the court may award litigation costs for the disinterested third party in civil proceedings, according to the Supreme Court rulings that confirm such right.

1.7 Are there any constraints to assigning a claim or cause of action in Lithuania? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Pursuant to Article 48 of the CCP, a claim may be assigned at any phase of the proceedings. All actions performed before the assignment are obligatory for the assignee. The consent of the defendant is not necessary for the assignment of claim. However, pursuant to Articles 6.101 and 6.102 of the Civil Code, the assignment can be effected only if the claim is not directly related to the personality of the creditor (e.g. claims for alimony and claims for compensating damages for health impairment). It is explicitly forbidden to assign a claim to a judge, prosecutor or attorney who is professionally engaged in the litigation of that particular claim.

Litigation costs are initially funded by the parties themselves. The court usually orders the unsuccessful party to pay the litigation costs. There is no specific regulation concerning the funding of litigation by a non-interested third party. The court can award litigation costs to a third party participating in the proceedings without a separate claim.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The CPP itself does not establish any pre-action procedures. However, according to other laws, referral to specific pre-court dispute resolution commissions in some types of disputes is a prerequisite for the parties to bring a suit in court.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Under Lithuanian law, the applicable limitation periods are determined by the substantive law. According to the Civil Code of the Republic of Lithuania ('the CC'), the general limitation period is 10 years. Shorter limitation periods for specific types of claims

are established by the CC and other laws. Therefore, Article 1.125 of the CC establishes abridged limitation periods that vary from one month to five years. For instance, an abridged one-month limitation period is applicable to claims arising from the results of tender; a three-month period – in respect of claims for declaring the decisions of the bodies of a legal person voidable; and a one-year period – with respect to insurance-related claims, etc.

The limitation period starts from the day after the claimant's cause of action accrues. Limitation periods are calculated in accordance with the provisions of Article 1.127 of the CC.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Lithuania? What various means of service are there? What is the deemed date of service? How is service effected outside Lithuania? Is there a preferred method of service of foreign proceedings in Lithuania?

Civil proceedings are initiated by filing a written claim (that satisfies the requirements of the claim established by the CCP) with the court. The claim is delivered by post, courier or in person. When the claim is delivered by post, the deemed date of service shall be the date of dispatch and, in case of delivery in person, the deemed date of service is the day of registration of the claim performed by the court.

Documents may be served to the recipients by registered post, in the court premises, by fax, couriers and through a bailiff, as well as by public announcement if the recipient's address is unknown.

The service outside Lithuania is performed in accordance with the provisions of the 1965 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters and Regulation (EC) No. 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000.

The preferred method of service of foreign proceedings in Lithuania under the Hague Convention is through a Central Authority of the State. There is no preferred method of service under EC Regulation No. 1393/2007.

3.2 Are any pre-action interim remedies available in Lithuania? How do you apply for them? What are the main criteria for obtaining these?

The courts may apply interim measures upon the request of an interested party if non-application could hinder or make the execution of a satisfactory decision impossible, or at their own discretion when defending the public interest. When the court applies interim measures to secure the future claim, the party has to file the lawsuit within the time period prescribed by the court, which may not be longer than 14 days, or 30 days if a claim must be filed in a foreign court or arbitration proceedings.

3.3 What are the main elements of the claimant's pleadings?

A claimant's pleadings should contain the following: the clearly expressed claim; facts that constitute the basis of the claim; evidence in proof of the facts which are the cause of action; the value of the claim; and the claimant's view on issuing a default judgment

when the respondent does not answer the claim filed with the court. Moreover, the claim should satisfy other general requirements applicable to procedural documents, for instance, the court to which the claim is addressed and details of the parties and their attorneys-at-law (if any) have to be indicated. Furthermore, the documents proving the payment of the state fees should be enclosed.

3.4 Can the pleadings be amended? If so, are there any restrictions?

As a general rule, amendments to the subject matter or the ground for the pleading are allowed at any time before the hearing at court commences. Later amendments are only permissible where the necessity of such amendments arose at a later stage or with the consent of the other party, or where the court decides that such amendment will not delay the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

A statement of defence should satisfy general requirements applicable to all procedural documents, for instance, the name of the court, details of the parties and their attorneys-at-law (if any) have to be indicated. Moreover, it must state: whether the defendant admits the claim; reasons for the objection of any allegations; evidence upon which the objection is based; the defendant's view on issuing a default judgment when the claimant fails to deliver procedural documents to the court; and information on whether the defendant will be represented by the attorney-at-law.

Further, the defendant can make a counterclaim before the hearing at court commences. Late submission of a counterclaim is only allowed where the necessity of such submission arose at a later stage or with the consent of the other party, or where the court decides that a late counterclaim will not delay the proceedings. Article 143 of the CCP sets out the conditions under which a party might bring a counterclaim.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed with the court within time limits set by the court, i.e. within 14 to 30 days from the date of the receipt of the claim. The latter period may be extended by the court by up to 60 days in exceptional circumstances.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Under Lithuanian law, there is no mechanism whereby a defendant can pass on or share liability by bringing an action against a third party. Separate proceedings have to be commenced.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, a default judgment may be entered against him.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction during all proceedings, i.e. first instance, appeal or cassation.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

According to the CCP, a third party can be joined into ongoing proceedings if his or her rights and duties may be affected by the court decision rendered in respect of the parties to the proceedings. A third party may join as the one raising individual claims or not. If the party joins as the one raising such claims, he/she will have all the rights of the claimant. If he/she chooses to join without raising any claims, he/she will have limited rights in the proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The Lithuanian courts will order the consolidation of several sets of proceedings where simultaneous hearings will result in a faster and fair resolution of the disputes, as well as if there is such a close link between the claims that it is impossible to hear and judge them separately and the following alternative conditions are met: where several proceedings are initiated in courts where the parties are identical; where one claimant has formulated claims against different respondents; or where several claimants have filed several lawsuits against the same respondent.

5.3 Do you have split trials/bifurcation of proceedings?

Under the CCP, the Lithuanian courts have discretion to allow split trials if it is thought to be more reasonable.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Lithuania? How are cases allocated?

Cases are allocated according to the provisions of the CCP. To begin with, it should be established whether the district court or regional court, depending on the subject matter and the value of the dispute (if the size of the claim exceeds 150,000 *litas* (EUR 43,443) the case is attributed to the regional court), should hear the case as the court of first instance. Further, it should be determined which among the district courts or which among the regional courts has jurisdiction over the dispute (i.e. territorial jurisdiction). It is noteworthy that territorial jurisdiction may be changed by written agreements of the parties. However, exclusive jurisdiction established in Article 31 of the CCP is not subject to change by the parties.

Actual cases are allocated among judges pursuant to the provisions of the Law on Courts. The system of allocation is intended to ensure an independent and fair trial.

6.2 Do the courts in Lithuania have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

To start with, the court is obliged to take all possible measures to settle the dispute. It is noteworthy that from 75 per cent up to 100 per cent of the court's fee (depending on the stage of the proceedings) is refunded if the parties enter into a settlement agreement.

Moreover, the court has the statutory power to oblige one party to pay the deposit and thus to secure the claim. Furthermore, the CCP does not set out the final list of interim measures. The court has the power to grant various interim remedies upon a well-grounded application of the party or on its own initiative in some cases.

6.3 What sanctions are the courts in Lithuania empowered to impose on a party that disobeys the court's orders or directions?

The Lithuanian courts have powers to impose on a party that disobeys the court's orders or directions the following sanctions: a warning; expulsion from the court room; a fine; or detention.

6.4 Do the courts in Lithuania have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Under the CCP, the courts are not empowered to strike out the whole or any part of a statement of case. The court has to adjudicate on all claims lodged by the claimant. The court has the power to dismiss the case entirely only if there are certain conditions: if the court does not have jurisdiction over the case; if there already is a binding ruling in a similar case, with the same parties; or if the claimant does not have the right to initiate the proceedings.

6.5 Can the civil courts in Lithuania enter summary judgment?

Courts in Lithuania may not render summary judgments.

6.6 Do the courts in Lithuania have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The courts in Lithuania have to discontinue the proceedings in the cases provided in Article 293 of the CCP, except when: the parties concluded a settlement agreement; there is another court ruling or arbitration award for the same subject matter between the same parties; and other cases. The courts have to use power to stay the proceedings in the circumstances set in Articles 1621, 1622, 1623 and 163 of the CCP. Article 164 sets up cases when the courts may stay the proceedings, except when: criminal proceedings have been initiated regarding the same proprietary claims; there is the possibility to further hear the case until a ruling in another civil, administrative or criminal case is issued; the court applies to the Constitutional Court or the ECJ for clarification on a legal matter related to the case; or other cases provided in law.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Lithuania? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Each party has to provide the court with a bundle of all the evidence on which it wishes to rely before the main hearing. Evidence at later stages of the proceedings may be permissible if it could not be presented earlier and where late submission of documents will not delay the case. It is noteworthy that parties have to present the documents requested by the other party if the court orders so. Only documents that are protected by legal professional privilege or other privilege are exempt from disclosure in legal proceedings.

There is no possibility to obtain disclosure pre-action.

7.2 What are the rules on privilege in civil proceedings in Lithuania?

According to the Law on the Bar, any information obtained in the course of an attorneys-at-law profession is confidential and may not be used as evidence in civil proceedings. An attorney cannot be examined as a witness with regard to circumstances that became known to the attorney while acting in his or her professional capacity. It is noteworthy that privilege extends only to attorneys and attorneys' assistants; in-house lawyers are not protected. Although there are no specific statutory provisions, by virtue of the provisions of the ECHR and the abolition of restrictions to provide services in the EU, legal advice from foreign attorneys should enjoy the same amount of privilege.

Other privileges apply to other professions, such as the medical profession, and these persons cannot be summoned as witnesses regarding such circumstances.

7.3 What are the rules in Lithuania with respect to disclosure by third parties?

The court may order a third party to produce specific documents or materials establishing a relevant fact. Third parties against whom a disclosure was ordered should present the requested documents or indicate the reasons why they are not able to do so.

7.4 What is the court's role in disclosure in civil proceedings in Lithuania?

The court's main role in the disclosure process is by way of court orders to compel a party to provide evidence requested by the counterparties within time limits set by the court. It is noteworthy that the court may collect evidence on its own initiative for the protection of the public interest and other exceptional cases prescribed by the law. Moreover, to prevent undue delay in the proceedings, the court may disallow late submissions of the documents.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Lithuania?

There are no specific provisions in the CCP restricting the use of documents obtained following a judgment ordering their production. However, under the CCP, a general rule is that any data disclosed in

the course of the mediation may not be used as evidence in civil proceedings. Moreover, the court is entitled to make an order that particular documents of the case containing secret information should not be available to the public.

8 Evidence

8.1 What are the basic rules of evidence in Lithuania?

The general principle of burden of proof (*onus probandi*), established in Article 178 of the CCP, requires the party to prove every submission the party makes. The documents submitted by each party should be relevant to the case (i.e. documents must either confirm or deny the facts of the case). Moreover, if one party does not have, or cannot obtain, relevant documents that are in possession of another party or an entity that is not the party to the case, that party may request the court to oblige the aforementioned subjects to submit those documents. It is noteworthy that particular circumstances described in Article 182 of the CCP do not have to be proven, such as circumstance confirmed by the other party or established by another court ruling. See also question 7.1 above.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

To begin with, all types of evidence are admissible. However, under the CCP, a general rule is that any data disclosed in the course of the mediation may not be used as evidence in civil proceedings. Along the same line of thought, a state or official secret containing data may not be used as evidence in civil proceedings until their secrecy is removed in a manner prescribed by the law.

The court alone can appoint experts at the request of a party or on its own initiative to establish factual or technical issues. Both parties are entitled to submit questions to the impartial expert and the expert would usually be expected to be present at the court hearing and give an oral explanation as to his or her written report.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A witness who is aware of the facts of the case may be called by the court to testify. Certain persons listed in Article 189 of the CPP cannot be called to testify as regards any facts they became aware of upon the exercise of their duties. Moreover, the general rules against self-incrimination are applicable to all witnesses. Therefore, a person may refuse to testify if such evidence would mean producing evidence against him or her, or his or her family members or close relatives.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in Court? Does the expert owe his/her duties to the client or to the Court?

Experts are appointed by the court on request by a party to the dispute. The party asking for the appointment must define circumstances to be established and questions to be answered by the expert. The court asks the opinion of the other parties, but will itself determine final questions for the expert and who the expert will be. The Minister of Justice has issued a list of approved court experts.

The list is being constantly updated. Other persons with necessary qualifications can, in certain cases, be called as expert witnesses. In certain cases, the court offers both parties a chance to agree who to appoint as the expert. If the parties agree, that expert is appointed; otherwise the court chooses an expert from the lists provided by the parties.

The experts provide independent written opinions and answer questions provided by the court. The experts must be independent from any parties to the dispute.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Lithuania?

The Lithuanian courts have the power to make various orders to support the provision of evidence, either upon application of a party or of their own motion (see question 7.4 above).

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Lithuania empowered to issue and in what circumstances?

The court has the power to make a judgment (final, partial, preliminary, default or additional) when it has definitely decided on the merits of a case. The court issues procedural orders in the context of case management, where the case is not decided on its merits, for instance, by which it orders interim measures.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

To begin with, the Lithuanian courts are empowered to award only actual damages and not punitive ones. Next, the court may exercise its power to reduce an unreasonable interest rate. It may also award interest calculated until the court ruling is performed. Further, the court will order the losing party to bear all costs of the litigation (see question 1.5 above).

9.3 How can a domestic/foreign judgment be enforced?

The Court of Appeal has jurisdiction over the recognition of foreign judgments. For the judgment to be recognised, it should satisfy the fair process requirements and not infringe public order or international private law. The procedure for enforcing judgments of EU Member States is regulated by Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters. Recognition and enforcement of foreign judgments in Lithuania follow a simplified procedure since the cases are not examined on the merits.

It is noteworthy that procedure for enforcing judgments of non-EU Member States is governed by international treaties or by the CCP if no such agreements exist.

9.4 What are the rules of appeal against a judgment of a civil court of Lithuania?

The appellate courts hear cases on their merits. However, no new evidence is allowed to be introduced, except when it was not admitted by the court of first instance and the appeal and decides

to do so. The appellate courts reassess the evidence to the extent specified by the appeal application. Appellate court proceedings are usually verbal.

The decision of the appellate instance court cannot be worse for the appealing party if compared to the ruling of the court of first instance.

The Supreme Court is the third and final instance in civil proceedings. It does not hear claims on their merits and only examines matters of law in cases where there is reasonable doubt that lower-instance courts applied substantive and procedural law correctly. The investigation of the Supreme Court is also limited by the scope of the cassation appeal. Cassation proceedings are usually written, except in cases when the court decides to open a verbal hearing. The Supreme Court's decisions are final. However, the hearing of the court case may be reopened based on specific grounds, established in the CCP (e.g. new evidence crucial to the case appears or one of the parties to the case was incapable and ill-represented, etc.) (see questions 1.2 and 1.3 above).

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Lithuania? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods of alternative dispute resolution in Lithuania are arbitration and court mediation – arbitration being much more popular.

Mediation is a procedure conducted in the court by special mediators who are judges or assistant judges, or persons having the necessary qualifications. Mediation is a 'pilot' project, launched on 1 January 2008 in certain courts in Lithuania.

Court mediation is a voluntary procedure, which may be commenced upon the agreement of the parties. The latter procedure is free of charge and is conducted in the court premises. All the parties concerned can, at any time, leave the proceedings without specifying the reason. If a settlement cannot be reached at the conclusion of the mediation, the mediation procedure is terminated and the dispute goes back to the court.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Primary domestic sources of law governing arbitration procedure are the CCP and the Law on Commercial Arbitration, which is based on UNCITRAL Model Law. It is noteworthy that the Law on Commercial Arbitration was enacted in 1996 and it is based on the 1985 version of the UNCITRAL Model Law. Further, in general, the domestic law does not contain substantive requirements for the arbitration procedure to be followed. It is noteworthy that

Lithuania is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in Lithuania on 12 June 1995.

Court mediation procedure is governed by the Rules of Court Mediation that were adopted by the Council of Judges Decree No. 13P-15 on 26 January 2007. Moreover, the Code of Conduct of European Mediators applies to mediators. The Council of Judges has also confirmed the list of court mediators.

1.3 Are there any areas of law in Lithuania that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The Law on Commercial Arbitration sets out a list of non-arbitrable disputes. Therefore, disputes arising from constitutional, employment, family and administrative legal relations, as well as disputes connected with competition, patents, trademarks and service marks, and bankruptcy and disputes arising from consumption agreement, may not be submitted to arbitration.

The aforementioned list unreasonably limits and restricts the use of this ADR and causes hostility to arbitration. The proposed amendments of April 2010 to the Law on Commercial Arbitration have extended the list of arbitrable disputes in order for Lithuania to become a more arbitration-friendly country.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Lithuania in this context?

A general rule is that the courts respect the choice of the parties to submit their dispute to arbitration. It is noteworthy that the practice of the Supreme Court of Lithuania has adopted the arbitration-friendly approach that would give the parties a real opportunity, providing that the conditions in the legal acts are satisfied, to refer to arbitration.

Upon request of the parties to the arbitration or of the arbitration panel, the court has the power to grant interim measures or to collect particular evidence. A wide range of interim measures are available, for example: arrest of property, funds or proprietary rights; order to refrain from certain actions; and designation of property administrator, etc.

If arbitration proceedings have not been initiated yet, a party must apply to the domestic court of the place of arbitration for interim measures. The domestic court shall define a period for filing a request for arbitration.

After arbitration proceedings have been initiated, the parties may request the arbitral tribunal to apply to the domestic court for

application of interim measures, unless the parties have agreed otherwise. The parties also have a right to apply to the domestic court for application of interim measures by themselves.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Lithuania in this context?

Article 37 of the Law on Commercial Arbitration provides that an award can be challenged if any of the following grounds exist:

- a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the applicable laws;
- the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case for other valid reasons;
- the award deals with disputes falling outside the scope of the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the valid agreement between the parties or imperative requirements of arbitration law in case no such agreement was concluded.

The arbitration award will also be set aside if either of the following two grounds exist:

- the subject matter of the dispute could not have been resolved by arbitration procedure; or
- the arbitration award is contrary to public policy.

An application for setting aside an arbitration award must be submitted to the Court of Appeals by the party to the arbitration proceedings within a three-month period after the arbitral award is rendered. Appeals can be made irrespective of whether the arbitration procedure was conducted as an *ad hoc* arbitration or as an institutional arbitration. Further appeal is available to the Supreme Court, but is limited to issues of law.

If a voluntary mediation procedure ends in a settlement agreement, such agreement is confirmed by the court and has the power of a court decision (*res judicata*).

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Lithuania?

The most prominent arbitral institution in Lithuania is the Vilnius Court of Commercial Arbitration. The latter arbitral institution also provides extrajudicial mediation services.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration is still quite unpopular in Lithuania, although the number of cases is steadily increasing. The majority of cases handled by arbitration have an international element. In 2013 Vilnius' arbitration courts heard 50 cases; in 2012, only 29.

Mediation is rarely used among parties to litigation. There are no positive indications that there will be any rise in its popularity and there are no official statistics so far.



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The lawyers' expertise is ensured by their premier legal education from world-leading legal education institutions. The team also has substantial experience with landmark disputes and deals, especially in the energy and natural resources, pharmaceutical and aviation sectors, banking & financial services, healthcare, agriculture, real estate and construction.

Macedonia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Macedonia got? Are there any rules that govern civil procedure in Macedonia?

Macedonia has a continental legal system. Civil procedure is governed by the provisions of the Law on Civil Procedure.

However, the following laws are also a significant legal source:

- Law on International Private Law (Official Gazette of the Republic of Macedonia no. 07/2007 and 156/2010), which contains rules for ascertainment of the applicable law in personal, family, labour, property and other material-legal relations with an international element, as well as rules for the court's competences and other bodies in the Republic of Macedonia, rules of procedure and rules for recognition of foreign court decisions and decisions of other bodies of foreign countries.
- Law on Courts (Official Gazette of the Republic of Macedonia no. 58/2006 and 39/2012), which regulates the organisation and jurisdiction of the courts.
- Law on Enforcement (Official Gazette of the Republic of Macedonia no. 35/2005 and 187/2013), which regulates the rules for coercive enforcement of enforcement deeds (such as court decisions and notary deeds).
- Law on Mediation (Official Gazette of the Republic of Macedonia no. 188/2013), which regulates the mediation of disputed relations in which the parties may freely dispose with their rights.
- Law on International Commercial Arbitration of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no. 39/2006), which applies to domestic and international commercial arbitration.
- Law on Securing Claims (Official Gazette of the Republic of Macedonia no. 87/2007), which regulates the mechanisms for the securing of claims.

1.2 How is the civil court system in Macedonia structured? What are the various levels of appeal and are there any specialist courts?

Judicial power within the civil court system in Macedonia is vested in the basic courts (first instance), the courts of appeal (second instance) and the Supreme Court of the Republic of Macedonia (third instance). Work in the civil courts is performed in specialised

court divisions, which are established depending on the type of case and workload in the court (for example in the area of civil and commercial law, labour relations, or other specific types of disputes). Such divisions are mandatorily established within the basic courts with expanded competence.

The basic courts are established as courts with basic competence and courts with expanded competence (for one or several municipalities).

The courts of appeal are established in the territory of several courts of first instance and they decide upon appeals filed against the decisions rendered by the first instance courts.

The Supreme Court of the Republic of Macedonia exercises judicial power over the whole territory of the Republic and it is competent, amongst others, to decide in the third and last instance upon appeals against the decisions of the courts of appeal.

1.3 What are the main stages in civil proceedings in Macedonia? What is their underlying timeframe?

A civil procedure is commenced with the filing of a lawsuit before the competent basic court.

The following are the main stages in a first instance proceeding:

- **the filing of a lawsuit** by the plaintiff;
- **preparation for the main hearing** which includes examination of the lawsuit, delivery of the lawsuit to the defendant/s for response, holding of a preparatory hearing and scheduling of the main hearing;
- **holding of the main hearing** during which the proposals of the parties and the factual allegations by which the parties elaborate their proposals are discussed, i.e. the proposals of the opponent may be disputed, as well as the evidence offered on their part, and the evidence shall be exhibited and reviewed. After exhibiting all evidence, both parties, starting with the plaintiff, shall have the right to briefly address the court with their closing statements, and sum up the legal and factual aspects of the case; and
- **the rendering of a decision** by the court.

Under the provisions determined by the Law on Civil Procedure, an appeal can be filed against the decision rendered by the first instance court, and a revision may be filed against the absolute and final judgment adopted at the second instance.

The Law on Civil Procedure prescribes some timeframes, such as:

1. First instance

The defendant must provide a written response to the lawsuit within the period determined by the court, which cannot be shorter than 15 days or longer than 30 days as of the day of receipt of the lawsuit.

The schedule of the preparatory hearing must be set within a period of eight days as of the day of receipt of the response to the lawsuit, or after the expiration of the time period for submitting a response to the lawsuit. In proceedings for minor value disputes, the provisions on preparatory hearings do not apply.

The main hearing must be scheduled on the preparatory hearing in a term which cannot be shorter than eight days or longer than 60 days (90 days in complex cases) as of the day the preparatory hearing was held.

The judgment must then be reached immediately after, or in more complex cases, within eight days as of the day of closing the main hearing.

The announced judgment has to be prepared in writing within a period of eight days or 15 days in more complex cases as of the day of its announcement. A certified copy of the judgment shall be served to the parties within a period of eight days as of the day the judgment was prepared in writing.

Depending on the complexity of the case, in practice the first instance court proceedings last between one and 1.5 years.

2. Second instance

The parties can file an appeal against the judgment within 15 days as of the day of serving the copy of the judgment or eight days in disputes on bills of exchange and cheques, as well as in commercial disputes.

The court of appeals shall decide within a period of three months, or six months in complex cases, as of the day of receipt of the case.

The published judgment has to be prepared in writing within a period of eight days, or 15 days in more complex cases, as of the day of publication, and shall serve it to the court of first instance within a period of eight days.

In practice the second instance proceedings last between six and 12 months.

3. Third instance

The Supreme Court of the Republic of Macedonia shall decide on the case within a period of eight months after receiving the case at the latest. However, in practice, the Supreme Court of the Republic of Macedonia makes decisions within a period of one to 1.5 years.

1.4 What is Macedonia’s local judiciary’s approach to exclusive jurisdiction clauses?

The courts in Macedonia have exclusive jurisdiction when it is determined by the Law on International Private Law or by another law.

The Law on Civil Procedure prescribes that the Macedonian courts shall have exclusive jurisdiction in disputes with an international element when it is expressly determined by law or an international agreement. If no such exclusive provision is foreseen, then the Macedonian courts shall have jurisdiction over the dispute when it is determined by the court’s local competence.

1.5 What are the costs of civil court proceedings in Macedonia? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil proceedings comprises (i) court taxes, (ii) attorneys’ award, (iii) translation, (iv) interpretation, (v) compensation for travel allowances and allowances for food and lodging, as well as compensation for the lost profit for witnesses and experts, (vi)

preparation of expert finding and opinions, (vii) inspection and for publishing a court announcement, and (viii) costs for providing expert witnessing, as well as a reward for experts who provide witness.

In some specific cases the court may exempt a party from payment of costs in the procedure.

The amount of the court taxes (statute-determined minimum and maximum amounts) and the attorney’s award depends on the value of the claim.

The parties and the attorney at law are free to agree upon the award and the costs, however they cannot be lower than the amount determined by the tariff for award and compensation of costs for the work of attorneys at law.

Each party is obliged to cover the costs caused by its action upfront. At the end of the proceedings the court shall decide upon the parties’ requests for compensation for the costs. The court’s decision shall depend whether the winning party has been entirely or partially successful in its claim.

There are no rules for costs budgeting.

1.6 Are there any particular rules about funding litigation in Macedonia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no rules that refer to funding litigation.

The attorneys’ fees can be determined by concluding an agreement in accordance with the tariff for award and compensation of costs for the work of attorneys at law. However, in accordance with the principal standing of the Supreme Court of the Republic of Macedonia, the fee cannot be determined in a percentage amount.

In case the plaintiff is a foreign citizen or a person without citizenship who does not have residence in the Republic, than he/she shall be obliged to cover the litigation costs for the defendant upon his/her request.

1.7 Are there any constraints to assigning a claim or cause of action in Macedonia? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In general, a party is allowed to assign a claim (assignment of rights) to another party, provided that there are no contractual provisions prohibiting such assignment or if it is strictly prohibited by law.

The regulations do not prohibit a non-party from financing a certain proceeding; however, only the party to a certain proceeding is entitled to be reimbursed for the costs incurred in the proceeding. The right of collection of the adjudged proceeding costs may be assigned to another party only by a written agreement which must be solemnised by a notary public.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In general, there are no particular formalities with which one must comply before commencing a civil proceeding.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Statutes of limitations are defined by substantive law. The Macedonian Law on Obligations defines most of the statutes of limitations that apply in civil proceedings, those being:

- a general term of five years, unless otherwise determined by law;
- one year (for, e.g., bills for electricity, heating, telephone, etc., issued to natural persons);
- three years (for, e.g. claims arising out of commercial agreements, damages, lease fee, etc.); or
- 10 years (all claims determined by an absolute and final court decision or a decision of another competent body or court settlement).

Unless otherwise determined by a specific law, the statute of limitations starts on the first day after the day the creditor was entitled to request fulfilment of the specific obligation.

The court shall decide upon the statute of limitations only if an objection was raised by the party.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Macedonia? What various means of service are there? What is the deemed date of service? How is service effected outside Macedonia? Is there a preferred method of service of foreign proceedings in Macedonia?

A civil proceeding is commenced by filing a lawsuit before the competent court.

Submissions are served by mail, via electronic means, by an official person of the court, directly in the court, by a notary, enforcement agent or another person determined by law. If the service is unsuccessful after two consecutive efforts, then the submission shall be published on the court's notice board and after eight days thereafter it shall be considered that the service of process is completed.

Unless otherwise determined, service of process to persons or institutions abroad or foreigners enjoying the right to immunity shall be performed via diplomatic channels.

Service of process to a Macedonian citizen abroad shall be performed by mail, courier service, via electronic means or via the competent consular representative or diplomatic representative in the Republic of Macedonia.

Service of process to a legal entity which has a head office abroad can be performed via its branch office or representative office in the Republic of Macedonia.

The service of submissions to attorneys at law and legal entities shall be performed via electronic means to their electronic mailbox; however, so far this type of service of process is being executed by only a few courts. The service of process shall be considered completed on the day of receipt of the submission via electronic means. The electronic mail has to be read within eight days as of the day of its sending.

3.2 Are any pre-action interim remedies available in Macedonia? How do you apply for them? What are the main criteria for obtaining these?

The procedure for securing claims is initiated upon request (lawsuit or proposal) by the plaintiff, i.e. the creditor to the competent court.

There are two types of interim remedies:

- **previous measure for securing a monetary claim** (approved on the basis of a decision referring to a monetary claim, which has not become absolute and final or enforceable, if the creditor renders the danger probable or if there is an assumed danger that without such securing the effectuation of the claim would be thwarted or significantly hindered); and
- **temporary measures for securing monetary and non-monetary claims, non-matured and conditional claims** (can be approved before the initiation and during the course of the court procedure, provided that the creditor renders probable the existence of the claim and the danger arising from the absence of such measure that the debtor is to thwart or significantly hinder the collection of the claim, by alienating, covering or in any other way using his/her property, i.e. his/her funds).

3.3 What are the main elements of the claimant's pleadings?

The lawsuit needs to contain certain claims in terms of the main issue and the secondary claims, facts upon which the plaintiff founds its request, evidence to confirm such facts, as well as other data mandatory for each submission as defined in the Law on Civil Procedure. All evidence must be enclosed to the lawsuit or at the latest in the preparatory hearing.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The plaintiff can amend the lawsuit before the first main hearing. If the lawsuit was served to the defendant, then he/she needs to provide his/her consent. However, even when the defendant opposes, the court can approve the amendment provided that it is considered to be purposeful in the final decision upon the parties' relations.

If the defendant enters the dispute on the main issue in the amended lawsuit it shall be considered that he/she has not opposed the amendment.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In the response to the lawsuit, the defendant has to declare upon the plaintiff's requests and claims and propose evidence to support such allegations. If the defendant disputes the claim, he is obliged to state the facts on which he bases the allegations and the evidence in support thereof.

The defendant may file a counterclaim, provided that the claim in the counterclaim is related to the plaintiff's claim, or if such claims

can be set off against each other or the counterclaim contains a request for establishing a right or a legal relation on whose existence or non-existence the decision upon the petition depends completely or partially.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant is obliged to provide a written response to the lawsuit in a period determined by the court, which cannot be shorter than 15 days or longer than 30 days as of the day of receipt of the lawsuit. In some specific cases, the period for providing a response to the lawsuit is eight days.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant who is being sued as holder of an item or user of a right and claims that he holds the item or exercises the right on behalf of a third party can summon through the court the respective third party (antecedent) to enter as a party in the litigation instead of himself. This can be done at the latest at the preparatory hearing, and if a preparatory hearing has not been held, then it may be done at the main hearing before the defendant commences with deliberation on the main issue.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not file a response to the lawsuit, the court may pass a decision by which it shall approve the claim, provided that the conditions determined in the Law on Civil Procedure are met. Nevertheless, even if all conditions are met, the court shall not adopt a decision if it determines that it comes to matters the parties cannot dispose with.

4.5 Can the defendant dispute the court's jurisdiction?

Immediately after receiving the lawsuit, the court *ex officio* assesses whether and in what capacity it is competent.

Under the conditions determined in the Law on Civil Procedure, the defendant can dispute the court's jurisdiction, both with respect to jurisdiction regarding territory and subject matter.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A person who has legal interest for one party to succeed in an ongoing litigation between other persons can join that respective party. The intervening person can enter the litigation throughout the course of the whole procedure, by giving a statement at the hearing or in a written submission, before the court's decision becomes absolute and final, as well as in the time periods anticipated for filing an extraordinary legal remedy.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If several litigations between the same persons are ongoing in the same court, or if the same person is an opposing party to different plaintiffs and defendants, all of these proceedings can be consolidated for the purpose of joint deliberation if it would accelerate the deliberation and decrease the costs. For all consolidated proceedings the court can reach a joint judgment.

5.3 Do you have split trials/bifurcation of proceedings?

The court may close the hearing and adopt a partial judgment with respect to most claims or part of a claim, if the legal conditions are met.

In case the defendant disputes both the basis and the amount of the claim, the court can, due to purposefulness, reach a judgment on the basis of the claim only if this issue has reached a phase in which it can adopt a decision (interim judgment). The court cannot discuss the amount of the claim until the interim judgment becomes absolute and final.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Macedonia? How are cases allocated?

Once a certain case is registered in the relevant registers, at the end of the day the case shall be automatically allocated through the Automated Court Case Management Information System – ACCMIS.

6.2 Do the courts in Macedonia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court is obliged to implement the proceeding without postponement, with the lowest costs possible in order to hinder any abuse of the procedural rights. In general, the court prepares for the main hearing, orders service of process of the relevant submission to the parties, determines terms in which the party is obliged to undertake certain legal activity, decides on the parties' request and decides which proofs shall be taken into account, etc.

The court can *inter alia* decide upon the following interim applications: entering the antecedent in the litigation; participation of the intervenor; provision of evidence; amendment of the lawsuit; discontinuing the procedure; temporary measures for securing; adhering/separating procedures; reinstatement due to missing a deadline or hearing; securing litigation costs; and down payment of costs for undertaking certain actions in the procedure, etc.

6.3 What sanctions are the courts in Macedonia empowered to impose on a party that disobeys the court's orders or directions?

The court is entitled to impose monetary fines on the parties and their proxies in case they are abusing the procedural rules.

6.4 Do the courts in Macedonia have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

On the preparatory hearing the court shall adopt a decision for dismissal of the lawsuit should it be established that litigation is already ongoing upon the same claim, that an absolute and final judgment has already been reached upon the issue, that court settlement has been concluded for the subject of the case or that there is no legal interest of the defendant to file a declaratory lawsuit.

6.5 Can the civil courts in Macedonia enter summary judgment?

The court can enter a summary judgment (without holding a hearing) only if the defendant has admitted to the decisive fact(s) in his response to the lawsuit, regardless of the fact that he has disputed the claim.

6.6 Do the courts in Macedonia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court shall discontinue the procedure when:

- 1) a party dies;
- 2) one of the parties loses the litigation capacity, and has no proxy in that procedure;
- 3) the legal representative of one of the parties either dies or his authorisation for representation terminates, and the party has no proxy in the procedure;
- 4) the party which is a legal entity ceases to exist, i.e. when a competent body decides in a legally valid manner to prohibit its work;
- 5) legal consequences from opening a bankruptcy procedure occur;
- 6) both parties request for its discontinuance due to settling the dispute via mediation or in another manner;
- 7) there is war or due to other reasons the court terminates its operations; and
- 8) it is determined by another law.

The court may also discontinue the proceeding in other cases determined by the Law on Civil Procedure.

The Law on Civil Procedure does not allow the stay of proceedings.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Macedonia? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Each party in the proceeding is obliged to present all evidence in support of their claims.

7.2 What are the rules on privilege in civil proceedings in Macedonia?

The parties to the civil proceeding, and any third party, are protected by the following privileges:

- attorney-client privilege;
- religious confession privilege;
- doctor-patient privilege;
- family privilege;
- privilege against self-incrimination; and
- professional privilege.

7.3 What are the rules in Macedonia with respect to disclosure by third parties?

Under the conditions determined in the Law on Civil Procedure, the court may order a third party to submit documents.

On the request of a party, the court shall obtain any document from a state or state administrative body or from a legal entity or natural person performing public authorisation, if the party itself cannot obtain the document to be handed in or shown.

7.4 What is the court's role in disclosure in civil proceedings in Macedonia?

The court is also authorised to exhibit evidence which has not been proposed by the parties, if the outcome of the contention and substantiation results in the parties being headed towards disposing with claims they cannot dispose with.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Macedonia?

There are no restrictions on the use of documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Macedonia?

Each party in the proceeding is obliged to produce evidence in support of its claims and facts.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The following evidence is admissible:

- documents;
- insight;
- witness and expert deposition;
- hearing of the parties; and
- expertise.

Expertise shall be admissible only if the parties have proved it is necessary in the lawsuit and the response to the lawsuit. By exception, the parties may submit expertise in a later stage of the proceedings provided that they give sufficient proof that the expert person was not able to prepare the expertise in the required period.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The parties are obliged to provide the necessary contact details for

the witnesses they are proposing to be questioned, such as name and surname, profession and work/residence address.

The summoning of the witness is performed by serving written summons stating the name and surname, the time and place of holding the hearing, the case he is summoned for and that he is summoned as a witness. Witnesses who, due to old age, illness or serious physical impediments, cannot answer the summons, shall be heard in their home or in the place where they are located.

Prior to questioning, the court shall remind the witness that he/she is obliged to speak the truth and cannot hide anything, and shall be warned of the consequences of giving a false statement. The witness shall be questioned orally and without the presence of witnesses who shall later be heard.

The witness shall always be asked how he knows about what he testifies for, shall be called up to state everything familiar about the facts he is supposed to testify for and can be asked questions for the purpose of checking, adding or clarifying matters. It is prohibited to ask questions which indicate the preferred answer.

Witnesses can be confronted if their statements do not match regarding important facts.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The expert report must be filed together with the lawsuit or its response, in which case the parties provide instructions and relevant evidence to the expert. In case the expert reports presented by the plaintiff and the defendant are contradictory, the court shall order a super expertise to be performed by a third independent expert.

However, if the party proposes expertise as evidence, but renders it possible that there are facts or circumstances for which it cannot obtain a professional finding and opinion, the court shall order for an expert assessment to be performed.

The court can summon the expert for questions and providing explanations in regard to the given professional finding and opinion.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Macedonia?

In the summons for the preparatory hearing, the court shall point out to the parties that they are obliged at the latest at this hearing to propose all the evidence in support of their claims and facts, as well as to enclose the documents and items they intend to use as evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Macedonia empowered to issue and in what circumstances?

The court can adopt the following judgments:

- Partial judgment.
- Interim judgment.
- Judgment based on admitting.
- Judgment based on denying.

- Judgment due to not filing a response to a lawsuit.
- Judgment due to absence.
- Judgment without holding a hearing.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court can decide upon various types of damages (such as material and immaterial).

Interest can be awarded within the limits prescribed by the Law on Obligations and only if the party has stated such claim in the lawsuit.

Only those costs which are deemed as necessary shall be awarded to the winning party, provided that such party has filed a proper request to the court listing all of the costs related to the proceeding.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced once it has become absolute, final and enforceable. The enforcement procedure is performed by a competent enforcement agent and in accordance with the provisions of the Law on Enforcement.

A foreign judgment which is absolute, final and enforceable can be enforced in Macedonia, provided that it has been previously recognised by a Macedonian court. Such judgments are enforced under the same rules as for domestic judgments.

9.4 What are the rules of appeal against a judgment of a civil court of Macedonia?

An appeal can be filed against a judgment due to:

- 1) substantial violation of civil procedure rules;
- 2) incorrect or incomplete determined facts; and
- 3) incorrect application of the material law.

A judgment due to absence, to not filing a response to a lawsuit and a judgment without holding a contention cannot be appealed because of wrong or incompletely determined facts.

A judgment based on admitting and a judgment based on denying can be appealed because of an essential violation of the litigation procedure provisions or because the statement for admitting or denying has been given due to misdirection or under the influence of coercion or fraud.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Macedonia? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most used methods of alternative dispute resolution in Macedonia are arbitration and mediation. They apply to both domestic and international disputes.

Arbitration can be implemented only if the parties have agreed that any dispute arising out of or in connection with their agreement is to be resolved through arbitration and if it refers to rights with which they are free to dispose with.

The parties may agree in their agreements that any dispute could be resolved through mediation prior to commencing a court proceeding. However, in the event a court proceeding was initiated, mediation can be implemented only if the parties state their consent that they are willing for the dispute to be resolved through mediation.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration is regulated by the Law on International Commercial Arbitration in the Republic of Macedonia and mediation by the Law on Mediation.

1.3 Are there any areas of law in Macedonia that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration and mediation cannot be used as alternative dispute resolution methods in cases where the courts in Macedonia have exclusive jurisdiction. In addition, mediation cannot be used where other competent bodies have exclusive jurisdiction.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Macedonia in this context?

The court is obliged in the summons to provide a response to the lawsuit and/or for the scheduling of a preparatory hearing to inform the parties that they can resolve the case through mediation (applies only in cases where mediation is allowed).

In arbitration procedures the Basic Court Skopje 1 Skopje is the only court competent to decide on the parties' request with relation to appointment and/or exemption and/or cessation of the appointment of the arbiters, as well as exemption and/or cessation of the appointment of the expert persons, jurisdiction of the arbitration court and upon legal remedies for annulment of the arbitral award.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Macedonia in this context?

An arbitral award which has been rendered in accordance with the applicable law shall produce the same effect as an absolute and final court decision and shall be considered as an enforcement deed.

Foreign arbitral awards can be recognised and enforced in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards executed in 1958 in New York.

Parties may file a lawsuit for an arbitral award's annulment to the Basic Court Skopje 1 Skopje under the provisions determined by the Law on International Commercial Arbitration in the Republic of Macedonia.

In accordance with the provisions of the Law on Civil Procedure, the court shall discontinue the proceedings if the parties agree to try and resolve the dispute through mediation. The mediation needs to be finalised within a period of 60 days as of the day of giving the statement for commencement of the procedure, regardless of the outcome.

If the parties have reached a settlement through mediation prior to initiation of court proceedings, and if they want the settlement to have the character of an enforcement deed, the executed content of the settlement in written form shall be solemnised by a notary public in accordance with the law. However, if the mediation has been conducted by the court's referral, then within three days as of the day the settlement was reached the mediator is obliged to provide the court with the executed version of the settlement, which shall act as the basis for a court settlement.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Macedonia?

The Permanent Court of Arbitration attached to the Economic Chamber of Macedonia is the only institutional arbitration in Macedonia which can settle mutual business relations disputes between the partners, who in their contracts have agreed on the competence of this court.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The draft Law for the amendment and supplement of the Law on Civil Procedure, which is currently being discussed before the Macedonian Assembly, envisages mandatory application of mediation as a method for dispute resolution. According to the provisions of the proposed draft, in commercial disputes for monetary claims whose value does not exceed the amount of MKD 1,000,000.00, the parties shall be obliged to try and settle the dispute through mediation. In such cases, the plaintiff shall be obliged to enclose written proof issued by the mediator that the attempt for settlement of the dispute through mediation was unsuccessful. If no such proof is provided, the court shall dismiss the lawsuit.



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Maja Jakimovska, attorney at law, has 10 years of experience, of which she has spent two years as a lawyer and over five years as an attorney at law. In 2007 she graduated from the University "St. Cyril and Methodius", Faculty of Law "Justinian I", Skopje, Republic of Macedonia. After her graduation, from 2007 to 2009 she worked as a legal apprentice at MENS LEGIS CAKMAKOVA Advocates. Following passing of the Bar exam in 2009 and her admittance to the Macedonian Bar Association, she started her career as an attorney at law at CAKMAKOVA Advocates (formerly MENS LEGIS CAKMAKOVA Advocates).

Maja specialises in practising tax law, M&A, banking and finance law, competition law, litigation, energy law, intellectual property law, commercial law and administrative law. As of 2008 she is registered as an attorney for industrial property protection within the State Office for Industrial Property of the Republic of Macedonia.



ČAKMAKOVA
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CAKMAKOVA Advocates is a Macedonian advocates' partnership which provides a full range of legal services to both commercial and private local and international clients.

The founders of CAKMAKOVA Advocates (formerly MENS LEGIS CAKMAKOVA ADVOCATES) have been present on the legal services market in the Republic of Macedonia for more than 25 years.

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We cover all areas of the law, with particular expertise in corporate law, business law, banking and finance, commercial law, telecommunications, labour and employment, foreign investments, litigation and dispute resolution, tax law, mergers & acquisitions, competition, intellectual property & transfer of technology.

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Malaysia

Edmund Bon Tai Soon



New Sin Yew



BON, *Advocates*

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Malaysia got? Are there any rules that govern civil procedure in Malaysia?

The Malaysian civil legal system is based on common law, much of which has been codified by statute. In limited areas such as family and estate law, Sharia law applies to Muslims only.

There are three sets of rules that govern civil procedure in Malaysia: the Rules of Court 2012 (ROC); the Rules of the Court of Appeal 1994; and the Rules of the Federal Court 1995.

The ROC applies to all proceedings in the Magistrates' courts, the Sessions courts and the High Court while the Rules of the Court of Appeal 1994 and the Rules of the Federal Court 1995 apply to proceedings in the Court of Appeal and Federal Court respectively.

1.2 How is the civil court system in Malaysia structured? What are the various levels of appeal and are there any specialist courts?

The hierarchy of the civil courts is, in order of prominence, the Federal Court, the Court of Appeal, the High Courts of Malaya and Sabah and Sarawak, the Sessions courts and the Magistrates' courts. Appeals may be filed to the High Court from the Magistrates' and the Sessions courts. Appeals from High Court matters may be filed to the Court of Appeal and thereafter with leave to the Federal Court.

Within the High Court structure, courts are categorised according to subject matter: commercial; construction; and intellectual property. Some Sessions courts only hear corruption cases and Magistrates' courts are also the courts for legal issues relating to children.

There is also a specialist court known as the Special Court for the Rulers.

1.3 What are the main stages in civil proceedings in Malaysia? What is their underlying timeframe?

Generally, civil proceedings may be initiated by a writ of summons or originating summons. Action with substantial disputes of facts should be commenced by writ action.

The main stages in a writ action before the Malaysian courts are:

- Issue of writ and statement of claim.
- Service of process.

- Exchange of pleadings.
- Case management.
- Exchange of trial documents such as agreed issues to be tried, statement of agreed facts and witness statements.
- Trial.

The average timeframe for disposal is nine months in the High Court from the date of filing the action.

1.4 What is Malaysia's local judiciary's approach to exclusive jurisdiction clauses?

The courts usually accept exclusive jurisdiction clauses by exercising the discretion to stay proceedings save for exceptional reasons.

1.5 What are the costs of civil court proceedings in Malaysia? Who bears these costs? Are there any rules on costs budgeting?

Costs in civil proceedings vary depending on the complexity of the matter, time taken for its disposal and value of the subject-matter.

The general rule is that costs follow the event unless there has been misconduct or abuse of process such as by the deliberate suppression of material facts. It is now common for courts to award lump sum costs at the end of proceedings to save time on taxation.

1.6 Are there any particular rules about funding litigation in Malaysia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fee arrangements are prohibited. Conditional fee arrangements have been sanctioned by the courts but are now under review by the Malaysian Bar Council.

A defendant may apply for security for costs on one or more of the following grounds:

- The plaintiff is ordinarily resident out of the jurisdiction.
- The plaintiff has no assets within the jurisdiction.
- The plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs if ordered to do so.
- The plaintiff's address is not stated in the originating process or is incorrectly stated.

- The plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.

1.7 Are there any constraints to assigning a claim or cause of action in Malaysia? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Champerty and maintenance are viewed as offending public policy and therefore illegal. Litigation funding is largely still an alien concept in Malaysia but is permitted as long as it does not infringe the champerty or maintenance principles.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are none, save as a matter of legal manoeuvring as advised by solicitors, such as sending demand notices for debt recovery or cease and desist letters in intellectual property matters.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation is a matter of substantive law and provides an absolute defence to a plaintiff's claim. It must be pleaded as a defence before it can be relied on.

Generally, the limitation periods under the Limitation Act 1953 are as follows:

No.	Cause of action	Period
1.	Contract or tort	6 years
2.	Action upon judgment	12 years
3.	Action to recover land	12 years
4.	Recovery of principal secured by a charge or to enforce such charge	12 years
5.	Fraudulent breach of trust or recovery of trust property or proceeds thereof in the possession of trustees	No limitation
6.	Breach of trust other than fraudulent breach of trust or recovery of trust property or proceeds thereof in the possession of trustees	6 years
7.	Action in respect of any claim to the personal estate of a deceased person or to any share or interest therein	12 years

Under the Public Authorities Protection Act 1948, any action against the government must be brought within 36 months.

Under the Civil Law Act 1956, a dependency claim must be brought within three years after the death of a deceased.

Limitation periods are calculated from the date the cause of action arose subject to extensions in cases of fraud, mistake, concealment, disability and acknowledgments of part payment.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Malaysia? What various means of service are there? What is the deemed date of service? How is service effected outside Malaysia? Is there a preferred method of service of foreign proceedings in Malaysia?

Civil proceedings are commenced when the originating process is sealed by the court. The papers may be served either by prepaid AR registered post or personally on the defendant. Substituted service may be ordered if these methods have been attempted to no avail.

To serve out of jurisdiction, a plaintiff must first obtain leave of court by satisfying the following questions:

- Whether the plaintiff's evidence discloses a serious issue to be tried.
- Whether there is a good arguable case that the court has jurisdiction over.
- Whether as a matter of discretion the court should grant or refuse leave by applying the doctrine of *forum non conveniens*.

Once leave is given, the court will issue a notice of writ to be served out of jurisdiction. Malaysia is not a signatory to the Civil Procedure Convention and as such, where leave is granted a plaintiff must serve the writ in accordance with the laws of the country in which the process is to be issued.

3.2 Are any pre-action interim remedies available in Malaysia? How do you apply for them? What are the main criteria for obtaining these?

A range of injunctive reliefs such as *Anton Piller*, *Mareva*, *Fortuna*, *quia timet*, *Erinford*, prohibitory and mandatory orders are available. These may be obtained at any stage of the proceedings subject to the plaintiff showing an arguable case that raises serious issues to be tried and a danger of dissipation or destruction of the subject-matter in the litigation. An undertaking in damages would also be required. Order 22A of the ROC provides that a plaintiff may at any time after the service of process apply for an order requiring the defendant to make interim payments in respect of damages.

3.3 What are the main elements of the claimant's pleadings?

The trial will be confined to the pled allegations. The pleadings must clearly set out the following:

- The names and addresses of the parties.
- The facts giving rise to the dispute.
- The essential elements of the underlying causes of action.
- The relief sought.

Evidence need not be pled.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Amendments without leave of the court are allowed once at any time before pleadings close. Thereafter leave is required. The general principle is that amendments would be allowed if they do no injustice to the other party.

The following questions are relevant to the exercise of the court's discretion:

- Whether the application was *bona fide*.
- Whether the prejudice (if any) caused to the other side may be compensated by costs.
- Whether the amendments would in effect turn the suit from one character into a suit of another and inconsistent character.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A defence should plead the allegations the defendant admits or denies and where necessary to put the plaintiff to strict proof. To avoid the defence from being struck out as a bare denial, the defendant should also plead his or her version of the dispute.

The defendant may file a counterclaim at the same time the defence is filed. Alternatively, a defence of set-off may be pled.

4.2 What is the time limit within which the statement of defence has to be served?

A defence has to be served before the expiration of 14 days after the defendant has entered an appearance to an action subject to any agreement between parties or if leave of court is obtained for an extension of time.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may institute third party proceedings for a contribution or indemnity or for any question or relief to be determined which is relevant to the main action.

4.4 What happens if the defendant does not defend the claim?

There are several possibilities, which include the following:

- Where the claim is for a liquidated sum, judgment may be entered for the sum claimed. For unliquidated damages, judgment may be entered with damages to be assessed.
- Where the claim is for immovable property, judgment may be entered for possession of the property. For movable property, judgment may be entered either for the delivery of the property or for the value of the property to be assessed.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant who intends to dispute the court's jurisdiction may, within 14 days of entry of appearance, apply to court to, among others, set aside the originating process or service thereof, discharge the order for leave to serve out of jurisdiction, or strike out or stay the proceedings on the grounds that the court has no jurisdiction or is not the proper forum to adjudicate the dispute.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Multiple parties or defendants may be joined in cases where there are common questions of law or fact between the parties and the relief claimed, whether jointly or severally arisen out of the same transaction or dispute. Leave of court in certain instances is required to join parties into the proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Multiple proceedings may be consolidated on similar grounds as a joinder of parties described above in question 5.1 or where the court thinks it is in the interests of justice to do so.

5.3 Do you have split trials/bifurcation of proceedings?

Split trials may be ordered at the court's discretion to avoid embarrassment, delay or inconvenience.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Malaysia? How are cases allocated?

The case allocation system is known as the 'Tracking System' to divide cases between those litigated on affidavits (A-Track) and those requiring *viva voce* evidence conducted by way of a trial (T-Track). A third miscellaneous category (M-Track) is available for appeals, and family, land, judicial review and winding-up matters.

6.2 Do the courts in Malaysia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have wide powers at case management stage to ensure the just, expedient and economical disposal of matters. These powers include but are not limited to:

- Ordering the parties to go through mediation.
- Regulating the documents to be used by the parties at trial.
- Regulating the witnesses to be called at trial.
- Scheduling the time to be taken and dates for trial.

The parties are at liberty to apply for interim orders such as the interim preservation of property, discovery of documents, interrogatories and security for costs.

The costs consequences are usually ordered as costs in the cause to be determined at the end of the trial.

6.3 What sanctions are the courts in Malaysia empowered to impose on a party that disobeys the court's orders or directions?

The courts may dismiss the action, strike out the defence or enter judgment.

6.4 Do the courts in Malaysia have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts may on their own motion, or on the application of a party, strike out parts of an action or defence where there has been non-compliance with case management orders or an inordinate delay in proceedings. Other grounds include there being no reasonable cause of action or defence, or if the action is an abuse of the court process.

6.5 Can the civil courts in Malaysia enter summary judgment?

In most civil cases, summary judgment may be entered where the defendant is unable to show a triable issue fit for trial.

6.6 Do the courts in Malaysia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A party may discontinue or withdraw the proceedings subject to costs orders or other terms the court deems fit to impose. For a party to stay proceedings, special circumstances must be shown.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Malaysia? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

The rules of disclosure in civil proceedings have changed. Previously, mutual disclosure was required. Under the new ROC, disclosure is only made where there is an order by the court. Such an order may be made against any party by serving a list of documents that are or have been in his or her possession, custody or power. The court will not order disclosure unless it is necessary to dispose of the matter fairly.

Where an order for disclosure is made, the party is required to disclose documents which the party intends to rely on at trial and any other documents which could support or adversely affect either party's case. Once an order is made, there is a continuing duty of disclosure.

Pre-action disclosure in the form of a '*Norwich Pharmacal Order*' is possible under Order 24 rule 7A of the ROC. The court must be satisfied that the party against whom the order is sought is likely to be a party to the proposed proceedings and the documents are in his or her possession, custody or power.

7.2 What are the rules on privilege in civil proceedings in Malaysia?

Privilege may be claimed against the production of evidence on grounds of public interest, State affairs, without prejudice communications and legal professional privilege.

7.3 What are the rules in Malaysia with respect to disclosure by third parties?

An order for disclosure against a third party may be made if the documents are relevant, specified and they are in his or her possession, custody or power.

7.4 What is the court's role in disclosure in civil proceedings in Malaysia?

The court's role is to facilitate disclosure in terms of relevancy, fairness and justice at all times, ensuring that the disclosure is not a 'fishing expedition' or for any ulterior purpose.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Malaysia?

Unless otherwise ordered, documents obtained by disclosure may only be used for the relevant proceedings. Where there is a real risk that the documents would be used for collateral purposes, the court may restrain the use of such documents.

8 Evidence

8.1 What are the basic rules of evidence in Malaysia?

The Evidence Act 1950 (EA) has largely incorporated the rules of evidence used in the Malaysian courts. The EA is in three parts – relevancy, proof and production of evidence. It applies to judicial proceedings. Common law may be resorted to as an aid to interpretation or where the EA is silent.

The 'best evidence rule' is strictly followed unless parties agree to the evidence produced or dispense with the rule. Admissibility is also based on whether the particular piece of evidence is relevant.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Relevant evidence is a condition for admissibility subject to rules regarding privilege, similar fact and hearsay. The court may require the party adducing the evidence to show relevancy.

An expert witness is first required to establish that he or she has the necessary qualification or experience as an expert to express an opinion on a particular matter in the proceedings.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

All persons are competent and compellable to testify. For child witnesses, the court may ascertain the child's competency before he or she gives sworn or unsworn evidence.

Evidence is to be given by oral testimony and the witness is subject to cross-examination. It is now common for written witness statements to be filed and exchanged before trial. These statements would be taken as stated on oath when the witness is on the stand.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Under the EA, expert witnesses may be called to assist the court on points of foreign law, science, art or customs and usages. The witnesses' duty to court overrides their obligations to the party calling them. However, there are no written or published rules to this effect.

At case management, the court will usually direct that written expert reports be exchanged between parties before trial.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Malaysia?

The court is bound by the strict rules of evidence under the EA. Apart from the duty to rule on admissibility and relevancy, the court's role is to facilitate the exchange and, where necessary, the disclosure of evidence, in the interests of justice towards an expeditious disposal of the proceedings.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Malaysia empowered to issue and in what circumstances?

Subject to the ROC and the Courts of Judicature Act 1964, the courts have a wide range of order-making powers and discretion such as summary and default judgments, pre-trial and stay orders, and injunctions, as explained above.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts have the discretion to grant compensatory, special, exemplary and aggravated damages. Unless agreed between parties, the maximum rate of interest the court may award is 5% calculated from the date of judgment until the judgment is satisfied. Costs are also discretionary and, in certain instances, solicitors may be personally liable for costs owing to misconduct.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment may be enforced by the following methods:

- Writ of seizure and sale for movable and immovable property.
- Prohibitory order to prevent a judgment debtor from dealing with immovable property.
- Garnishee proceedings to freeze and recover monies in the hands of third parties.
- Writ of possession to a person in the possession of the subject property.
- Writ of distress for the recovery of rent due.
- Charging order on securities.
- Appointment of receivers to receive monies due on the judgment for the benefit of the judgment creditor.
- Judgment debtor summons to cross-examine the judgment debtor for information on his or her assets.
- Committal order for contempt of court.

A foreign judgment may be enforced by way of registration under the Reciprocal Enforcement of Judgment Act 1958 (REJA) provided that:

- the country in which the judgment was obtained is the United Kingdom, Hong Kong, Singapore, New Zealand, Republic of Sri Lanka, India or Brunei Darussalam;
- the judgment is final and for a definite sum of money;
- the judgment is not more than six years old, starting from the date it was obtained;

- the judgment is not on matrimonial matters, winding-up, lunacy, guardianship, bankruptcy, tax or fine, or penalty or charges; and
- the enforcement of the judgment is not contrary to public policy.

If the judgment cannot be enforced by registration under REJA, the only method of enforcement is to sue on the judgment in the courts as an action in debt.

9.4 What are the rules of appeal against a judgment of a civil court of Malaysia?

No appeal shall lie to the High Court from the Magistrates' courts or the Sessions courts if the value of the subject matter is less than RM10,000.00 except in any proceedings relating to the maintenance of wives or children.

An appeal from the High Court to the Court of Appeal may be filed where the value of the subject matter is more than RM250,000.00.

An appeal from the Court of Appeal to the Federal Court requires leave of the Federal Court. Leave would only be granted if the applicant is able to show that the question of law under appeal is novel and would, if answered, be to public advantage.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Malaysia? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration, mediation, adjudication and expert determination are all available and frequently used in the resolution of Malaysian commercial disputes.

Arbitration is the most comprehensive method of dispute resolution, and is available whenever the parties have agreed to use arbitration instead of commencing proceedings in a court of law. In this case, the arbitrator or arbitral tribunal has the power to decide the entire dispute between the parties finally, and in accordance with its own procedure, and the court's role is limited to facilitating and enforcing the arbitral decision.

Mediation is a form of dispute resolution that can run on its own, or as a preliminary to arbitration or court litigation. A mediator can be chosen by the parties or the court may allocate a judge to act as mediator. Unlike judges, arbitrators or adjudicators, the mediator does not make a binding decision, but instead attempts to find a solution that can be agreed by the parties to the dispute. This solution will then be binding. If no solution is agreed, the parties may proceed to seek a binding decision by arbitration or court litigation.

Adjudication is a form of dispute resolution that is available in respect of construction contracts. It is intended to be a quick and cost-effective means of determining construction payment disputes, and can run on its own or as a preliminary to arbitration or court litigation. Adjudicators are able to provide quick interim decisions within 45 days, which are binding unless the dispute is set aside or finally decided by court litigation or arbitration.

Expert determination can be used whenever the parties have agreed to refer any matter to an expert. Unlike an arbitrator, an expert is usually confined to the determination of a single matter in dispute

between the parties, e.g. the market value of a property. The findings of an expert will be binding on the parties and can be enforced by arbitration or court litigation.

In addition to this, Malaysia has a number of specialist statutory courts and tribunals that are confined to specific types of disputes, for instance, the Industrial Court, the Consumer Claims Tribunal and the Homebuyers' Claims Tribunal.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration is governed by the Arbitration Act 2005 (AA), which is based on the United Nations Commission on International Trade Law's (UNCITRAL) Model Law, and court proceedings in respect of arbitration are governed by the Rules of Court 2012. Mediation is governed by the Mediation Act 2012 (MA), and construction adjudication is governed by the Construction Industry Payment and Adjudication Act 2012 (CIPA).

There are no statutes governing expert determination. Statutory tribunals are governed by their respective statutes and rules.

1.3 Are there any areas of law in Malaysia that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The AA provides that all matters that the parties have agreed to arbitrate may be arbitrated, unless public policy otherwise dictates. Malaysian courts apply this exception narrowly. Generally, criminal and family matters are considered non-arbitrable.

Family matters as well as all other civil and commercial matters may be mediated.

Adjudication under the CIPA applies only to construction disputes other than small residential construction disputes.

Specialist courts and tribunals are limited to the specialist disputes for which they were established by statute.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Malaysia in this context?

The Malaysian courts will issue interim measures of protection in support of arbitration, and will stay any court proceedings commenced in breach of the arbitration agreement. Anti-suit injunctions are also available against parties who have commenced foreign proceedings in breach of an agreement to arbitrate in Malaysia.

The courts will not order the parties to mediate or seek expert determination unless the parties have previously agreed to do so. A party to a mediation is not obliged to agree to any proposed solution; however, the parties' agreement may provide that participating in a mediation is compulsory before an arbitration or court proceedings can be commenced.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Malaysia in this context?

Arbitral awards are final and binding. There is no right of appeal under the AA. References on points of law cannot be made in international arbitrations, unless the parties have otherwise agreed. Awards can only be set aside on the limited grounds set out in section 37 of the AA, which mirrors the UNCITRAL Model Law.

Expert determinations are binding except in cases of fraud, partiality and fundamental mistake.

Judges are expected to encourage parties to mediate, but there are no sanctions for refusing to mediate. Settlement agreements reached at mediation are usually recorded as consent judgments, with minimal judicial involvement.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Malaysia?

The Kuala Lumpur Regional Centre for Arbitration (KLRC) is the main institution in Malaysia for arbitration and adjudication.

The Malaysian Mediation Council (MMC) is the main institution in Malaysia for mediation.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The Malaysian government and judiciary are active in promoting the use of alternative dispute resolution. In 2011, Parliament amended the AA to strengthen the arbitral process and in 2012 passed the MA, as well as the CIPA, the last of which recently came into force in April 2014.

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Mexico



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Mexico got? Are there any rules that govern civil procedure in Mexico?

In Mexico, our legal system is a written law based on the Roman or civil law tradition. Mexico is a federal country; notwithstanding the above, our legal system has federal, as well as local laws, for each of the 31 States and for the Federal District (Mexico City, and Federal District, or DF) that forms this country.

In this regard, the Mexican legal system is integrated by federal laws (i.e. Commercial Code, Federal Code of Civil Procedures and Federal Civil Code) and by local laws of each of the Mexican States (i.e. Civil Code for the Federal District and Code of Civil Procedures for the Federal District).

The scope of local laws is limited to the State that enacted them, and the scope of federal laws applies to all Mexican States, including the Federal District; however, it will be necessary to address the nature of the act in question and the specific area of law to determine whether it is a local or a federal matter (i.e. the Commercial Code, which is a federal law, contains substantive and procedural rules; it regulates commercial acts in general and establishes the rules governing the commercial court proceedings, which can be processed by local courts [ordinary] and/or federal courts because, under Mexico's Constitution, there is concurrent jurisdiction between local and federal courts with respect to disputes involving the application of the Commercial Code).

1.2 How is the civil court system in Mexico structured? What are the various levels of appeal and are there any specialist courts?

The civil justice system in Mexico is basically divided, in both federal and local jurisdictions, by subject matter, expertise, grade level, and in some cases, by the amount or value of the matter in dispute. The highest court at the federal level is the Supreme Court of Justice, conformed by 11 Ministers grouped in two Chambers, each integrated by five members and the president. The Supreme Court essentially resolves matters regarding the constitutionality of laws and constitutional conflicts among the Federation, States and municipalities.

In addition to the above, our federal judicial system is also conformed by Collegiate Circuit Courts with three Magistrates each, District Courts and Unitary Circuit Courts, formed by a single Magistrate.

District Judges resolve matters regarding civil, commercial, labour, administrative and criminal disputes and criminal proceedings in

federal matters, as well as indirect *amparos* (constitutional action alleging the violation of rights committed by a court or an authority).

Unitary Circuit Courts resolve *amparos* (constitutional proceedings) and also act as an appellate court for proceedings resolved by District Judges.

Collegiate Circuit Courts are divided by subject matter, into civil, administrative, labour and criminal. These courts resolve direct *amparos* (constitutional proceedings against final court resolutions) and also act as courts of appeals regarding the indirect *amparos* (constitutional action alleging the violation of rights committed by a court or an authority) resolved by District Judges.

Regarding local matters, each State has its own judiciary structure, which consists of a Supreme Court for hearing, on appeals, regarding civil, commercial, family, criminal and lease disputes. The local Courts of Appeal are formed by chambers of three judges, each with specific and/or concurrent (mixed) jurisdictions.

Below the local Courts of Appeal are the Trial Courts and, at yet a lower level, the Justices of the Peace. These judges resolve issues or disputes whose competence is determined by the nature of the dispute and the amount or value of the matter at hand.

1.3 What are the main stages in civil proceedings in Mexico? What is their underlying timeframe?

The general or main stages of civil proceedings in Mexico are the following:

First instance:

Introductory stage, which includes:

- Claim: the written document that must be filed in order to initiate the trial.
- Service of process: the formal act in which notice of the claim is served to the defendant and in which he is required to file his defence (due process of law).
- Answer of claim/defence: must be filed during the specific term established by law, which may vary from five to 15 days, depending on the specific matter.
- Counterclaim: the action brought by the defendant against the plaintiff at the time of responding to the claim.

Probatory stage, which includes:

- Offering of evidence: the parties have a term of 10 days to offer evidence, once the probatory stage is ordered by the court.
- Admission of evidence: the act in which the court admits or rejects the evidence offered by the parties.
- Submission of evidence: the stage of the trial in which evidence is submitted and heard by the court.

Allegations/Pleadings stage:

- Closing arguments made to the judge by the parties. Allegations/pleadings can be presented orally or in writing, depending on whether the proceeding is civil or commercial.

Decisive stage:

At this stage, the court must issue a ruling to resolve the first instance trial, and this must be done within the time specified by the law governing the proceeding. Depending on the complexity of the case, the trial stage can last between one and two years.

Second instance (Court of Appeals):

Appeal: the party to which the resolution is not favourable can appeal within the specific term set in the law governing the proceeding. Usually, the Courts issue the decision within approximately six months.

Third instance (Constitutional action):

Writ of Amparo: this is heard in federal Collegiate Circuit Courts against final court decisions that violate the constitutional rights of any of the parties involved in the proceeding. Usually, the Courts issue the decision within approximately six months.

1.4 What is Mexico's local judiciary's approach to exclusive jurisdiction clauses?

The jurisdiction is normally determined by agreement of the parties. If there is no jurisdictional agreement between the parties, the competent courts will be the courts located at the defendant's address and/or at the place designated by the debtor to be required for payment and/or at the location of the real estate for actions concerning property rights. In case there are several defendants with different addresses, the plaintiff may choose the competent court from among the defendants' addresses.

1.5 What are the costs of civil court proceedings in Mexico? Who bears these costs? Are there any rules on costs budgeting?

According to our Constitution, justice is free. Notwithstanding the above, procedural laws determine the obligation for courts to order costs to be paid which are generally recovered by the prevailing party from the losing party: (i) when no evidence is filed in order to justify its action or motion on disputed facts; (ii) when submitting false documents or witnesses; (iii) when condemned in a summary commercial trial or when not obtaining a favourable ruling in a summary commercial trial; and (iv) when either the plaintiff or the defendant is condemned by two judgments (first instance and appeal resolutions).

The amount of recoverable costs is regulated by statute. The Court order to pay costs will depend on the amount claimed, thus the costs can be awarded between 6% and 10%, if the case is decided by the Trial Court. If the case is decided by the Court of Appeal, the percentage can increase by 2%. In business for an unspecified amount, the prevailing party must file a bill of costs in order for the Court order to be approved.

1.6 Are there any particular rules about funding litigation in Mexico? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

In the Mexican legal system, there are no particular rules about funding litigation or rules on security for costs, or conditional fee arrangements. There is no limitation or prohibition for the negotiation of legal fees between counsellors and clients.

1.7 Are there any constraints to assigning a claim or cause of action in Mexico? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In the Mexican legal system each party must pay or fund their litigation costs. Nevertheless it is not prohibited for a non-party to finance those litigation proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No, there is not.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The limitation periods are established in the local and federal civil codes and in the commercial code. The limitation period for action may vary, depending on the code and the kind of action involved. In commercial matters, the general period for limitation of actions is 10 years. For actions arising from corporate matters (derived from articles of incorporation or by-laws), the limitation period is five years; the limitation period with respect to fees and compensation for hidden defects, liability from wrongful acts and moral damage is two years. In civil matters, such as collection of rents, pensions and in any other periodic benefit, the limitation period is five years.

Notwithstanding the above, there are other obligations that do not have a limitation period, such as alimony (alimentary obligations).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Mexico? What various means of service are there? What is the deemed date of service? How is service effected outside Mexico? Is there a preferred method of service of foreign proceedings in Mexico?

The civil trial begins with the filing of the claim and when the claim is admitted, the judge serves the defendant to process.

Service of process – the formal act in which notice of the claim is served to the defendant and in which such defendant is required to answer, defend and/or object to the claim in the specific term established by law for such matter. Service of process must be carried out in person at the address of the defendant, by the clerk or the officers of the court.

Service of process outside Mexico – the serving of process to a defendant living outside (abroad) of Mexico must be done through a diplomatic letter rogatory addressed to the judge located in the domicile of defendant, requiring such judge to help the Mexican judge serve process to the defendant. The term to answer the claim will be increased because of the distance. The letter rogatory must have attached the following documents, duly translated into the corresponding language: judge's order; claim; and appendixes, among others.

Forms to serve process – when the plaintiff ignores the address of the defendant and when it is not possible to know it through official

records (of authorities and institutions, such as: Police Department; Transit Authorities; Treasury Department; Federal Voters' Registry; Social Security Authorities, etc.), then process is served through edicts, which are publications addressed to the defendant in a local newspaper of the domicile of the court. In this case, the time limit to answer the claim is extended.

3.2 Are any pre-action interim remedies available in Mexico? How do you apply for them? What are the main criteria for obtaining these?

As indicated above, in Mexico there are interim remedies which aim to ensure goods and to obtain a restriction order. Their main purpose is to ensure the execution of a court resolution. Interim remedies can be requested when there is a well-founded fear that, by personal actions, the debtor might squander its assets in order to allege insolvency or declare bankruptcy.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleadings must contain the following main elements: (i) the court before which the claim is filed; (ii) the full name of the plaintiff and an address to receive notices regarding the proceeding; (iii) the name and address of the defendant; (iv) object or objects claimed; (v) the facts on which the plaintiff bases and grounds its claim, narrated clearly and precisely, describing and identifying the documents on which the claim is based and the names of people who have knowledge of the facts; (vi) the applicable law and type of action/proceeding filed; (vii) the value of the negotiation/business, in case it is necessary in order to determine the competent court; and (viii) the signature of the plaintiff or of his legal representative.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes, pleadings can be amended, albeit with restrictions.

In general terms, local procedure laws allow the plaintiff to amend the claim only when the defendant has not been served to process.

In federal procedure laws, the defendant is allowed to amend its defence only if the final hearing of trial has not taken place, and the amendment may only concern motions or defences regarding acts that were not known when filing the defence. Furthermore, the plaintiff may file a new claim only if the final hearing of trial has not taken place, whereby the original claim is extended and amended. The aforementioned amendment may only be filed once by the plaintiff.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of a statement of defence are the following: (i) the court before which the claim is answered; (ii) the full name of the defendant and an address to receive notices regarding the proceeding; (iii) the facts on which the plaintiff bases its claim, confessing or denying them, describing and identifying the documents in which his defence is based and the name of the witnesses who have knowledge of the facts; (iv) motions; and (v) the signature of the defendant or of his legal representative.

In addition, the defendant can bring a counterclaim. The counterclaim must fulfil the same requirements as a claim.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit for serving defence of a claim varies, depending on the matter and the applicable law. For example, in civil matters, the time limit is nine days; in commercial matters, the time limit is 15 days, although there are special trials (such as summary commercial actions), in which the time limit is five days.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes. In order for the defendant to pass on or share liability on to a third party, it is necessary to mention credited reasons, such as: (i) assignment of debt with creditor's consent; and (ii) when the defendant ceased to possess the property subject matter of the trial, etc., and in such case, the defendant must provide the name and address of the third party in order to serve him into the process.

Only the judge resolving the proceeding can determine whether or not a defendant is liable.

4.4 What happens if the defendant does not defend the claim?

As a general rule, the lack of defence (response) in a civil or commercial claim leads the judge to presume that the facts alleged by the plaintiff are true. Nevertheless, the plaintiff is not absolved from proving the facts on which his action is based and the judge is not obligated to resolve against the defendant.

In family matters, when the defendant does not contest the facts alleged by the plaintiff, the defendant is presumed to deny such facts.

In federal matters, when the defendant has been served to process in person, or through its legal representative, and does not answer the claim, the facts alleged by the plaintiff are presumed to be true as if the defendant were to have confessed to them. Nevertheless, the defendant will have the right to prove otherwise in trial. If the defendant is not served to process in person, or through its legal representative, and if he does not answer the claim, then the facts alleged by the plaintiff will be presumed to be denied.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the defendant can dispute the court's jurisdiction, filing a motion of incompetence (lack of jurisdiction), which can be determined depending on the matter, amount or territory.

Incompetence can be filed as follows:

- As a motion of change of venue filed by the defendant with the court believed to lack proper jurisdiction, by which it is required to remit the case to the court believed to have proper jurisdiction (*declinatoria*).
- As a motion for change of venue filed by the defendant with the court believed to have proper jurisdiction, by which it must request the court presently hearing the matter to refrain from hearing the case and to remit it over to the former (*inhibitoria*).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, a third party can ask to be joined into an ongoing proceeding when it has both a personal and a different interest from the one corresponding to the plaintiff and defendant, in any trial and in any stage, provided the case has not been resolved.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, the Mexican legal system allows consolidation of two or more proceedings.

Consolidation can be filed in the following circumstances:

- a) When a trial between the same parties and on a related cause of action is pending resolution in the same or in another court (*conexidad*).
- b) When a trial between the same parties and the same causes of actions is pending for resolution (*litispendencia/lis pendens*).
- c) When a procedure that affects the assets of a person (i.e. inheritance, bankruptcy), in which case all actions against him must be accumulated.

5.3 Do you have split trials/bifurcation of proceedings?

No. The Mexican legal system does not allow split trials or bifurcation of proceedings.

Neither the Civil Procedures Codes, nor the Commercial Code grant authority to the courts to split trials.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Mexico? How are cases allocated?

Yes, in Mexican civil courts there is an allocation system.

Civil affairs (including family and leasing) and commercial affairs are allocated to the courts through a computerised system in a random manner.

6.2 Do the courts in Mexico have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes, judges and magistrates are empowered to enforce their resolutions and impose sanctions such as: (i) fines; (ii) assistance of forces; (iii) forcible removal of locks; and (iv) up to 36 hours' arrest. Moreover, judges and magistrates have the duty to maintain order and demand respect of the parties; therefore they can enact measures to prevent or punish any act contrary to these principles.

6.3 What sanctions are the courts in Mexico empowered to impose on a party that disobeys the court's orders or directions?

See the answer to question 6.2 above.

6.4 Do the courts in Mexico have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Yes, courts in Mexico have the power to dismiss a case, by issuing an order disposing a proceeding without deciding on the merits of the case. For example, in *amparo* (see the answer to question 9.4) proceedings, dismissal and nonsuit applies whenever the claimant dies during the trial, provided the constitutional right being claimed only affects the claimant's personal status.

Once a claim has been admitted by a court, and it has not been resolved by irrevocable judgment, a new claim cannot take place for the decision of the same issue, neither before the same court nor in a different court. If that is the case, the court has to dismiss the new case without further question.

6.5 Can the civil courts in Mexico enter summary judgment?

In the Federal District and in some States of Mexico, the summary trial is derogated, but in other States of Mexico there is still a summary civil trial for cases considered urgent (i.e. the collection of professional fees, issue of public deeds, etc.).

6.6 Do the courts in Mexico have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes, courts in Mexico can discontinue proceedings in the following circumstances:

- a) when a party asserts a cause for disqualification or impediment to the judge to whom the case was allocated; and/or
- b) once the trial has begun, an impediment that occurs requires the judge to excuse the case from further hearing (i.e. when one of the parties appoints a relative of the judge as his attorney).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Mexico? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Pursuant to civil and commercial legislation, parties must attach all the documentary evidence that supports their claim and those on which the defendant bases its defence or counterclaim. These documents should be disclosed at the time of filing the claim or when answering it. No documentary evidence will be admitted after this point, unless: (i) the documents in question have a date later than the one on which the claim was filed; (ii) the documents are dated prior to the date on which the claim was filed, and the corresponding party did not have knowledge of their existence; and (iii) when the corresponding party was not able to obtain the documents due to reasons not attributable to him.

When the parties are not able to file the documents that support their claim, defence or counterclaim, they must declare, under oath, the corresponding reasons why they were not able to file such documents.

Based on the Commercial Code and the Code of Civil Procedures, it is possible to obtain disclosure through pre-trial procedure used to secure evidence or satisfy formalities necessary to bring suit.

7.2 What are the rules on privilege in civil proceedings in Mexico?

Mexico recognises Attorney's Professional Secret (*Secreto Profesional*) as an equivalent of the American Attorney-Client Privilege. Nevertheless, in Mexico, exceptions to Attorney's Professional Secret (*Secreto Profesional*) are recognised only in rare cases.

7.3 What are the rules in Mexico with respect to disclosure by third parties?

In order to know the truth about the disputed facts, the court may use any third party, and any document or thing (evidence), whether it belongs to the parties of the proceeding or to a third party, with the only constraint that such evidence is not prohibited by law and is not contrary to morals.

Therefore, third parties are required at all times to assist courts in the ascertainment of truth, as witnesses, or through the display of documents and things that are in their power, only when they are required to do so by the judge.

7.4 What is the court's role in disclosure in civil proceedings in Mexico?

Evidence is submitted and heard in court. The court will indicate the date and time at which the hearing will take place, within 30 days of its admission.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Mexico?

See the answer to question 7.3 above.

8 Evidence

8.1 What are the basic rules of evidence in Mexico?

There are different rules and principles related to evidence in Mexico, which regulate its admission and presentation in a legal proceeding. We refer, among others, to the following activities: (i) neither the evidence in general, nor the means of evidence established by the law, can be waived; (ii) only the facts shall be subject to evidence, as well as the uses and customs upon which the law is founded; (iii) the court shall apply the foreign law just as would the judges in the State whose law were to be applicable; to this end, the court must be informed as to the text, term, sense and legal scope of the foreign law; (iv) the court must receive the evidence submitted by the parties, provided it is permitted by the law and refers to the points questioned; (v) the obvious facts do not have to be proven, and the judge can invoke them even though they have not been argued by the parties; (vi) the parties shall assume the burden of proof of the facts that support their arguments; (vii) the documentary evidence must be offered and disclosed along with the claim or response to such claim; and (viii) the evidence must be offered, clearly expressing and related with the fact or facts that it is trying to prove, as well as the reasons why the offeror considers that it will prove his statements, etc.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

As mentioned previously, to know the truth on the disputed facts, the

judge can avail himself of any person, whether a litigant or a third party, and of any thing or document, whether they belong to a litigant or to a third party, without further limitation than the fact that the evidence is not prohibited by the law, and is not contrary to morals.

Expert testimony is a necessary element whenever special knowledge of the science, art, technique, trade or industry in question is required, but not with regard to general knowledge that the law assumes judges should have. Consequently, any expert testimony offered by the parties for that type of knowledge will be dismissed by the judge, or when it has been proved by documents, or that merely refer to simple arithmetic or similar operations.

The parties shall clearly indicate the science, art, technique, trade or industry on which the evidence shall be prepared, the points it must address and the questions that must be resolved in the expert testimony, as well as the professional certification, the technical, artistic or industrial capacity of the expert being proposed, his first and last names and address, with the corresponding correlation of such evidence with the facts disputed.

Before admitting the expert testimony, the judge shall give it to the opposing party for three days, so that such party can declare with regard to the pertinence of such evidence and can propose the expansion of other points and questions in addition to those formulated by the offeror, to be examined by the experts.

When the reports rendered are substantially contradictory, such that the judge considers that it is not possible to find conclusions that provide elements of conviction, the judge shall designate a third-party expert to render his opinion on the disagreement.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Yes. There are rules that regulate the admission and hearing of the testimonial evidence. Our laws establish that all persons who have knowledge of the facts that the parties must prove are required to declare as witnesses.

The parties will be required to present their own witnesses; however, in the event that they cannot do so, they must declare so, under oath, and shall request that the witnesses be summoned, expressing the reasons for such impossibility, which the judge shall qualify at his discretion.

The witnesses' examinations will not have to be presented in writing. The questions will be formulated verbally and directly by the parties and must be directly related to the points in dispute, and shall not be prohibited by law or contrary to morals.

The statements and examination of the witnesses shall be made in the presence of the parties in attendance, and their statement shall be entered in writing, first interrogating the offeror of the evidence, and then the other parties of the case, prior warning that such statements must be conducted truthfully, because their false statement constitutes a conduct that the law penalises with imprisonment.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are rules concerning the appointment, acceptance, performance, preparation and presentation of the opinions of the experts to the court. Similarly, there are rules and sanctions in the case that the experts are not legally appointed or that their reports are not submitted in a legal and timely manner.

Definitely the experts owe his/her duties to the court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Mexico?

The Mexican courts are empowered to decree at any time, and in any matter, the reception and submission of any evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Mexico empowered to issue and in what circumstances?

The type of judgments and orders that courts in Mexico can issue are the following:

- Executive orders, which are determinations of procedures.
- Provisional court orders, which are determinations that are executed provisionally.
- Definitive court orders, which are decisions with definitive force that prevent or permanently paralyse the proceeding.
- Preparatory court orders, which prepare the decision about the settlement ordered, admitting or discarding evidence.
- Interlocutory judgments, which resolve issues before or after the judgment, but not the subject matter of the case.

Final judgments that resolve the dispute between the parties can be declarative or constitutive of rights (or both) and of conviction.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts are public bodies whose primary purpose is to resolve controversies and/or litigations within their jurisdiction. Therefore, they can order the payment of damages and/or interest and court costs, provided the plaintiff has justified his right to claim the aforementioned.

9.3 How can a domestic/foreign judgment be recognised and enforced?

There are primarily four international treaties/conventions that Mexico has entered into to confirm decisions, awards and/or arbitral resolutions that were issued in a country other than the one in which they shall be enforced, such as: the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Decisions (the New York Convention); the Inter-American Convention on International Commercial Arbitration (1975 Panama Convention); the Inter-American Convention on International Jurisprudence for the Enforceability of Foreign Judgments, 1979; and the Inter-American Convention on the Extraterritorial Enforceability of Foreign Decisions and Arbitral Awards, 1987.

Consequently, our laws contemplate the possibility of recognising and enforcing in Mexico, decisions, commercial and non-commercial arbitral awards and other jurisdictional resolutions that have been ordered abroad.

The Federal Civil Procedures Code establishes that the decisions, non-commercial arbitral awards and other jurisdictional resolutions that have been issued abroad shall be enforceable and shall be recognised in Mexico, provided, in addition to not being contrary to public policy, they fulfil the necessary requirements to be considered authentic, except as provided for in the terms of the treaties and conventions signed by Mexico.

In no case are the Mexican courts entitled to examine and/or decide on the reasons or grounds of fact or of law upon which the foreign decision to be enforced is based, because the function of our courts is limited to examining the authenticity of such reasons or grounds, and whether they should be enforced in accordance with the Mexican law.

With respect to the enforceability of arbitral awards, the Commercial Code states the following: a) the arbitral award whose enforcement is being requested must be filed in a certified copy, accompanied by the certified copy of the arbitration agreement; and b) that the recognition or enforcement of an arbitral award can be denied, when: i) the party of concern verifies that one of the parties in the arbitration agreement was in some way incapacitated, or that such agreement or the arbitration clause is not valid; ii) the defendant was not duly served and therefore, his right of due process has been violated; and iii) the controversy, the award or its enforcement is against public policy, etc.

9.4 What are the rules of appeal against a judgment of a civil court of Mexico?

The general rules are the following: (i) only the party or third party to whom the resolution is not favourable can appeal; the party to which the resolution is favourable can appeal only if he has not obtained restitution of benefits, compensation of losses and damages, or the payment of court costs; (ii) the appeal must be filed in writing, and it must express the grievances caused by the resolution; (iii) the party to which the resolution is favourable has the right to argue the causes of grievance filed by the appealing party; (iv) the appeal is resolved by the court superior to the court issuing the resolution being disputed; and (v) the judgment that resolves the appeal does not admit any remedy whatsoever.

Notwithstanding the above, in case the appeal resolution violates any constitutional right of the parties, they may file an *amparo* (constitutional proceedings with no exact equivalence under U.S. law, the main purposes of which are: (a) to preserve the rights and freedoms established by the federal constitution against legislative and executive acts, governmental acts of authority and court decisions; and (b) to preserve local and federal sovereignty in interstate or federal-state disputes; relief applies only to the petitioner and the decision serves only as a reference to subsequent cases, and does not have the same force and effect as precedent under U.S. law). Nevertheless, in civil and commercial cases, the *amparo* proceeding could be considered as a second appeal and a revision by a Federal Court.

In regard to civil and commercial matters involving small debts (USD \$40,000 US Cy approximately), the resolution issued by the Trial Court cannot be appealed and therefore, it can only be challenged by an *amparo* proceeding.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Mexico? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods are mediation and arbitration in law or in equity. The ombudsman is not a dispute resolution method under Mexican law.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

To answer this question, certain distinctions must be made, namely:

- 1) the civil or commercial nature of the dispute submitted to arbitration; and
- 2) whether the arbitration is domestic or international.

In the first scenario, the procedural rules are those of the applicable State or Federal Code of Civil Procedure, or those of the Commercial Code.

If the arbitration is domestic, the domestic procedural rules would apply; if it is international, it will be governed by the provisions of conventions such as the following:

- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (The New York Convention, 1958.)
- The Inter-American Convention on International Commercial Arbitration. (Panama Convention, 1975.)
- The Inter-American Convention on the Validity of Foreign Judgments and Arbitral Awards. (Montevideo Convention, 1979.)

1.3 Are there any areas of law in Mexico that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Yes. There are certain matters which cannot be submitted to arbitration, such as disputes related to:

- Land and waters (lakes, rivers, sea).
- Family cases (parenthood, divorce, etc.).
- Consular and diplomatic cases.
- Antitrust.
- Criminal, labour and tax matters.

The concept of “public policy” is the general or main principle that must be taken into account in order to determine whether a dispute can be submitted to arbitration.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Mexico in this context?

If the arbitration agreement is clear and there is no doubt about its obligatoriness, the court commonly refuses to know and resolve the dispute and the parties are ordered by the court to submit their disputes/controversies to arbitration. In general terms, the law recognises that the arbitration tribunals pronounce provisional measures. Also, at the request of one party, the court may order the provisional measures recognised or authorised by law.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Mexico in this context?

In principle, arbitral awards cannot be appealed; however, and in the unlikely event that the parties so agree, or the chosen rules of arbitration allow the parties to appeal, Mexican law would recognise the validity of such agreement or rule.

According to the Mexican Law, the awards and other resolutions, issued as a consequence of an alternative dispute resolution method, are binding and enforceable. However, in regard to the awards issued by an Arbitral Tribunal, the courts may deny its enforcement when: i) the party of concern verifies that one of the parties in the arbitration agreement was in some way incapacitated, or that such agreement or the arbitration clause is not valid; ii) the defendant was not duly served and therefore, his right of due process has been violated; and iii) the controversy, the award or its enforcement is against public policy, etc.

Since arbitrators and mediators have no authority to enforce or award a settlement agreement, the assistance of the courts of law is needed.

Mexican law does not provide legal provisions to punish a party that refuses to mediate. In regard to arbitration, if one of the parties refuses to attend the arbitration proceedings, such party may lose the right of due process.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Mexico?

Among others available are: the International Court of Arbitration, through the International Chamber of Commerce (CCI Mexico); the CAM (Mexican Arbitration Center); CANACO (Mexico City Chamber of Commerce); and the Mexican Institute of Mediation.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Mediation and arbitration are the most commonly required methods of dispute resolution used in Mexico.

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Our firm currently has seven partners, and 20 associates, and a supporting staff including paralegals, translators, technical specialists and administrative staff, with offices in Mexico City, Queretaro and Los Cabos.

The specialisation and development of each practice area of the firm, the support provided among different areas, and the deep knowledge that we have of Mexico, its legal system, markets and industry, enable the firm to offer clients innovative, timely and complete solutions to their needs in a very good manner and with competitive prices. In order to avoid problems before they develop, we take a preventive, coordinated and strategic approach to advising our clients.

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Peru

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Javier Lozada Paz



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Peru got? Are there any rules that govern civil procedure in Peru?

Peru has a civil law system. The civil procedure is essentially written and governed by the Peruvian Political Constitution of 1993 and the Civil Procedure Code (CPC). The main rule for the Peruvian Judicial system is the Judiciary Act and complementary laws. Exceptionally, certain general instructions given by the Supreme Court and the Constitutional Court apply in addition to some matters.

1.2 How is the civil court system in Peru structured? What are the various levels of appeal and are there any specialist courts?

Civil jurisdiction in Peru is comprised of ordinary Courts. The Peruvian Constitution prohibits the institution of extraordinary Courts, except for military and arbitration Courts. However, the creation of special divisions inside the ordinary Courts dealing with particular matters (e.g. commercial, labour, family, etc.) is allowed.

The Peruvian civil Court system is composed of courts of mainly three levels. At the first level, and depending on the value and on the subject matter, claims are brought before the Justice of the Peace (a local magistrate) or before the so-called Specialised Courts, which consist of Tribunals of one judge each. As second instance, we find the Court of Appeal, where Tribunals are regional and composed by three judges. At the highest level of the judicial system is the Supreme Court, which sits in Lima and is composed of Tribunals of five judges dealing mainly with Cassations, which is a very formal kind of appeal that is filed only for certain pre-established grounds.

The Constitutional Court located in Lima has competence over the whole Peruvian territory; it is a separate body and deals only with constitutional law. It has the authority to rule on the constitutionality of laws, acts or regulations; even the Constitutional Court may annul the laws and rules when it finds them incompatible with the Peruvian Constitution. It also decides, as final instance, on appeals brought by citizens looking for protection against governmental or private acts that violate their fundamental rights.

1.3 What are the main stages in civil proceedings in Peru? What is their underlying timeframe?

There are four main stages in civil proceedings in Peru. The number of acts and terms within those stages may vary depending on the type of proceeding (value and subject matter involved). However, proceedings generally may develop as follows:

1. The initial stage is aimed at establishing the formal institution of the case. It starts with the filing of the plaintiff's claim and includes the servings process and the filing of the statement of defence, if any. If the defendant files a counter lawsuit, then this stage will also include the serving of the counter lawsuit to the plaintiff and the filing of the plaintiff's statement of defence. This first stage ends when all preliminary motions and incidentals, including those related with the evidence presented by the parties, have been decided. If all the formal requirements for the correct institution of the case have been complied with, then the Court will declare the points at issue and order to continue with the next stage.
2. The second stage is known as the evidentiary stage: the Court calls for one or more evidentiary hearings (depending on the number and quality of the evidence admitted) where all the evidence is produced and gathered. Under Peruvian laws, if evidence presented by the parties is not sufficient for making a decision, the Judge may order new evidence, including expert advice if the case involves issues for which it is required.
It should be mentioned that from 2008, Courts are able to dispense with the evidentiary hearing based on the type and quality of the evidence admitted. If so, the parties may request to the Court to present their closing arguments orally. After that, the Court must decide the case.
3. Once all evidence has been received and produced and the evidentiary stage is declared closed, the Court must decide the case. Both parties may submit to the Court their final briefs in writing.
4. The final stage primarily consists of the judgment, where the final decision is issued based on the evidence admitted and produced.

Upon the ruling, the first instance ends. After that, either party to which the judgment is not favourable, in full or in part, may challenge or appeal what was decided by the lower Court, in which case the second instance starts. The Superior Court issues the decision after a hearing where both parties may present their closing arguments orally.

Against the second instance judgment, the parties may lodge a Cassation appeal, which is basically an exceptional nullity remedy based on procedural defects as well as errors in the application of the law.

Even though the CPC establishes some terms that the Courts and the parties must fulfil with respect to some of the main procedural acts, the overall duration of civil proceedings may vary depending on several factors, such as the complexity of the case, priority and possible delaying actions by the parties and the heavy case-loads handled by the Peruvian Courts, among others. However, in general, the first instance of a civil proceeding may take between one to two years; and the average duration of civil proceedings, including all stages and instances, may take between three and four years.

1.4 What is Peru's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses regarding choice of law and legal venue are widely accepted, except for those affecting public order matters and in cases where Peruvian Courts hold exclusive jurisdiction or the extension of jurisdiction is forbidden by law.

Consequently, Peruvian Courts generally recognise an exclusive jurisdiction clause and hence decline jurisdiction to hear a claim based upon an agreement giving exclusive jurisdiction to the Courts of another country; but also they allow the execution in Peru of decisions made by foreign courts (by means of an *exequatur* proceeding).

1.5 What are the costs of civil court proceedings in Peru? Who bears these costs? Are there any rules on costs budgeting?

Legal fees to be paid within civil court proceedings in Peru are fixed on an annual basis and considering the amount of the claim. They usually are relatively small amounts. The filing fee is borne by the claimant and also by the defendant, only if a counterclaim is lodged. Other legal fees are in connection with the kind of procedural acts to be performed, such as service of the writ of summons, registration of the judgment, execution of interim remedies, appeals, etc.

In the event that the Court appoints an expert to deal with specific matters, the expert's fees are initially jointly paid by both parties and, at the end of the proceedings, are subject to the same rule applicable to the allocation of legal fees and costs. Another important cost consists of the attorneys' fees. The attorney and the client may agree freely on the fee amount and structure. The general rule in Peru is that the winning party is entitled to full reimbursement from the losing party of the legal fees and costs paid within the proceedings. However, the Court may decide to exempt the losing party from liability for legal fees and costs, due to a reasonable cause.

Each judicial year the Peruvian Judicial System fixes the Litigation Reference Unit (URP), which is the reference value used in Peru to determine the basis for estimating the value of the legal fees. The URP's value is equivalent to 10% of the Peruvian Tax Unit (UIT), which is approved by Supreme Decree every year. The current URP is S/. 385.00 (approximately USD 128.00 at the current exchange rate).

1.6 Are there any particular rules about funding litigation in Peru? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

In Peru, there is no rule about funding litigation. Peruvian laws only allow that people in situations of extreme poverty may be exempted from the payment of the legal fees within the proceedings. In criminal and family matters, this legal aid may include the services of a lawyer paid by the State. To these purposes, the person concerned shall request this legal aid to the Judiciary by proving his/her poverty situation.

Lawyers' fees are freely agreed between the lawyer and client. Even though there is no rule regarding contingency/conditions, the Bar Association of Lima has issued guidelines on minimum legal fees to be charged by lawyers. Non-fulfilment of these minimum legal fees is considered a breach of the Code of Conduct adopted by the Bar Association of Lima.

In the Peru legal system there are no legal rules pertaining to security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Peru? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Any person is able to assign their claim to a third party as long as the claim deals with rights of free disposal. There is no restriction or limitation regarding the financing of those proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Before commencing proceedings, the future claimant must start a conciliation process with the future defendant. To this purpose, the future claimant must submit a petition with the main arguments and evidence supporting his/her claim to a Conciliation Centre duly regulated by the Judiciary. The Conciliation Centre calls a hearing conducted by a conciliator, wherein parties, future claimant and defendant, may agree to settle their dispute or not. If the dispute is settled, then an Act is issued, which is enforceable and binding for both parties.

The conciliation process is not applicable to claims dealing with matters affecting public order or rights of non-free disposal (such as criminal matters, domestic violence and nullity of contracts, among others).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In the Peruvian legal system, time limits as to the statute of limitation are treated as a matter of substantive law. The existence of a statute of limitation has to be alleged by the defendant in writing before or upon the filing of his/her statement of defence. If the defendant does not do so, he/she is regarded as having waived the defence and will not be permitted to use it in any subsequent proceedings. The Court decides about the statute of limitation on the initial stage of the proceedings.

For tort claims, the limitation period is two years; for contract claims, the general limitation period is 10 years, whereas the limitation period for annulment action is two years. For certain matters, the limitation period can be shorter (e.g. for defects in the sale of goods or services, claims under insurance contracts, etc.). Limitation periods are mandatory and any agreement aimed at preventing their effects is null and void.

According to the Peruvian Civil Code, the period starts to count from the moment that it could be brought before the courts. It also provides that the statute of limitation period may be suspended or interrupted in certain circumstances.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Peru? What various means of service are there? What is the deemed date of service? How is service effected outside Peru? Is there a preferred method of service of foreign proceedings in Peru?

Civil proceedings are commenced by the filing of a claim by the plaintiff. When a claim is admitted, then the Court serves it by sending it by regular mail with a written acknowledgment of receipt to be returned. If the defendant's domicile is unknown, service is performed by the publication of notices in official State gazettes. In this case, date of service will be the third day after the last publication.

After the parties have notified the Court of their respective procedural address for the case, further documentation can be served by the Court to that address by regular mail and electronic mail. Services by electronic mail are for reference purposes only and are not considered *per se* as valid service.

Services upon foreign States are performed through diplomatic channels, prior to payment of a legal fee.

3.2 Are any pre-action interim remedies available in Peru? How do you apply for them? What are the main criteria for obtaining these?

The CPC provides that a party may apply for interim remedies before the commencement of proceedings to secure the future claim. The person concerned shall submit a motion in writing with the Court, proving that his/her claim is supported in reasonable basis and that the enforcement of a claim will be impossible or substantially hampered if the remedy is not granted. The party shall also provide a security (mortgage, pledge, recognisance, etc.) for any losses suffered by the defendant if the claim is dismissed.

The Court decides to grant the interim remedy based on the fulfilment of the abovementioned conditions. This decision is issued without knowledge of the adversary party.

Once the pre-action interim remedy is granted and executed, the claimant must file its claim within a 10-day term under penalty of the injunction being automatically lifted. In those cases where the conciliation process is mandatory, such a term is counted from the conclusion of the conciliation process, which shall be started within the next five days following the date in which the remedy was executed.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleading should include the name of the Court before which the action is brought, the names and addresses of

the claimant and of the defendant, the object of the claim, factual circumstances and legal basis, the amount of the claim, if any, the type of proceedings, all the evidence that supports the claim and is presented and the appointment of the claimant's lawyer.

Pursuant to the CPC, if the claimant's pleading does not contain any of the abovementioned elements, the Court provides a term no longer than 10 days. If the plaintiff does not comply with the Court's order in such term, the proceeding expires.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Under the Peruvian law system, the plaintiff may amend the claim only before it is served.

The plaintiff may extend the amount of the claim before the final judgment if new deadlines expire (provided that they arise from the same contract) as long as the claimant reserved that right on the pleading.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The statement of defence must include all the elements of the claimant's pleading, when applicable. The defendant should respond to every one of the claimant's arguments and recognise or deny the documents attributed to him/her. The statement of defence should include the factual circumstances and legal basis of the respondent's defence, the evidence on which its defence relies and the appointment of the defendant's lawyer.

The defendant is also entitled to bring counterclaims, including defence of set-off.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit within which the statement of defence has to be filed with the Court is set by the CPC, depending on the type of proceedings (from five to 30 business days). In all cases, the term is counted from the date the claim is served to the defendant.

After the statement of defence has been filed, the Court shall verify whether it complies with all the corresponding elements. If so, the statement of defence is admitted and served to the plaintiff. There is no specific time to deliver it to the plaintiff.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

According to the CPC, a defendant may seek to implead a third party, who will substitute him/her or will take part as one more defendant. At its discretion, the Court will decide whether to grant the motion to implead the third party. If so, the third party will be served and take part in the proceedings from that time on, sharing liability with the defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to defend a civil claim, the proceedings continue in his/her absence and the defendant is declared party in default (“*rebelde*”). This situation causes a rebuttable presumption of truth of the facts supporting the claim, for which the Court is entitled to issue an early judgment, except when: (i) there was more than one defendant and at least one of them files a statement of defence; (ii) the claim deals about rights of non-free disposal; or (iii) the Court deems that the claimant’s evidence is not sufficient.

The defendant in default is allowed to appear at any time, but he/she is foreclosed from activities which had to be performed in the previous stage of the proceedings.

4.5 Can the defendant dispute the court’s jurisdiction?

The defendant may challenge the jurisdiction of the Court whether for territory or material reasons. He/she also may dispute the Court’s jurisdiction if there is an arbitration clause.

To that purpose, the defendant must submit in writing such an objection within the time limits set by law for each kind of proceedings, which are usually terms below or equal to those granted for the filing of the statement of defence.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Besides in the case explained in question 4.3 above, a third party can be joined into ongoing proceedings at any stage thereof (even in the appeal stage), provided that he/she has a legitimate interest in the result of the proceedings. To this purpose, the party concerned shall file a petition to the Court to join the proceedings either as a claimant or defendant, or as an intervener in support of any of them. Such a petition must comply with the elements required to the pleading, when applicable. If the Court accepts the petition, the new party will join upon the stage at which the proceedings are at that time; the proceedings will not be taken back.

A joinder of a third party can also be made on the Court’s motion if, from the pleading or the statement of defence, it is evident that the claim involves such third party (mandatory joinder).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Pursuant to the CPC, the parties may request the consolidation of two different proceedings if they are raising closely related claims and they are being treated by the same form of procedure (in order to avoid contradictory or incompatible decisions). The petition of consolidation must be filed before judgment with any of the Courts that are hearing the proceedings and said Court will decide whether the consolidation petition is accepted or not. If accepted, the two proceedings will be consolidated and from that time they will be treated by the Court that is hearing the oldest proceeding.

5.3 Do you have split trials/bifurcation of proceedings?

The Peruvian civil justice system allows split trials on the Court’s motion, only when two or more proceedings were previously consolidated. The bifurcation of proceedings can be ordered based on the relation of the claims and the difference of the stage of the procedures, in which case the Court may reserve the right to issue a sole ruling (relative split trials). The bifurcation of proceedings can also be ordered based on judicial economy (because of time, expenses or human resources), in which case proceedings shall be heard and decided separately by their original Courts (absolute split trials).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Peru? How are cases allocated?

Claims in Peru are filed before a Court based on the value, the nature of the claim and the territorial venue. Once filed, the cases are automatically distributed amongst judges through a computerised system by the order of entry at the Registry.

6.2 Do the courts in Peru have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Under the Peruvian legal system, Civil Courts have the authority to conduct the proceedings in accordance with the law; therefore they schedule hearings, order evidence on their own motion or upon the parties’ request and, in general, conduct the case through the different stages. However, it is worth noting that, pursuant to the CPC, the claimant is responsible for bringing a case to Court and promoting progress thereof, otherwise the claim might be treated as abandoned (if none of the parties perform any act for four or more months).

The parties are allowed to make any interim applications, except for those made against the rules of good faith in the scope of the procedure.

6.3 What sanctions are the courts in Peru empowered to impose on a party that disobeys the court’s orders or directions?

Peruvian Courts have the authority to enforce any of their orders or directions. Besides the payment of legal fees and costs, Peruvian Courts are entitled to impose fines on the party who disobeys the Court’s orders or directions, or who acts in bad faith in the course of litigation. The fine is fixed at the Court’s discretion under the limits set in the CPC.

In addition, a party who disobeys the Court’s orders may be held in contempt for up to 24 hours and processed criminally.

6.4 Do the courts in Peru have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Peruvian Courts do not have the power to strike out part of a statement of case. However, they are entitled to give early conclusion of the proceedings without judgment when: (i) the claim

is satisfied out of the process; (ii) according to law, the case cannot be subject to judgment; (iii) the Court grants one party's motion, for which the case is immediately dismissed (e.g. statute of limitation, lack of jurisdiction, *res judicata*, non-compliance of mandatory formalities before commencing proceedings, etc.); and (iv) expiry of the right claimed.

6.5 Can the civil courts in Peru enter summary judgment?

Peruvian Civil Courts are entitled to enter summary judgment when: (i) the case is only a matter of law or, being a matter of fact, there is no need to produce any evidence on the respective hearing; and (ii) the defendant is declared party in default as described in question 4.4 above.

6.6 Do the courts in Peru have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Peruvian Courts do not have the authority to discontinue the proceedings on a discretionary basis. The circumstances causing discontinuance of the proceedings are set by law: (i) while the Superior Court decides on cases of dispute over jurisdiction; (ii) for 30 days in cases of death, declaration of absence, or loss of parties' or representatives' capacity; (iii) if, after the service of the pleading, the Court realises that there is a mandatory joinder (see question 5.1 above) that is not part of the proceedings; and (iv) for a term no longer than 30 days, in case the Court deems that parties could be acting under fraud or collusion.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Peru? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Pursuant to the CPC, the disclosure of documents may be ordered by the Courts' own motion or on either parties' request. In this last case, the party concerned shall precisely express his/her interest in the document as well as the contents thereof. The disclosure of documents shall be limited to the documents closely related to the case.

The CPC provides that a party may request the disclosure of documents before the commencement of proceedings to secure the evidence in a future claim. The person concerned shall submit a motion in writing, declaring the object of his/her claim and the reason that justifies the disclosure pre-action.

7.2 What are the rules on privilege in civil proceedings in Peru?

There are no specific rules on privilege in the Peruvian Legal System. However, in-house attorneys enjoy a privilege based on the Bar Association Rules, for which they have confidentiality privilege and cannot be forced to disclose any information provided by clients involved in a case and identified as confidential. In addition, there are other special rules in Peru aimed to protect information disclosed to or obtained by some professionals (e.g. psychologists, health professionals, priests, etc.).

7.3 What are the rules in Peru with respect to disclosure by third parties?

Disclosure of documents by third parties is allowed. In such case, said documents must belong to, be referred to or directly involve, the claimant or the defendant.

7.4 What is the court's role in disclosure in civil proceedings in Peru?

See question 7.1 above.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Peru?

In Peru there is no restriction or limitation on the use of a document obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Peru?

Evidence is provided by the parties upon the filing of the claim or the statement of defence, as applicable. New evidence is accepted only when they are aimed at proving new facts.

Courts must decide on whether the means of evidence proposed by the parties are related to and relevant for the case. For this matter, Courts will appreciate and evaluate evidence reasonably and in whole.

The burden of proof is held by the party who proposes the claim, except when the other party is in a better position to prove it.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The types of evidence regulated by the CPC are as follows:

- Statement of the parties.
- Witness testimonies.
- Documents.
- Experts' reports.
- Judicial inspections.

All evidence that is not related to the case, including non-controverted, impossible or notorious acts, will be disallowed.

Expert evidence is not expressly regulated in the CPC. However, expert reports will be required when the evidence is subject to special knowledge of science, technology and arts, among others.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

There is a limit of three witnesses per party. Any individual is able to testify, except those under 18 whose intervention proceeds exclusively in the cases permitted by law.

The witness statements or depositions shall be elaborated based on the questions related to the case and to the evidence provided by the party who proposed the witness.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The party who proposed an expert report shall specify the issues to be treated by the report, as well as the occupation or profession of the expert to be in charge. The Court, at its own discretion, shall decide the number of the experts.

If experts agree, they submit one report only. If they disagree, experts submit different and separate reports. Reports are explained and discussed in one or more hearings.

At the same time, any party may submit its own expert report as long as it was proposed at the evidentiary stage. Courts are entitled to call the parties' experts to a hearing to inform about their reports.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Peru?

Peruvian Courts are empowered to decide in connection with the legality and admissibility of the evidence, to make sure it is properly and timely produced and gathered, and to determine the value of each piece of evidence at the moment of ruling the case.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Peru empowered to issue and in what circumstances?

Peruvian Courts may issue three kinds of orders:

- Decrees, issued to impulse the development of the procedure.
- Orders (*autos*), used to admit or dismiss the motions and applications filed by the parties.
- Ruling, final decision by which the instance or the proceedings end.

According to the Peruvian legal system, judgments are declaratory (to declare the existence of a right or a fact) or condemnatory (to order a party to do something, to refrain from doing something or to pay a certain amount).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Peruvian Courts have no powers to issue rulings on damage and interest unless the party has expressly requested them. However, any judgment which orders a party to pay a certain amount will accrue, as a matter of law, a legal interest since the date it is rendered. With regard to costs of litigation, see question 1.5 above.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are immediately enforceable since they are final and conclusive (no recourse or remedy apply). To this purpose, the person concerned shall start an enforcement proceeding, within which attachment of the debtor's real property, movable assets and receivables can be ordered.

Foreign judgment can be recognised and enforced in Peru by means of an *exequatur* proceeding. Peruvian Courts shall only verify the compliance with some requirements provided by Private International Law; they are not allowed to make a decision on the merits of the case.

9.4 What are the rules of appeal against a judgment of a civil court of Peru?

The party who disagrees with a final judgment, in full or in part, can challenge the decision by filing an appeal before the first instance Court. Terms to file the appeal change depend on the type of proceedings. The appellant must explain the errors he/she asserts have been made by the lower Court and the negative results of those errors.

Appeal is limited only to a review of actions taken by the inferior Court; the appellant cannot raise new claims or objections, nor produce new evidence. The Appeal Court issues the decision after a hearing where both parties may present their closing arguments orally.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Peru? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Peru, the most common methods of alternative dispute resolution are:

- Negotiation: the parties solve their disputes, seeking individual benefits and/or collectively attempt to obtain results that serve their mutual interests.
- Mediation: a third party acts as the mediator, who is governed by the principle of neutrality, seeking a consensual agreement made and accepted by the parties, who are still in charge of the process. In this sense, the parties decide whether to follow the agreement or not.
- Conciliation: a third party, the conciliator, is governed by the principles of fairness and justice, and his/her main goal is to conciliate by usually seeking concessions between the parties. The conciliator proposes an agreement that is either accepted by the parties or not. The agreement at the end of the conciliation is mandatory to the parties and its failure may lead into a civil proceeding.
- Transaction: the parties agree, in order to extinguish their dispute or doubtful obligations, to make reciprocal compensations. This transaction can be judicial or extrajudicial (out of the proceedings).
- Arbitration: the parties, by mutual agreement, appoint an independent third party called the arbitrator, who is responsible for solving any claim in the case. The arbitrator will solve according to the rules chosen by the parties in the agreement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

There is no specific law or rule for negotiation and mediation. Conciliation is governed by Law N° 26872 and its regulations,

approved by Supreme Decree N° 014-2008-JUS, as well as Legislative Decree N° 1070. The transaction is governed by the Peruvian Civil Code and the CPC. Finally, the arbitration is governed by Legislative Degree N° 1071.

1.3 Are there any areas of law in Peru that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Pursuant to Law N° 26872, the conciliation process is not applicable to claims dealing with matters affecting public order or rights of non-free disposal (such as criminal matters, domestic violence and nullity of contracts, among others). According to the CPC, transactions must treat pecuniary rights only, and should not affect public order or good customs. The same rules should apply to negotiation and mediation.

On the other hand, the Arbitration Act establishes that parties may submit to arbitration any dispute on a matter that is of free disposal to parties according to the law, as well as other matters provided for by international treaties. Some matters that cannot be subject to arbitration are therefore: criminal matters; any matter related to minors or a person's capacity or marital status; and matters dealing with public interest, etc.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Peru in this context?

Peruvian Courts are entitled to issue interim or provisional measures of protection in support of arbitration proceedings, on the arbitrators' motion (when the arbitral tribunal has been constituted) or on a party's request (prior to the constitution of the arbitral tribunal). Moreover, Courts can also conduct the production or procurement of evidence or information within an arbitration process.

Peruvian Courts are also the authorities in charge of enforcing the agreements reached by the parties when a dispute is settled through transaction or conciliation proceedings, as well as the awards resulting from arbitration.

Finally, notwithstanding the case explained in part I, question 2.1, Peruvian Courts do not have the authority to force parties to seek or use any method of alternative dispute resolution. In cases where the parties of the proceedings had agreed an arbitration clause, the defendant may challenge the jurisdiction of the Court within the time limits set by law for each kind of proceedings; otherwise it is considered that the defendant has accepted the Court's jurisdiction.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Peru in this context?

As explained in question 1.4 above, agreements reached by the parties when a dispute is settled through transaction or conciliation

proceedings, as well as the awards resulting from arbitration, are enforceable by means of enforcement proceedings with the Civil Courts.

Arbitration awards cannot be appealed and have the same legal effect as a final and conclusive judgment. However, the Arbitration Act regulates the annulment of the award under grounds specifically provided for in Article 63 of the said act (e.g. the arbitration clause is null and void; the defence right of one of the parties has been violated; the arbitral tribunal has decided on matters not subject to arbitration, etc.), upon the request of one of the parties, who shall file his/her petition of annulment with the Superior Court. The Superior Court is only entitled to review the validity of the award and therefore is expressly forbidden to decide on the merits of the case, on the contents of the award or from evaluating the criteria, motivations or interpretations as expressed by the arbitral tribunal.

According to the Arbitration Act, the filing of the annulment petition does not suspend the obligation to comply with the award or its arbitral or judicial enforcement, unless the party concerned requests the suspension and meets the requirement of the guarantee agreed upon by the parties, established in the applicable arbitral rules or, by default, submit a guarantee letter to secure the payment of the amount ordered to be paid by the award.

On the other hand, it is important to note the writ of *amparo*, a unique and extraordinary mechanism, the main purpose of which is the protection of citizens' constitutional rights, so its resolution is usually more expeditious than any regular motion. In 2011, the Constitutional Court issued a ruling constituting binding precedents, which stated that the annulment petition provided for by the Arbitration Act is the suitable remedy to challenge awards; however, the writ of *amparo* may be exceptionally admitted in specific cases affecting the constitutional system: (i) when there is a direct violation of this binding precedent; (ii) when the Arbitral Tribunal disregards a law or rule despite the Constitutional Court declaring it constitutionally valid; and (iii) when a third party files the writ of *amparo* due to a direct violation of his/her constitutional rights.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Peru?

The major alternative institution dispute resolution institutions for arbitrations in Peru are:

- Chamber of Commerce of Lima (*Cámara de Comercio de Lima*).
- American Chambers of Commerce of Peru (*Cámara de Comercio Americana del Perú – AmCham Perú*).
- Center for Conflict Analysis and Resolution (*Centro de Análisis y Resolución de Conflictos de la Pontificia Universidad Católica del Perú – CARC*).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Arbitration is the alternative dispute resolution method more commonly used in Peru, especially in commercial matters. In fact, over the last decade, commercial contracts have increasingly included an arbitration clause.


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Poland



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Poland got? Are there any rules that govern civil procedure in Poland?

The legal system in Poland is of a continental type. A characteristic feature of this system is the exclusivity of legislative bodies to make law and the hierarchy of normative acts – the subordination of all acts to the constitution.

The basic act governing the civil procedure is the Code of Civil Procedure (CPC). (Civil proceedings in Poland are divided into litigious proceedings (proper as to the principle) and non-litigious (proper for the matters specified in the CPC). Non-litigious proceedings are partly governed by own regulations, whereas the provisions of litigious proceedings apply accordingly in the remaining scope. Because this study is only a general outline, it discusses only the regulations concerning the litigious proceedings.) Primary principles of the civil procedure are as follows:

- the principle of equality (equal rights) of parties;
- the principle of an adversary system of parties in court proceedings;
- the principle of free exercise by the parties of their rights;
- the principle of open proceedings;
- the principle of oral proceedings; and
- the principle of concentration of evidence collected in the proceedings.

1.2 How is the civil court system in Poland structured? What are the various levels of appeal and are there any specialist courts?

Common courts and the Supreme Court are competent to hear civil matters. The common courts comprise: district; regional; and appeal courts. Courts of first instance are, in principle, district courts. Regional courts are the first instance courts for matters the value in dispute of which is over PLN 75,000.00 and for matters specifically set out in the Code of Civil Procedure. Second instance courts are regional courts for matters heard at first instance by district courts, and courts of appeal for matters heard at first instance by regional courts.

Commercial courts, which operate as divisions of district and regional courts, are competent to hear commercial matters, i.e. matters based on civil law relations between entrepreneurs.

The court of competition and consumer protection and the court of community trademarks and industrial designs operate as specialist divisions of the Regional Court in Warsaw.

As a rule, civil proceedings are in two instances. Decisions as to the merit (a judgment, a decision as to the merit in non-litigious proceedings) are always subject to appeal, whereas procedural rulings (a decision, an order) are subject to a complaint, unless provisions of the Civil Procedure Code provide otherwise. To the extent specified in the Code of Civil Procedure, a ruling as to the merit of the court of second instance can be subject to a cassation complaint – as an extraordinary appeal measure – to the Supreme Court, which triggers as if “the third instance”. A cassation complaint can also be filed against decisions of the court of second instance on rejection of an appeal or discontinuance of the proceedings concluding the proceedings in the case.

1.3 What are the main stages in civil proceedings in Poland? What is their underlying timeframe?

The proceedings before the court of first instance are instituted by filing a statement of claim. After it is served on the court, it undergoes a formal control aimed to supplement any potential formal defects. If the court has determined proper filing of the pleading, it is sent by the court to the opposite party, together with a notice of the hearing date and a summons for submitting a reply to the statement of claim. At the hearing the parties present their positions; witnesses are then heard and possibly also the parties, or other evidence is taken (usually in the course of the hearing several sittings are held). The Code of Civil Procedure does not define the time-limit within which a judgment should be rendered. After the hearing is closed, the court pronounces a judgment and provides major oral reasons for the resolution. It is possible to motion the court to draw up the reasons thereof in writing within a week.

The proceedings before the court of second instance commence by filing an appeal. It must be submitted within two weeks calculated: 1) from the date of the service of the written reasons for judgment on the party – if the party has requested the reasons; or 2) from the date of the lapse of the deadline to request the written reasons – if the party has not requested the reasons within the deadline.

An appeal shall be filed with the court that issued the judgment, which, after a formal control, will then forward it, together with the case file, to the court of second instance, as well as a copy of the appeal to the opposing party (which has the right to file a reply to the appeal) or reject the appeal if the defects have not been supplemented in time. The court of second instance holds a hearing and, after closing thereof, delivers a judgment.

1.4 What is Poland's local judiciary's approach to exclusive jurisdiction clauses?

Because Poland is a member of the EU, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters applies to this issue. In accordance with the regulation, if the parties, of which at least one is domiciled or based in the territory of a Member State, have agreed that a court or courts of a Member State should settle a dispute that has already arisen, or a future dispute that may arise under a specific legal relationship, it is the court or courts of that Member State that has/have jurisdiction, which is, in principle, the exclusive jurisdiction.

In addition, the Code of Civil Procedure also provides for the possibility of concluding an agreement as to the jurisdiction. The parties under a specific legal relationship may agree in writing that property rights disputes that have already arisen or those likely to arise be settled by a foreign court, which excludes a Polish court if such an agreement is effective in the foreign country under the applicable law. As a rule, the right to choose a foreign country shall be reserved in the agreement for both parties to such agreement. Such an agreement cannot be concluded in certain cases, specifically in matters concerning real estate in Poland.

As far as the jurisdiction of the Polish courts is concerned, parties can agree in writing that disputes that have already arisen or those that may arise in the future from a specific legal relationship be settled by the court of first instance, which, pursuant to an act of law, does not have territorial jurisdiction. Under such an agreement the parties, however, cannot change the exclusive competence of the court.

1.5 What are the costs of civil court proceedings in Poland? Who bears these costs? Are there any rules on costs budgeting?

Each party shall bear the costs of litigation, which comprise court fees (for filing pleadings, advance payments for drafting expert opinions, etc.) and reimbursable expenses (e.g. reimbursement of travel costs, etc.). The costs of legal representation, the amount of which a party determines with an attorney, constitute a separate category of the costs.

Ultimately the costs of litigation are determined by the court in a judgment closing the proceedings in a particular instance. As a rule, the party that loses the case shall pay the other party for the costs it has incurred and which were necessary to purposeful pursuit of the rights and defence. In terms of the reimbursement of the costs of legal representation, as a rule, the court shall decide on those costs by applying the rates stipulated in the regulation on the provision of legal aid *ex officio*, possibly by multiplying the amount thereof (max. six-fold). Most frequently, the reimbursement of the costs awarded by the court do not reflect the amount of professional fees agreed between a party and its representative under a service agreement.

There are exceptions to the principle of awarding the reimbursement of costs from the party that has failed in the proceedings, e.g. the court grants the defendant such costs from the plaintiff despite the fact it lost the case if the defendant has not provided a reason to bring an action, and recognised the claim in the first procedural action.

1.6 Are there any particular rules about funding litigation in Poland? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

If the party demonstrates that it is unable to bear the legal costs, it may motion for exemption from the obligation to bear the legal costs in full or in part. The party can also apply for appointment of a professional attorney *ex officio* if it proves that: 1) it does not have sufficient funds to pay the costs of advocate or legal adviser fees; or 2) participation of an advocate or a legal adviser in the proceedings is necessary, e.g. because of the complexity of the matter. Such requests are examined by the court, which assesses whether there are reasons to allow them.

Minimum advocates' and legal advisers' fees within the *ex officio* legal aid are set out in the regulations of the Minister of Justice. The court may award a multiplied minimum rate (max. six times), although in practice this occurs very rarely.

The remuneration of an appointed advocate or a legal adviser is determined in an agreement concluded by the professional and the client. This arrangement may include remuneration in any amount but it is necessary to take into account the workload of an attorney. Determination of the remuneration should take place before an advocate or a legal adviser provides legal assistance to the client.

The agreement between a client and an attorney (advocate or legal adviser) may provide for unexpected expenses which encumber the client. An advocate or a legal adviser shall not conclude an agreement with the client under which the client agrees to pay his attorney a fee for conducting a case exclusively in proportion to the achieved result (*pactum de quota litis*). It is permitted, however, to conclude an agreement which provides for an additional fee in the case of a successful outcome in the case.

1.7 Are there any constraints to assigning a claim or cause of action in Poland? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In accordance with the provisions of substantive law, the creditor may, without the consent of the debtor, transfer the debt to a third party unless this is contrary to the law, contractual clause or a kind of liability. Along with the debt, any rights associated therewith are transferred to the buyer, in particular the outstanding interest. The absolute statutory prohibition of transferability arising from the Civil Code applies, in particular, to the right to repurchase and of pre-emption, the right to a life-annuity, and under certain conditions also to claims for damages from injury to the person, prenatal damage, infringement of personal interest, caused by a tortious act. The disposal of an object or a right subject to the dispute may also occur during the proceedings, and then does not affect further development of the matter. However, the buyer can replace the transferor upon the permission of the other party.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Currently the Code of Civil Procedure does not require that any action be performed before instituting the proceedings. However,

to protect oneself against an obligation of payment of the costs of proceedings, in the case of recognition of the claim by the opposing party (see the answer to question 1.5) it is recommended to summon the opposing party to make the performance before filing a lawsuit.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods are determined by the substantive law. Unless a specific regulation provides otherwise, the limitation period shall be 10 years, and for claims for periodic payments and claims related to business activity, three years. Limitation periods may not be shortened or extended by an action in law. The Civil Code provides for a number of shorter periods, particularly relating to claims under a contract of sale, a contract for a specified task, which shall be barred by limitation after two years.

A claim confirmed by a final judgment of the court or other body appointed to hear certain cases or by a judgment of the arbitration court, as well as a claim stated in a settlement concluded before the court or arbitration court or in a settlement concluded before a mediator and approved by the court, shall expire after 10 years. If, however, a claim confirmed in this manner is for a periodic payment, then a claim for periodic payment due in the future shall expire after three years.

After the expiry of the limitation period a claim does not expire but transforms into the so-named “natural obligation” (*obligatio naturalis*), which is characterised by the lack of a possibility of compulsory enforcement. The court examines the limitation issue (and dismisses an action) only if the limitation period is raised by the opponent. In the event the opponent does not claim the statute of limitation, the court acknowledges the claim even though the claim pursued has been barred by limitation.

In addition to the period of statutory limitation of claims, substantive law sets deadlines for performing certain activities – the so-named final deadlines. After such time-limit elapses, the right to perform actions expires. In contrast to the periods of limitation, the courts acknowledge the expiry of final deadlines *ex officio*.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Poland? What various means of service are there? What is the deemed date of service? How is service effected outside Poland? Is there a preferred method of service of foreign proceedings in Poland?

Civil proceedings are instituted by a plaintiff bringing a pleading to a competent court. The plaintiff may submit a pleading via postal operator, courier or in person at a day-book office of a competent court and, in electronic admonition proceedings, via ICT system. The most common method of service of a pleading by the court is via postal operator with return receipt requested. Alternatively, the court may serve pleadings by persons employed in the court, a bailiff or a court service delivery unit. In electronic admonition proceedings the court service is via ICT system.

In civil proceedings, professional representatives of parties serve copies of pleadings on each other, and the pleadings addressed to the court shall be accompanied by a proof of service on the other party of a copy thereof or a proof of dispatch by registered post.

The receiver must acknowledge receipt of a pleading and the date with a signature.

For service outside Poland, the provisions of Regulation No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (“Service of documents”) and repealing the Council Regulation (EC) No 1348/2000 apply.

Pursuant to the Code of Civil Procedure, a party that is not a resident of, or based in, Poland or in another Member State of the European Union, if it has not appointed a representative to conduct the matter who is a resident of Poland, is obliged to indicate a representative for service in Poland. In case of a failure to indicate a representative for service, subsequent pleadings intended for the party remain on case file and are deemed delivered. The party should be instructed thereon at the first service.

3.2 Are any pre-action interim remedies available in Poland? How do you apply for them? What are the main criteria for obtaining these?

Polish civil procedure provides the possibility of filing a motion for amicable settlement or preliminary injunction before entering a dispute.

A motion for amicable settlement can be filed in a district court that has general competence to resolve disputes involving an opponent. In the motion, it is necessary to indicate the matter concisely as well as prove the probability of the circumstances. A motion for amicable settlement is permissible in civil matters the nature of which allows for a settlement.

In every civil case heard by a civil court or arbitration court it is possible to demand an injunction. The court may order an injunction before institution of the proceedings or when they are pending. Every party or participant in the proceedings can demand granting an injunction if he proves the probability of a claim and legal interest in obtaining an injunction, whereby the legal interest exists where a lack of injunction prevents or seriously impedes enforcement of a decision issued in the matter, or prevents or seriously impedes attainment of the objective of the proceedings. A motion for preliminary injunction shall comply with the requirements prescribed for a pleading, and further include: an indication of the manner of injunction sought; and, in matters for pecuniary claims, it shall also specify the value of injunction and substantiation of the facts that justify the motion.

3.3 What are the main elements of the claimant’s pleadings?

A statement of claims should include the correct elements for every pleading (indication of the court; details of the parties, their statutory representatives and attorneys; indication of the type of a pleading; essentials of a motion or a declaration; evidence in support of the listed circumstances; the signature of a party or its statutory representative or attorney; a list of annexes); the elements required for the first pleading in the proceedings (indication of the object in dispute; addresses of the parties, their statutory representatives and attorneys; and – if the plaintiff is a natural person – the personal identification number (PESEL) or tax identification number (NIP) and – if it is a legal person – the number in the National Court Register, or in another relevant register, records or (NIP)).

In addition, a statement of claims should include: a specifically defined demand; and, in cases involving property rights, the indication of the amount in dispute and an indication of facts justifying the demand, if necessary, which justify the competence of the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

It is possible to change the action if it does not affect the jurisdiction of the court. Changing the action may involve a change to the demand (reporting a new claim instead of or in addition to the original one) or to the factual basis therefor. In the event of an unacceptable change in the action (which affects the subject matter or territorial jurisdiction of the court) consisting in the introduction of a new claim in addition to the original one, the court will examine a new claim in a separate case if it is competent by subject matter or territory, otherwise it shall refer the matter to a competent court. However, when such change occurs in the district court, the court shall refer the entire changed action to the regional court that is competent to resolve the changed action by subject matter or territory.

If the plaintiff raises a new claim instead of, or in addition to, the original claim, the effects of the change occur upon submission of such claim at the hearing and in the presence of the defendant, in other cases it is upon the service of a pleading containing such change on the defendant.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence shall meet the requirements set out in the Code of Civil Procedure for a pleading and a preparatory pleading (specifically, the parties, the name of a pleading, a concise description of case facts, comments on the statements of the opponent and on the evidence adduced by the opponent, and the indication of evidence to be presented at a hearing or attaching thereof).

In the statement of defence, the defendant may, in a separate pleading no later than at the first hearing, bring a counterclaim if the counterclaim is in connection with the plaintiff's claim or is suitable for offset. The counterclaim shall be submitted to the court in which the statement of claim is filed.

The defendant may also claim a set-off, and in doing so should prove the grounds thereof. If the circumstances have not been reported and proven in the statement of defence, the court may, in principle, omit such assertions or evidence unless the party proves that: 1) it did not report them in a timely manner without any fault of its own; 2) the examination thereof will not cause delay in the examination of the case; or 3) other exceptional circumstances have occurred.

The possibility to raise a claim from the statute of limitation is limited in the proceedings by writ of payment and in summary proceedings. In the proceedings by writ of payment, it is possible to set-off only the receivable debt proven by means of one of the documents referred to in the Code of Civil Proceedings. In summary proceedings, an allegation of set-off and a counterclaim shall be admissible if the claims which they address are suitable for examination in summary proceedings.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence may be brought of the defendant's own initiative or upon the court's order. The court, by calling for submission of the statement of defence, shall set the time-limit not shorter than two weeks. If the court did not order the filing of the statement of defence, the defendant may do so before the first session at the latest.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Pursuant to the Code of Civil Procedure, where a statement of claims has not been filed against the person who should be the defendant in the case, the court (at the request of the plaintiff or the defendant) will call the person to participate in the proceedings. A person summoned to participate in the proceedings as the defendant may, upon the consent of both parties, replace the defendant, who will then be exempt from participation in the proceedings.

However, if the defendant has been appointed correctly, in the case of an unfavourable outcome, he will be entitled to raise a claim against a third party and he may notify the person about the pending proceedings and request participation therein. Such a participation request is made by filing a pleading with the court stating the reason for the request and the status of the matter. The pleading shall be served on the third party without delay, which may (but need not) require it to join the party as an intervening third party. The third party, by failing to report participation in the matter, in the next trial will not be able to claim an erroneous conduct of the matter by the defendant.

4.4 What happens if the defendant does not defend the claim?

In the event the defendant fails to defend the claim and does not appear at the hearing (and in the absence of a request to hear the matter *in absentia*), the court will issue a judgment in default.

4.5 Can the defendant dispute the court's jurisdiction?

Jurisdiction of the court is governed by the provisions of the Code of Civil Procedure. The subject matter and territorial jurisdiction – which include general, alternative and exclusive jurisdiction – can be distinguished. The parties may, however, agree in writing to submit a dispute that has already arisen or disputes that may result from a determined legal relation to a court of first instance that is not territorially competent. That court will then be exclusively competent unless the parties have agreed otherwise or unless the plaintiff has filed a statement of claim in the electronic admonition proceedings. The parties may also in a written agreement limit the right of the plaintiff to choose from several courts competent to resolve such disputes. The parties may not, however, change the exclusive jurisdiction.

In the case the above-mentioned agreement on territorial jurisdiction is concluded, the defendant, before entering a dispute on the merit, should raise a claim of improper jurisdiction of the court and duly justify it, as according to Article 202 of the Code of Civil Procedure, the court takes into account the lack of proper jurisdiction, which can be removed under an agreement of the parties, only upon a demand from the defendant.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In accordance with Article 75 of the Code of Civil Procedure, a petitioner raising a claim for a thing or a right for which the case is pending between other persons, may, until the closing of the hearing at first instance, bring an action for the thing or the right against both parties before the court in which the matter is pending (main intervention).

Pursuant to Article 76 of the Code of Civil Procedure, a person who has a legal interest in the resolution of the matter to the benefit of one of the parties, may, at any stage of the case until the closing of the hearing at second instance, accede to that party (secondary intervention). To this end, a party files a pleading with the court, and indicates which party it joins.

Main and secondary interventions are subject to a court fee: a main intervention is the same amount as the fee for a statement of claims; and a secondary intervention is 1/5 of the fee for a statement of claims.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

A court may order a consolidation of several separate cases pending before the court as regards common proceedings or settlement, where they are in relation to each other or may be covered by a single lawsuit (Article 219). Consolidated matters cannot be appealed.

5.3 Do you have split trials/bifurcation of proceedings?

In accordance with Article 218 of the Code of Civil Procedure, the court may order a separate trial as regards the main statement of claim or counterclaim, as well as to one of several claims interconnected in a single lawsuit, either main or counterclaim, or in relation to the individual participants. The court may limit the hearing to the various complaints or preliminary matters (Article 220 CPC).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Poland? How are cases allocated?

In principle, cases are heard in accordance with the order of filing thereof with the court. In specifically justified cases, the president of a department may order the hearing of a case or cases of a specific type out of turn. The president of a department assigns cases to judges and court officials. The president appoints a reporting judge in subsequent cases in accordance with an alphabetical list of judges from a specific department, taking into account the situation in a sub-department of a specific judge, among others, the type and gravity of specific cases, to evenly burden each of the judges. It is possible to appoint a reporting judge out of turn indicated by an alphabetical list of judges if the case which is to be allocated has a connection with another case from the sub-department of a specific judge.

6.2 Do the courts in Poland have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The presiding judge of the adjudicating panel conducts the proceedings and has a number of powers. Among others, he: 1) gives the floor, asks questions, imposes fines, deprives of the floor (if a speaker abuses the power to speak), disallows a question (if a question has been deemed to be inappropriate or irrelevant); 2) can order the filing of a statement of defence or impose an obligation on parties to submit further pleadings; and 3) can issue orders aimed at the preparation of a hearing, specifically, summonses to the parties to appear at the hearing, demands from a state organisational unit or an organisational unit of local government to provide evidence available to them if the party cannot receive this evidence on its own, summonses to witnesses and experts, order the presentation of documents or objects to be inspected, and order the inspection before a trial.

As regards activities that are available to the parties before entering into litigation, see the answer to question 3.2. The cost of conciliatory proceedings is minor. A party may also request the securing of evidence if it is feared that taking thereof may be impossible or an impediment to do so will arise, or if for other reasons it is necessary to establish the current facts.

6.3 What sanctions are the courts in Poland empowered to impose on a party that disobeys the court's orders or directions?

In accordance with the system's provisions, the court may apply the following sanctions for serious violations of the peace or order of the court: 1) admonition; 2) expulsion from the court room after an unsuccessful admonition; or 3) a fine for disruption up to a maximum amount of PLN 10,000 or imprisonment for a maximum period of 14 days.

Pursuant to the Code of Civil Procedure, the court may also: 1) obligate a party to reimburse costs because of negligent or, for obvious reasons, improper conduct (regardless of the outcome of the case); or 2) impose a fine on a party if it obtained legal aid from a state-funded representative on the basis of knowingly giving false facts (regardless of an obligation of the party to pay the remuneration of an advocate or a legal adviser) or if it provides false information in bad faith which will result in the adjournment of a hearing.

6.4 Do the courts in Poland have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

A court may dismiss a statement of claim on procedural grounds in its entirety or in part if it finds that procedural preconditions in this respect are not satisfied. In such case the court does not examine the merits of the case, but only bases it on formal issues. A court may also dismiss a statement of claim in its entirety or in part on substantive grounds without examining the case in detail if it finds an allegation raised by the opponent concerning e.g. the statute of limitation, is well-grounded. When examining the merits of the case, because of the requirements related to the concentration of procedural material, the court may disregard delayed assertions or evidence (see the answer to question 8.2).

6.5 Can the civil courts in Poland enter summary judgment?

Civil proceedings can be divided into: summary proceedings which, in principle, are for claims not exceeding the amount of PLN 10,000; or claims with regard to the leasing of residential premises, regardless of the amount in dispute. Pleadings must be filed on official forms. Cases of this type are heard by district courts.

6.6 Do the courts in Poland have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Pursuant to the Code of Civil Procedure, a stay of proceedings is: (1) by law in case of *force majeure*; (2) by the court, *ex officio* when circumstances set out in the Code of Civil Procedure arise, whereby the Code provides for compulsory and supplementary stay of proceedings; or (3) upon unanimous request of the parties.

There is also the possibility for the court to adjourn a hearing for various reasons specified in the Code of Civil Procedure.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Poland? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Polish civil procedure does not provide for an institution of disclosure as defined in common law countries. It is debatable whether, in the field of intellectual property law, the Polish regulations implementing Directive 2004/48/EC introduced into Polish law institutions are similar to disclosure and an *Anton Piller Order*.

In proceedings, the right to motion the court to impose an obligation on the other party or a third party to submit documents relevant to the outcome of the matter can be similar to disclosure. The party, in a relevant motion, must, however, specify the documents it requests and indicate how the documents are evidence.

7.2 What are the rules on privilege in civil proceedings in Poland?

Parties to the proceedings or third parties have, in certain cases, the right to refuse to testify or to refuse to submit documents within the procedure described in the answer to question 7.1. The privileges mentioned above relate, among others, to information: covered by the confidentiality clause; related to family members; under professional secrecy (e.g. of an advocate), the disclosure of which could expose a witness or a party (or a member of their family) to criminal liability, disgrace or severe and direct damage to property; or under confessional secrecy.

7.3 What are the rules in Poland with respect to disclosure by third parties?

The procedure for obtaining documents from third parties is discussed in the answer to question 7.1, and the right of a third party to refuse to submit documents in the answer to question 7.2.

7.4 What is the court's role in disclosure in civil proceedings in Poland?

Please see the answer to question 7.1.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Poland?

There are no such restrictions because Polish law does not provide for the institution of disclosure. However, it results from the essence of the institution described in the answer to question 7.1 that the documents submitted by the other party or a third party may be used only in pending civil proceedings.

8 Evidence

8.1 What are the basic rules of evidence in Poland?

The general rule of the burden of evidence states that this obligation rests on the party which derives legal effects from the cited facts. Therefore, a party must prove the thesis that it puts forward. The burden of evidence is related to the principle of an adversary system of parties in the proceedings, which is dominant in Polish civil proceedings, according to which the parties are to be in dispute before the court and present before it the veracity of their assertions. The court is therefore not required to determine the facts *ex officio*. As indicated in the answer to question 8.5, Polish proceedings law provides for the discretionary power of the judge, which means that the court decides whether there are grounds to acknowledge assertions as to the facts or the evidence not adduced by the party at an earlier stage. In addition, the principle of free evaluation of the evidence rests with the court, which provides that the court shall evaluate the credibility and the value of evidence on which the matter is adjudicated. As a rule, the evidence is heard before the adjudicative court and reflected in the principle of direct examination of the evidence by the judge. Under the principle of direct examination of the evidence by the judge, the testimony of witnesses shall not be in writing.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Polish civil proceedings have an open catalogue of evidentiary means. The Code of Civil Procedure includes regulations which relate to six categories of evidence, not excluding the possibility of adducing other evidentiary means. Among the evidentiary means governed by the Code of Civil Procedure there can be distinguished: 1) official and private documents; 2) witness testimony; 3) expert opinions; 4) inspection; 5) hearing of the parties; and 6) other (here: evidence from a group blood test; or evidence from film, television, photocopies, photographs, plans, drawings and CDs or audio tapes or other devices which record or transfer images or sounds).

As regards evidence from a witness, the Code of Civil Procedure precludes the possibility to hear: a) a person who is not capable of perceiving or communicating perceptions; b) military and government officials not discharged from an obligation of maintaining professional secrecy; c) unified joint participants; d) mediators as regards the facts discovered in relation to mediation proceedings; and e) statutory representatives of the parties, and persons who can be heard as a party as the bodies of a legal person or other organisation which is capable to be a party in court proceedings.

Evidence from experts can be heard in cases that require special knowledge. The court, after hearing the submissions of the parties as to the number of experts and the basis of their choice, may summon one or more experts to obtain their opinion. The court determines whether the opinion is to be delivered orally or in writing. A person appointed as an expert may refuse to accept the obligation imposed on him for the reasons which entitle the witness to refuse to give testimony, and also if there is an obstacle that prevents him from providing an opinion. For the same reasons for which it is possible to request recusation of a judge, a party may demand recusation of an expert until he completes the activities. When a party requests the recusation of an expert after the start of his activities, it is required to prove that the reason for recusation as emerged after the beginning of the testimony, or that it has not been previously known to the party. The court may request oral explanations of an opinion submitted in writing and may, if necessary, request additional opinions from the same or other experts.

The court may also request an opinion from a relevant scientific or research institute. The court may require additional explanations from the institute, either oral or in writing by a person designated to do so; it can also order submission of additional opinion by the same or another institute.

A private expert opinion (drafted at a commission of a party, without the court deciding in this respect) is not treated as evidence from an expert, and has the character of evidence from a private document.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A person summoned as a witness is required to appear when summoned by the court, even if they have the right to refuse to testify. In addition to the personal appearance, a witness is required to testify.

The right to refuse to testify as a witness is conferred on: spouses of the parties; their ascendants, descendants and siblings; and relatives in-laws in the same line or degree as well as those with adoption ties with the parties. The right to refuse to testify continues after the termination of a marriage or adoption. However, refusal to testify is not permissible in family status matters, except for divorce matters.

A witness may refuse to answer a question posed to him if the testimony could expose himself or his relatives, mentioned in the preceding paragraph, to criminal liability, disgrace, or serious and immediate damage to property, or if the testimony may entail substantial violation of professional secrecy. A priest can refuse to testify as to the facts entrusted to him in confession.

The order of the examination of witnesses is decided by the presiding judge. Witnesses who have not submitted testimony cannot be present when other witnesses are heard. Before a witness is heard, he is informed about the right to refuse to testify and criminal liability for making false depositions.

Witness testimony is oral and starts with answering the queries of the presiding judge on what a witness knows about the matter and what the source of information is; after that parties can pose their own questions to a witness on the matter. Witnesses whose testimonies contradict one another can be confronted.

The court can fine a witness and order detention for up to one week for unjustified refusal to testify.

For unjustified failure to appear or leaving without the consent of the presiding judge, the court will fine a witness and then summon him again, and in the event of a repeated failure of the witness to appear, the court will again fine him and can also order compulsory appearance. In the event of justified non-appearance the court will release the witness from a fine and compulsory appearance.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The rules on expert evidence are described in the answer to question 8.2. In addition, it should be noted that the provisions on witnesses shall apply accordingly to summons and testimonies of experts, with an exception for the provisions on compulsory appearance. The jurisprudence states that the task of an expert is not to determine the facts of the case, but to enable the court to clarify the circumstances from the perspective of the specialised knowledge an expert holds and in consideration of the collected evidence made available to him. It is unacceptable for an expert to present their own observations about the facts, the determination of which rests with the court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Poland?

The parties on which the burden of proof rests submit motions as to evidence. In 2012 a system of discretionary power was introduced, which allows judges to focus the evidence presented by the parties in the proceedings. Preclusion of evidence and assertions from the parties are declared by a court decision. Pursuant to this principle, the court ignores delayed assertions and evidence unless a party substantiates that it did not submit assertions or evidence in the statement of claims, the statement of defence or further preparatory pleading through no fault of its own, that the consideration of delayed assertions, that the evidence will not cause delay in the examination of the case, or that there are other exceptional circumstances.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Poland empowered to issue and in what circumstances?

In civil proceedings the court renders: (i) judgments; (ii) orders of payment; (iii) decisions; and (iv) orders. Decisions and orders address incidental issues ensuring the proper conduct of proceedings (e.g., summonses for personal appearance at the hearing, setting a hearing date, admitting or refusing to admit evidence) or closing the proceedings without deciding on the merit of the case (e.g., due to the lack of payment of a court fee, lack of jurisdiction of Polish courts, immunity of the defendant, withdrawal of the statement of claims, inadmissibility of a judgment).

Judgments and orders of payment settle the merits of a matter. Judgments are issued after holding a hearing in adversarial proceedings. Orders of payment are issued *ex parte*, and the court adjudicates on the basis of the facts mentioned in the statement of claims and the evidence attached to the statement of claims. The court serves on the defendant orders of payment together with a copy of the statement of claims, and from that moment on the defendant may respond to the merits of the action brought against him.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Upon the request of the plaintiff, the court can rule on redress of the damage and interest pursuant to the applicable rules of the substantive law. It is therefore a matter of substantive, and not procedural, law. It is worth mentioning that, regardless of the applicable substantive law, if the court deems that it is impossible or very difficult to prove an exact amount of damage, it may award an appropriate amount according to its assessment based on an examination of all the circumstances of the case. As regards principles governing the costs of the proceedings – see the answer to question 1.5.

9.3 How can a domestic/foreign judgment be recognised and enforced?

National judgments can be divided into judgments forming relation or declaratory judgments (e.g. exclusion of a shareholder from a company) and judgments ordering payments (e.g. ordering the payment of compensation). In the first case, there is no need to conduct enforcement proceedings and, therefore, the judgment shall take effect from the date of validity thereof. In the other case, enforcement proceedings can commence only after the judgment being granted an enforcement clause – as a rule, after it becomes final, unless the court grants an immediate enforcement order to a non-final judgment.

As regards foreign judgments, the provisions of European law (including the Brussels I Regulation 44/2001) shall apply in the first place as well as the provisions of international agreements – bilateral and multilateral – that bind Poland (including the Lugano Convention).

If the provisions of European law or international agreements shall not apply, a foreign judgment (a judgment forming relation or a declaratory judgment) is recognised *ex lege*. The court adjudicates on the recognition of a judgment as if it was an incidental matter, and assesses the effects of a foreign judgment in a separate proceeding. However, it is possible to initiate separate proceedings to establish recognition or refusal of recognition of a foreign judgment – such proceedings are optional.

If a foreign judgment is to be enforced in the Polish territory (enforcement proceedings are to be instituted), it is necessary for an enforcement clause to be appended as it is the case with national judgments. In proceedings for declaration of enforceability, the court will examine similar circumstances, as in the case of a national judgment, and take into account possible grounds for refusal of recognition of a foreign judgment.

9.4 What are the rules of appeal against a judgment of a civil court of Poland?

The primary means of appeal against a judgment of the court of first instance is an appeal – see the answer to question 1.3. Submission of an appeal means that the judgment cannot become final. Against a judgment of the court of second instance, in certain cases, a cassation complaint to the Supreme Court can be filed. A deadline for filing a cassation complaint is two months from the date of service of a ruling and the reasons. The cassation complaint does not, however, suspend the validity of the judgment and the possibility to enforce thereof (with some exceptions). In addition to the cassation complaint, other extraordinary legal means of appeal include: a complaint to resume the proceedings; and a complaint to establish the unlawfulness of a final ruling.

Different rules of appeal apply to the orders of payment. In this case, the time-limit for lodging a means of appeal (an opposition or objection to the order of payment) is two weeks from the date of service of the order of payment. A means of appeal lodged against an order of payment will be examined by the same court (with a few exceptions), whereas a judgment of the court which hears the case after an opposition or after an objection to the order of payment can be subject to appeal similar to that against a judgment of the court of first instance.

In certain cases the Code of Civil Procedure also provides for a means of appeal against a ruling issued by court officials (in some cases the Code of Civil Procedure allows for a judgment issued not by judges, but by a court official), i.e. a complaint against a decision of a court official. It shall be filed with the court within a week from the date of service of the decision of the court official unless a specific provision provides otherwise. As a rule, the filing of a complaint results in the decision issued by the court official losing validity, and the case is examined by the court as a court of first instance. The situation is different in the case of a complaint against a decision of a court official on court costs or the costs of proceedings and against a decision to refuse appointment of a representative *ex officio*. In these cases, the court hears the matter as a court of second instance, applies the provisions on complaints, and issues a decision by virtue of which it either affirms the disputed decision of the court official or changes it.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Poland? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman?

There are two main methods of alternative dispute resolution in Poland, i.e. mediation and arbitration. Mediation is a voluntary, confidential and informal non-judicial procedure aimed at the conclusion of a settlement. Mediation is conducted between the parties (participants) to a dispute by a third party – an impartial mediator.

The parties may submit a case to be resolved by a permanent arbitration court or an arbitration court *ad hoc*. An arbitration clause established by the parties to a dispute conditions the resolution of the case by the arbitration court.

Some laws provide for the possibility of amicable settlement of disputes – as an alternative to court proceedings – e.g. before the Polish Insurance Ombudsman.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

General rules governing methods of alternative dispute resolutions are regulated in the Code of Civil Procedure. Arbitration rules are based on the UNCITRAL Model Law on International Commercial Arbitration.

1.3 Are there any areas of law in Poland that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Mediation may be conducted in all kinds of civil cases in which conclusion of a settlement is allowed. Moreover, mediation may be applied in all cases where reconciliation of participants may be important, such as family cases or even penal cases.

Courts of arbitration may resolve any tangible and intangible civil dispute that may be the subject of a court settlement, with the exception of alimony cases.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Poland in this context?

If court proceedings are brought in a matter related to a dispute which is subject to a valid arbitration agreement, the court rejects a statement of claim or application to start proceedings in the case a respondent or participant makes an objection to the arbitration agreement before submitting its first statement on the substance of the dispute.

A party may obtain interim measures of protection by the common court of law despite submission of a dispute before the court of arbitration. The court of arbitration is also entitled, at the request of a party, to order interim necessary measures in respect to the subject matter of the dispute. Such an order is enforceable after the obtainment of a court enforcement clause.

Moreover, during arbitration proceedings, the court of arbitration may request the court to take evidence or other actions which may not be taken by the court of arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Poland in this context?

A settlement reached before a mediator is equally as binding as a settlement reached before a common court of law, after being recognised by the court. In accordance with the voluntary principle, refusal to participate in mediation or withdrawal from it does not cause negative effects, with the exception that, in the event that a party previously agreed to mediation and then refused to mediate without a good reason, it may be ordered to reimburse the costs borne by the other party.

An arbitration award or settlement reached before the court of arbitration is equally as binding as the ones of the common court,

after being recognised or enforced by the court. The recognition or enforcement is refused in two cases: the dispute may not be submitted to arbitration; or it would be contrary to the fundamental public policy rules of the Republic of Poland (the public order clause).

A party may also apply to set aside an arbitration award in the following cases:

- 1) there is no arbitration agreement, the agreement is null and void, ineffective, or has expired under the law applicable for the agreement;
- 2) the party was not given proper notice of the appointment of the arbitrator, the arbitration proceedings or was otherwise unable to present its case before the court of arbitration;
- 3) the award deals with a dispute not contemplated by, or not falling within the scope of, the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement;
- 4) the composition of the arbitral court or the fundamental rules of the arbitration procedure were not in accordance with the agreement of the parties or the rules of law;
- 5) the award was obtained by way of crime or on the basis of a forged or falsified document;
- 6) a final judgment has already been made in the same case between the same parties;
- 7) the dispute could not have been submitted to arbitration under the law; or
- 8) the award is contrary to the fundamental public policy rules in the Republic of Poland (public order clause).

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Poland?

The major alternative dispute resolution institutions are: mediation; arbitration; and conciliatory proceedings.

Mediation is regulated in articles 183¹-183¹⁵ of the Code of Civil Procedure. Under Polish law the court may refer the parties to mediation before the first hearing at the trial is completed. After that the court may do so only upon the joint application of the parties. The court may refer the parties to mediation only once during the dispute.

Mediation proceedings cannot be initiated if one of the parties opposes the mediation within one week from the announcement or delivery of the court's order.

Arbitration is conducted under an arbitration clause. If statutory provision (*lex specialis*) does not state otherwise, the parties may submit to arbitration proprietary disputes or non-proprietary disputes that can be subject to court settlement, excluding claims for alimony (Article 1157 of the CPC). According to Article 1161, submission of the dispute to be resolved by arbitration requires the agreement of the parties, in which the subject matter of the dispute, or a legal relationship from which the dispute may arise or has arisen, should be mentioned (arbitration agreement).

Conciliatory proceedings (see the answer to question 1.1).

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Although entrepreneurs in Poland – as a rule – still present a rather reluctant attitude towards the methods of alternative dispute resolution, a growing significance of permanent arbitration courts can be noted. The biggest permanent arbitration courts operating in Poland uninterruptedly for several years have been recording an increase in the number of cases brought.



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Portugal

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Portugal got? Are there any rules that govern civil procedure in Portugal?

The Portuguese legal system is a civil law system.

Civil procedure is mostly regulated by the Portuguese Code of Civil Procedure (hereafter referred to as “PCCP”) which under Law nr. 41/2013 of June 26, has undergone a recent reform.

Specific matters are dealt with by special legislation, such as:

- Law nr. 63/2011 of December 14, setting forth the ruling of arbitration courts;
- Law nr. 78/2001 of July 13, regarding *Julgados de Paz*; and
- Law nr. 38/2008 of February 26, regarding judicial courts’ fees and expenses and Ordinance nr. 1456/2001 of December 28, setting forth the fees and expenses for *Julgados de Paz*.

1.2 How is the civil court system in Portugal structured? What are the various levels of appeal and are there any specialist courts?

The Portuguese civil court system is based on distinctive categories of courts:

- *Tribunal Constitucional* – the Constitutional Court;
- *Supremo Tribunal de Justiça* – the Portuguese Supreme Court;
- *Tribunais da Relação* – the Regional Appeal Courts;
- *Tribunais de Primeira Instância* – the Court of First Instance; and
- *Tribunais Arbitrais* – arbitration courts and *Julgados de Paz*.

The Constitutional Court is aimed at resolving disputes regarding people’s fundamental rights, as they relate to those foreseen in the Portuguese Constitution.

Generally, sentences given by the Court of First Instance can be appealed to the Regional Appeal Court. Exceptions are stated in certain matters involving claims below a certain threshold or in cases where the appellant’s loss is insignificant. Such thresholds do not apply to matters regarding personal status, parental authority and inalienable rights.

An appeal of a decision ruled by a Regional Appeal Court will fall in the jurisdiction of the Portuguese Supreme Court. The Supreme Court only rules regarding the interpretation of law and does not examine the facts established by the lower courts.

Courts of First Instance are the courts before which a judicial proceeding is initiated. Furthermore, they also act as a court of appeal regarding arbitration awards and are also competent for the enforcement/execution of disputes settled by *Julgados de Paz*.

Arbitration can be either “necessary” (determined by special legislation, such as the rule on expropriation) or “voluntary” (based on a convention entered into between parties).

Julgados de Paz constitute non-judicial courts which are competent to settle disputes amounting up to €15,000.

1.3 What are the main stages in civil proceedings in Portugal? What is their underlying timeframe?

The main stages in civil proceedings are:

- claimant’s statement of claim (“*Petição Inicial*”);
- preliminary and formal analysis of the claim; if no cause of rejection is found, the case proceeds with the Defendant being served the statement of claim;
- Defendant’s statement of defence (“*Contestação*”);
- certain matters addressed in the statement of defence may give rise to a reply by the Claimant, (“*Réplica*”) and, in some circumstances, the Defendant may as well have the possibility to produce a written answer to such statement (“*Tréplica*”);
- if new facts arise, parties can file subsequent written statements (“*Articulados Supervenientes*”);
- a pre-trial hearing (“*Audiência Prévia*”) takes place (except if the Defendant does not file his statement of defence or when the court finds legal basis to end the proceedings immediately), with the following purposes:
 - to promote conciliation between both parties through a settlement;
 - oral debate and pleading hearing;
 - delimitation of the terms of the dispute;
 - decision to supply remedies and formalities to avoid procedural nullity or to declare the case ready for trial (“*Despacho Saneador*”);
 - decision regarding eventual complaints filed by parties; and
 - preparation of the trial, indicating, namely, the judicial acts that will take place, the number of sessions, scheduling and probable timeframe;
- trial, with the production of evidence, before the court;
- Judicial Sentence; and
- appeal(s), if applicable.

It is not possible to indicate a timeframe for each stage in civil proceedings, as they vary from case to case.

1.4 What is Portugal's local judiciary's approach to exclusive jurisdiction clauses?

The Portuguese legal system foresees exclusive jurisdiction clauses provided that certain requirements are met, such as being included in a written agreement, concerning alienable rights and representing a serious and equitable interest of the parties involved.

Such clauses may be deemed ineffective in cases where jurisdiction is mandatory due to certain rules based namely on *forum* criteria.

A court will decline competence for a case if it is contrary to an exclusive jurisdiction clause validly attained.

1.5 What are the costs of civil court proceedings in Portugal? Who bears these costs? Are there any rules on costs budgeting?

Civil court proceedings comprise legal costs with court fees and expenses.

Court fees are stipulated in special legislation according to which, unless legal aid is granted to a party, one must bear its own costs during the pending of proceedings. In general terms, the court fees are determined in accordance with the value of the judicial proceeding.

The sentence determines the liability for the payment of the applicable legal costs, following a *pro rata* principle.

Accordingly, the defeated party may be sentenced to pay the other parties' legal costs (to a certain extent).

1.6 Are there any particular rules about funding litigation in Portugal? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Legal aid may be granted to a party when it is not in a position to bear the costs of a civil proceeding and may take the following forms:

- full or partial exemption from court fees and other procedural costs;
- appointment of a lawyer and payment of his/her legal fees;
- instalment payment scheme for court fees and other procedural costs;
- instalment payment scheme for legal fees of the appointed lawyer; and
- payment of the remuneration of the appointed enforcement agent.

1.7 Are there any constraints to assigning a claim or cause of action in Portugal? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

According to the principle of freedom of contract and in general terms, there are no limits to the assignment of rights. However, there are restrictions, such as, for instance, inalienable rights.

When legally admissible, the transfer of certain rights held by one entity to another shall be brought up before the pending proceedings. An example of this would be when a credit is transferred from one entity to another, causing the court to recognise the Assignee as the new Claimant of such credit within the legal proceedings.

In Portugal, there are no restrictions to third parties financing legal proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no particular formalities to be complied with before initiating proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Statute of limitations periods vary depending on the subject matter of the dispute.

From a substantive point of view, the general statute of limitations period is 20 years.

However, statute of limitations periods can be of five years (in specific claims such as alimonies, periodically renewable instalments, annual perpetual or lifelong rents, leases, conventional or legal interest and companies' dividends), three years (regarding non-contractual liability arising from illicit acts), two years (such as credits related to accommodation services, food, education and others) and even six months, regarding certain commercial credits contracted with a consumer.

Nevertheless, the Portuguese Civil Code foresees several events that may suspend or interrupt the statute of limitations period.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Portugal? What various means of service are there? What is the deemed date of service? How is service effected outside Portugal? Is there a preferred method of service of foreign proceedings in Portugal?

Civil proceedings are initiated with a Claimant's statement of claim ("*Petição Inicial*") before the court and followed by the court clerk's preliminary analysis of basic legal formalities (such as the payment of the initial court fee).

The service of a Claimant's statement of claim is provided by the court and is mostly carried out by registered mail or delivered in person by an enforcement agent.

In cases where a Defendant resides abroad, his notification is made in accordance with the provisions set forth in international treaties and conventions, by mail or through the local Portuguese consulate.

3.2 Are any pre-action interim remedies available in Portugal? How do you apply for them? What are the main criteria for obtaining these?

According to the PCCP, in certain matters deemed urgent, a Claimant may use interim/precautionary proceedings, provided the following cumulative requirements are met:

- serious risk of loss or relevant reduction of the patrimonial guarantee;

- the probable existence of the right in dispute; and
- the resulting injury to a Claimant considerably exceeds the damage that a Claimant wants to avoid by requesting for the interim/precautionary proceedings.

3.3 What are the main elements of the claimant's pleadings?

The main elements of a Claimant's pleadings are:

- indication of the court that has jurisdiction to rule on the case;
- indication of the parties involved in the dispute and value of the claim;
- exposing the cause of the action, including a description of the circumstances invoked as the basis of the claim, and providing their legal interpretation;
- when applicable, indication of the enforcement agent responsible for performing the service or the legal representative responsible for its appointment; and
- indication of the evidence that a Claimant wants to present during trial (e.g. testimonial evidence or expert analysis).

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes. Parties may amend their pleadings in certain circumstances, up until the pre-trial hearing. Such circumstances are, for instance, when the parties agree to such amendment or when the proceeding is still at an early stage and such amendment does not cause any impairment to any of the proceeding's stages.

However, please note that a Claimant may, at any time, increase or decrease his pleading during trial, if such amendment is a consequence or derives from the initial claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence must indicate the reasons of fact and law that are opposed to a Claimant's statement of claim and indicate the evidence a Defendant wants to bring before the court.

A Defendant may bring counterclaims against a Claimant ("*reconvenção*"). In this case, a Claimant will be served with such counterclaim in order to present the respective reply ("*réplica*").

4.2 What is the time limit within which the statement of defence has to be served?

In general terms, a Defendant has 30 days to present his statement of defence, but in more complex cases the court may grant (upon a Defendant's request) an extension of such time limit to a maximum of 60 days.

Such period runs from the date of the judicial service.

In proceedings where there is more than one Defendant, such period of time starts running from the date that the last service is executed.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes. In certain situations a Defendant can call a third person to join the proceeding as co-Defendant (namely, when the summoned third person shares responsibility with a Defendant or may be held responsible before a Defendant) or even to substitute a Defendant as a party (for example, in cases where a Defendant pleads that a third party is the only one to be held responsible for damages caused/alleged by a Claimant).

4.4 What happens if the defendant does not defend the claim?

If a Defendant does not present its defence after having been regularly summoned, facts set forth in the statement of claim are considered confessed by a Defendant.

Afterwards, the proceeding is made available for examination for a period of 10 days, first to the Claimant's lawyer and then to the Defendant's lawyer, to present their written pleadings before the court delivers its decision.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, a Defendant may dispute the court's jurisdiction in its statement of defence (see question 4.1 above).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, the PCCP foresees more than one mechanism by which a third party can be joined into ongoing proceedings, namely in situations where the summoned party has the same interest as one of the parties involved in the dispute (either in contesting a Claimant's request or, on the contrary, in enforcing it) or some legitimate interest in the proceedings (e.g., may be affected by the sentence).

Such joining may arise by the third party's spontaneous request, or by request of a Claimant or Defendant.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, several different proceedings can be consolidated into one judicial proceeding, provided that their respective causes of action are connected, the requirements of such consolidation are met and if the Court considers there is no inconvenience (such as the proceedings being in very different stages).

5.3 Do you have split trials/bifurcation of proceedings?

Yes, one proceeding may be subject to bifurcation, when, for example, the Court declines its jurisdiction regarding a specific matter related to the proceedings but considered independent from them.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Portugal? How are cases allocated?

Yes, the PCCP rules the allocation between civil courts, by which specific matters are allocated to specialised courts (for example, company law cases are allocated to commercial courts), whereas general matters are dealt with by the general courts of first instance.

Territorial jurisdiction rules are also applicable, determining, as a principle, that proceedings shall take place before the court nearest to the Defendant's residence.

The value of the claim is also relevant, as it may even determine that the procedure is submitted to a non-judicial court such as a *Julgado de Paz* (see question 1.2. above).

6.2 Do the courts in Portugal have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes. The court should conduct the case in order to achieve a prompt, fair and economical resolution of the dispute. In pursuing such outcome, it should provide indications and guidelines to the parties relating to legal and factual matters.

6.3 What sanctions are the courts in Portugal empowered to impose on a party that disobeys the court's orders or directions?

Depending on the relevance of the disobedient act or omission, Portuguese courts may hold the disobeying party as liable for unlawful litigation ("*litigância de má fé*"), subject to being conducted to court by police (when, in certain cases, the person fails to attend in court after being summoned) or even charged with a criminal offence.

6.4 Do the courts in Portugal have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Although the PCCP does not provide a specific rule empowering a court to strike out part of a statement, such an order can take place when there has been failure to comply with a specific rule. Such is the case when, for example, a certain statement is presented in breach of its timeframe or contains conclusions instead of factual allegations.

A case can be entirely dismissed on grounds of failure to comply with formal requirements when, for, example, the Claimant does not pay the applicable legal fee.

See question 1.3.

6.5 Can the civil courts in Portugal enter summary judgment?

As mentioned in question 1.3, a civil proceeding can be decided in the pre-trial hearing when the Court immediately recognises the existence of legal grounds for sentencing.

Such is the case when, for example, the parties agree on the facts and no other proof is required in order for the court to render a sentence, when a Claimant's alleged right is unenforceable due to forfeiture or when there is no legal connection between the claim and a Defendant.

The PCCP provides a simpler type of civil procedure ("*processo sumário*") for special cases where, namely, the value being claimed is below a certain threshold.

6.6 Do the courts in Portugal have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes, the PCCP enables the court to stay the proceedings whenever it considers it justified.

The possibility of discontinuing or ruling a stay of the proceedings may result from the occurrence of several circumstances such as, for example, the passing away of a party or his lawyer or when the judgment of the proceedings is dependent on the judgment of another pending case.

Courts can grant a stay of the proceedings when parties agree to such stay and provided such stay does not result in the postponement of a trial session already scheduled.

The court may also stay the proceedings in order to refer the parties to mediation.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Portugal? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Public access to civil proceedings is a general rule.

Exceptions may be determined when the courts considers it necessary to protect the parties' dignity or intimacy of their family life, for reason of safeguarding public moral standards or to guarantee the court's normal functioning and the effectiveness of its decisions.

When admissible, access to a judicial proceeding involves the possibility of reading the files, obtaining copies or even being allowed to temporarily take the files away from the Court.

7.2 What are the rules on privilege in civil proceedings in Portugal?

The law establishes different types of privilege applicable to civil proceedings such as the privilege of not testifying if the witness is a family member of one of the parties in the case, attorney-client privilege and other types of professional privilege (e.g. medical confidentiality, banking secrecy).

7.3 What are the rules in Portugal with respect to disclosure by third parties?

Besides lawyers and parties acting in the proceedings, third parties (journalists for example) may be granted access to proceedings if the court considers the interests invoked to be legitimate.

If a waiver of the attorney-client privilege is proved to be absolutely necessary for the defence of the personal dignity, rights and legal interests of the attorney, his client or the clients' representatives, such waiver may be authorised by the Portuguese Bar Association.

A similar rule is applicable to medical privilege.

7.4 What is the court's role in disclosure in civil proceedings in Portugal?

Upon request, the court may request the parties or any third parties to present specific documents they hold and that may be deemed relevant for deciding the case.

An illegitimate refusal to conform to such an order may result in the reversal of the burden of proof, the payment of fines or the submission to coercive measures including the seizure of such documents.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Portugal?

Documents obtained in the course of a procedure may be used subsequently by parties.

8 Evidence

8.1 What are the basic rules of evidence in Portugal?

In accordance with PCCP, the parties are responsible for presenting the facts, gathering evidence and determining the nature of the evidence they choose to provide.

The court's role is mainly to conduct and oversee the proceedings as to ensure that the evidence presented is within the rules. The court then weighs the evidence, according to pre-existing rules, to render its judgment. The court, however, at its own initiative, may request any evidence deemed necessary to reach its decision.

Each party has the burden of submitting and proving those facts upon which his/her claim or allegation is based. All that remains uncontested by the counterparty shall be considered proven, and only contested facts shall be subject to the submitting of evidence and judgment. If a fact is challenged by the counterparty, the other party must describe the evidence upon which it intends to rely upon to prove that fact.

Under the PCCP, the evidence must be presented by the parties with their written statements and presented before the trial hearing. In principle, after such stage, the proper moment to present any other means of evidence or to modify previously presented evidence would be at a pre-trial hearing (“*audiência prévia*”).

The only exceptions to this general rule are:

Up to 20 days before trial hearing, parties can alter their list of witnesses. Should this be the case, the counterparty will have five days to amend his/her own list of witnesses accordingly. Contrary to what occurs with written witness statements or within the pre-trial hearing, any and all witnesses resulting from these subsequent amendments will necessarily have to be brought before the court by the appointing party, as the court shall not summon them. Additionally, up to 20 days before the trial, the parties can file documents that were not presented along with the applicable written statement subject to a fine, except if the court decides that the party was unable to present the documents during the written statement stage.

After that, and during the trial, the parties can only present documents that could not have been presented earlier and that only became necessary due to a recent and subsequent event.

Reports of lawyers, professors or experts can be presented at any time of the proceedings before Courts of First Instance.

Judicial inspections of the place where the facts might have occurred, or of the things or persons under dispute, may also occur at any stage of the proceedings and may also be required by the court, during trial.

The court itself can also summon a witness to testify at any time of the proceedings if it is led to believe that a certain person, who was not called by the parties, may be aware of facts deemed relevant to the case.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Admissible types of evidence are as follows:

Parties' testimonies:

Witness testimonies may be requested, either by the counterparty (“*depoimento de parte*”) or by the party itself (“*declarações de parte*”). These should be held at the beginning of the trial, and the Defendant's witnesses are heard before the Claimant's witnesses.

Video or audio recordings disclosure:

As a rule, trial hearings are public and can be attended by the general public with or without interest in the case. However, should any of the referred means of evidence be presented by the parties, the judge may limit its presentation to the parties, their attorneys, and other specific members whose presence is relevant.

Experts' clarifications:

Should an expert report be filed in court, the latter may request that the expert(s) be summoned for the hearing, as to testify under oath exclusively to clarify any statements made in said report.

Witness testimonies:

Each party has the opportunity to call up to 10 witnesses to testify on his/her behalf. In judicial disputes with value equal to or below €5,000, the number of witnesses that can testify may not exceed five. However, should the complexity of the case justify it, a higher number of witnesses can be appointed. Witnesses are examined by the appointing counsel about all facts deemed relevant, and they can be cross-examined by opposing counsel about the content of his/her testimony. Witnesses can only testify about facts that they have actually experienced or have direct knowledge of.

Written testimonies are exceptional under Portuguese law.

Any further means of evidence may take place at a later stage of the proceedings by request of the parties or the court.

Notwithstanding, the court may change the order of these hearings, either at the parties' request, or if it considers that it will benefit the case.

Expert evidence is permitted in trial:

Experts are appointed by the court – if it is determined that the facts require special expertise – or by the parties. A court-appointed expert must be impartial and qualified. Written expert opinions by party-appointed experts – unusual in Portuguese court proceedings – shall not be treated as expert evidence, but as part of the respective party's pleadings.

Expert evidence is conducted by means of a written report to be presented to the Court and sent to both parties before trial, and is based on certain specific queries of the parties and relevant data and documentation provided for that purpose.

Expert evidence may be given by just one expert appointed by the court or by three experts: one appointed by each party, and one by the court.

The request for such evidence should be made with the initial written statement and no later than the preliminary hearing. Nonetheless,

the court itself may request such evidence, if deemed necessary, even if that requires a stay of the trial hearing for that purpose.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Please see question 8.2 above.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Please see question 8.2 above.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Portugal?

Please see question 8.2 above.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Portugal empowered to issue and in what circumstances?

Portuguese courts are empowered to issue the following decisions:

- *Sentenças*, decisions delivered by a Court of First Instance; and
- *Acórdãos*, decisions delivered by Regional Court of Appeals and/or the Portuguese Supreme Court.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

According to the Portuguese Civil Code, the general rule is that the party liable for damages must restore the situation that would have existed if the event that led to the damage had not occurred. Whenever this is not possible, compensation in cash shall constitute the indemnification.

Compensation should include losses suffered directly as a result of the event that led to the damages (“*danos emergentes*”) and also any profits that the injured party failed to obtain as a consequence of that event (“*lucros cessantes*”). The indemnification may also include future damages, if any.

Compensation for moral damages may be awarded. Its amount shall be determined on grounds of equity.

The party claiming for damages must determine and evidence, if possible, the exact extent of the damages. However, the party may claim more damages if in the course of the lawsuit it concludes that the existing damages are higher than the ones previously asked for.

Regarding contractual liability cases, a party may collect interest as of the obligation was due until the final award of the lawsuit and effective payment. In non-contractual liability cases interest is only due as of the moment the Defendant is notified.

During the proceedings both parties are required to make payments regarding court fees and are responsible for the payment of their own expenses and lawyers' fees. Please see question 1.5 above.

9.3 How can a domestic/foreign judgment be recognised and enforced?

An issued domestic decision becomes definitive, thus being recognised and enforced, when no more claims nor appeals can be filed against it, being therefore considered final (“*transitada em julgado*”).

According to the PCCP, no decision issued by a foreign court or arbitrator has any effect in Portugal, regardless of the nationality of the parties involved, unless it has been reviewed and confirmed by the competent Portuguese court.

The court responsible for the recognition of foreign decisions is the Regional Appeal Court. The Court must verify that: (i) the foreign decision is authentic; (ii) it does not contain decisions in conflict with Portuguese public order; and (iii) if the situation could be resolved under Portuguese law (in accordance with the rules of conflicts of law), it would not violate its provisions.

9.4 What are the rules of appeal against a judgment of a civil court of Portugal?

The general rule is that a party may file an appeal before the Regional Appeal Court when the value of the lawsuit is higher than €5,000 and the decision is unfavourable to the appealing party in an amount higher than €2,500.01. The Regional Appeal Court may rule on the matter relating to the facts and the applicable law.

A party may appeal to the Portuguese Supreme Court if the value of the lawsuit is higher than €30,000 and the decision is unfavourable to the appealing party in an amount higher than €15,000.01.

In most cases parties cannot appeal to the Portuguese Supreme Court if both the Court of First Instance and the Regional Court of Appeals have issued identical decisions with similar grounds.

The general rule is that the appeal does not suspend the proceedings unless the appealing party pays a deposit or presents a bank guarantee.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Portugal? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Portugal, “alternative dispute resolution” comprehends every means and proceedings of dispute resolution which is used as an alternative to resorting to State courts.

Accordingly, this designation comprises negotiation, mediation, conciliation, arbitration and also, in Portugal, a specific method named *Julgados de Paz* (please refer to question 1.2).

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

In Portugal, private mediation is still quite an uncommon method of dispute resolution.

However, there are in Portugal some public mediation systems, specifically targeted at family, labour, minor criminality and small civil claims filed before *Julgados de Paz*.

Under the PCCP, the parties could use mediation before bringing a civil or commercial dispute before court, and that the court could at any time suggest that the parties tried mediation and, most importantly, that proceedings were suspended since the date the intervention of a mediator was requested.

Conciliation

Conciliation may be found in judicial and arbitral courts.

In judicial courts, parties may request a formal hearing for conciliation purposes or the court may decide to do it.

In such cases, the court should actively promote a settlement between the parties. If a settlement fails to succeed, reasons for such failure must remain on record. Concerning conciliation, some rules envisage the possibility to conciliate parties; however, this possibility is seldom used in Portugal.

Arbitration

The new Portuguese law is essentially based on the UNCITRAL Model Law on International Commercial Arbitration (with the amendments adopted in 2006). Some innovative changes of the new Portuguese arbitration law, which differ in relation to the Model Law, are the following:

- The disposability of rights criterion has been replaced by the economic nature of the disputed interest criterion.
- It grants primary jurisdiction to arbitral tribunals, except in cases where the arbitration agreement is clearly null and void, inoperative or incapable of being executed.
- It expressly regulates issues related to multiparty arbitration, in particular the constitution of the arbitral tribunal. It allows the competent court to appoint all members of the arbitral tribunal where multiple parties fail to jointly appoint an arbitrator.
- It expressly regulates the third party intervention. For that purpose, Portuguese law requires that the party be bound by the arbitration agreement and, with respect to subsequent adherence to the arbitration agreement, that all other parties and arbitrators accept such adherence.
- It determines that international arbitration is deemed to occur if “interests of international trade are at stake”. Thus, in opposition to a subjective criterion based on the domicile of the parties set out in the Model Law, Portuguese arbitration law defines international arbitration based on an objective criterion.

1.3 Are there any areas of law in Portugal that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Criminal law is presently the sole area of law where arbitration or mediation cannot be used.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Portugal in this context?

Upon approval of Law 29/2013, courts may also at any time refer the parties to mediation, staying the judicial proceedings for that

purpose. If an agreement is reached during mediation proceedings, it will be remitted for the court’s confirmation. If no agreement is reached, judicial proceedings will follow.

In most situations, parties may also reach extrajudicial settlement by which they agree that the Claimant will dismiss the lawsuit. In these cases there is no need for the court’s approval.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Portugal in this context?

Although settlement agreements reached at mediation do not need to be sanctioned by the court, settlements reached in such methods and other available methods of alternative dispute resolution, namely arbitration, have binding nature, whereas they have the same value as a decision delivered by a Court of First Instance. The execution of arbitration decisions is undertaken by a Court of First Instance. As such, appeals can be filed regarding arbitration awards.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Portugal?

Portugal’s major alternative dispute resolution institutions are:

- *Centro de Arbitragem Comercial da Associação Comercial de Lisboa – Câmara de Comércio e Indústria Portuguesa;* and
- *Centro de Arbitragem Comercial da Associação Comercial do Porto – Câmara de Comércio e Indústria Portuguesa.*

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

A worldwide trend has been seen to emerge, since the 80s, to modernise the Voluntary Arbitration Act, thus reducing state courts’ control of the development of arbitral proceedings. This trend of modernisation of the internal arbitration rights is highly influenced by preparatory works on the UNCITRAL Model Law.



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Rogério Alves & Associados is a full-service law firm, located in Lisbon, Portugal.

Our motto is: "The strong and determined defence of our clients' rights".

At Rogério Alves & Associados, our highly skilled teams provide legal advice to our clients in a competent, permanent and attentive manner, in order to best fulfil their rights and comply with their duties. Rogério Alves & Associados' practice areas are Litigation & Arbitration, Business Law and Public Law, with a main focus on Criminal Law, headed by Rogério Alves, our law firm's founding partner, a key individual in Criminal Law in Portugal.

Romania

Cosmin Vasile



Alina Tugearu



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Romania got? Are there any rules that govern civil procedure in Romania?

Romania follows the inquisitorial Civil Law system. The court is actively involved in investigating the case and may address questions to the parties, decide upon the necessity of particular evidence, invoke procedural incidents, etc. The court is also responsible for leading the hearings. Several principles govern the development of a trial, among which are the equality of the parties, the adversarial proceedings, the parties' right to a fair trial, and the legality of the proceedings.

Civil trials are governed by the Civil Procedure Code (1865) or the New Civil Procedure Code (entered into force on February 15, 2013), according to the claim's registration date (a claim that was registered before the New Civil Procedure Code's entry into force will be entirely settled according to the 1865 Civil Procedure Code, while a claim that was registered after February 15, 2013 will be settled according to the New Civil Procedure Code).

1.2 How is the civil court system in Romania structured? What are the various levels of appeal and are there any specialist courts?

The Romanian civil court system encompasses the following subdivisions:

- First Court ("Judecătorie" in Romanian) – located in the main towns;
- Tribunal – located in every county;
- Court of Appeal – corresponding to larger regions; and
- High Court of Cassation and Justice – the highest jurisdiction in Romania.

According to its size or nature, a claim may be settled in first instance by any of these courts. The first courts' competence covers low-value litigations (no more than RON 200,000; approximately EUR 47,000), as well as family related claims, property claims, etc.

As a rule, appeals follow the hierarchy of the courts; for example, a claim settled in the first instance by the first court will be subject to a first appeal at the Tribunal and, if the case requires (depending on its nature), a second appeal at the Court of Appeal. Similarly, a claim settled in the first instance by the Tribunal will be subject to a

first appeal at the Court of Appeal and (depending on its nature) to a second appeal at the High Court of Justice. These procedural stages cannot be omitted during the course of the appeals process.

Specialised courts, as well as specialised sections within the courts, exist in matters like labour law, administrative and fiscal law, insolvency, etc.

1.3 What are the main stages in civil proceedings in Romania? What is their underlying timeframe?

Civil proceedings start with an extended exchange of written submissions prior to the setting of the first court hearing, a novelty introduced by the New Civil Procedure Code. After the registration of the claim, the court ensures that all the procedural requirements of the claim are met. If this is not the case, the Claimant is given a 10-day term to comply with the law.

Subsequently, the claim is communicated to the Defendant, who is granted a term of 25 days to submit their statement of defence. The statement of defence is then communicated to the Claimant, who, within 10 days after its receipt, may submit an answer.

The written submission phase is followed by the oral phase, comprised of judicial inquiry and debates. During the judicial inquiry, the court settles all preliminary matters, such as competence, payment of the stamp fee, admissibility of the claim, etc. Subsequently, the parties submit to the court's attention the proposed evidence, which is then administered according to the court's ruling.

The judicial inquiry is followed by the debates, during which each party states its case, and also considers the evidence that has previously been administered. At the end of the oral debates, the court may instruct the parties to submit written briefs or the parties may do so in the absence of the court's instruction.

The next phase of civil proceedings is the issuance of the judgment, which may be succeeded by the legal means of appeal or by the enforcement procedure.

1.4 What is Romania's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are recognised on both an international and national level. On an international level, if the local court lacks jurisdiction due to an exclusive jurisdiction clause in favour of a foreign court, the local court dismisses the claim. On a national level, if a court lacks jurisdiction it declines its competence in favour of the competent court.

1.5 What are the costs of civil court proceedings in Romania? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil court proceedings in Romania consist mainly of stamp fees, attorneys' fees and experts' fees.

In the initial phase of the litigation, each party is responsible for its own costs. Once an award has been issued, the losing party may be ordered, at the prevailing party's request, to reimburse all, or part, of the prevailing party's costs, including attorneys' fees. The prevailing party may claim reimbursement of its costs either during the course of the litigation itself or by means of a separate request, following the issue of the award. The court has the ability to limit the amount of the prevailing party's attorneys' fees by taking into consideration the difficulty of the litigation, the actual amount of work required from the attorneys and other similar elements.

There are certain limitations regarding attorneys' fees. Parties are forbidden from making a "no win, no fee" agreement; the parties may agree upon a "success fee" for the attorney if a favourable outcome is achieved, but this cannot exclude the typical fees.

1.6 Are there any particular rules about funding litigation in Romania? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Civil procedure law provides for a party that cannot afford the costs of the civil trial the possibility of obtaining legal aid.

There are no legal provisions concerning the security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Romania? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

A third party may undertake the position of a party involved in a litigation (for example, following the sale of the immovable in dispute), provided that it does not fall under any of the interdictions to do so (for example, judges, prosecutors and other judicial participants in a civil trial may not acquire the litigious rights that fall under the jurisdiction of the court in which they exercise their profession).

Litigation funding is not officially provided for within the Civil Procedure Code; therefore a third party may provide the funding for a party in a trial within the limits of a private agreement between them.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Starting from August 1, 2013, particular cases (those which concern consumer law, family law, labour law, professional liability, claims up to a certain value – under RON 50,000 (approx. EUR 11,000), etc.), required participation in a mediation meeting as a prerequisite to filing a lawsuit. However, following the Constitutional Court's Decision no. 266/2014, the mediation meeting is no longer a condition to filing a claim.

In specific cases there are also several other prerequisites, such as the issue of a decision by the notary public in litigation regarding inheritance.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The purpose of the statute of limitations is to protect the material right of the action. As a rule, claims having a pecuniary object are subject to the statute of limitations. The statute of limitations does not operate *ex officio*, instead, the objection of limitation can only be invoked, within the applicable terms (which differ according to the category of the right) in front of the first court, during the first court hearing at the latest. Before the commencement of the statute of limitations period, the parties cannot renounce the effects of the statute of limitations, as this is only possible after the commencement of the period.

The general limitation term is three years. There are also particular limitation periods, which range between six months and 10 years.

A limitation period that starts on a particular day will be considered to be fulfilled in the corresponding day of the year/month in which the limitation term expires. During the course of the limitation period, several judicial or factual events may cause the suspension or the interruption of the limitation period.

Time limits are treated as a substantive law matter.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Romania? What various means of service are there? What is the deemed date of service? How is service effected outside Romania? Is there a preferred method of service of foreign proceedings in Romania?

Following the written submissions phase, civil proceedings start with the summons of the parties. As a rule, the summons is fulfilled by the court's procedural agents or other employees. If this is not possible, the summons is made by mail, with a receipt confirmation.

The summons may also be fulfilled by fax, email or other means of communication that provide the possibility for a receipt confirmation to be issued.

When the claimant is not able to provide the defendant's address, the summons is made by publication at the court's headquarters, on the court's electronic portal and at the defendant's last known domicile.

The deemed date of service is the date when the receipt confirmation is signed by the receiver.

Outside the country, the summons is also sent by mail with receipt confirmation and declared content.

3.2 Are any pre-action interim remedies available in Romania? How do you apply for them? What are the main criteria for obtaining these?

As an interim remedy, the interested party may apply for freezing measures on goods or conservatory measures regarding evidence. In order to do so, the party has to file a claim that will be settled in conditions that are derogatory from the common procedure.

The main criteria for obtaining the interim measures are the risk that the debtor may alienate their assets during the trial, for freezing measures, or the risk that a piece of necessary evidence may be destroyed or disappear in the near future, the conservatory measures.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's pleadings are:

- The identity of the defendant.
- The facts which have led to the litigation.
- The claim and its value.
- The evidence proving the claim.
- The legal grounds of the claim.

3.4 Can the pleadings be amended? If so, are there any restrictions?

As a rule, the initial claim can be amended up until the first court hearing. After this moment, amendments are only possible with the other party's consent.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of the defendant's statement of defence are:

- The personal and contact information of the defendant.
- The answer to the claimant's claims on the merits of the case as well as regarding the legal grounds.
- The exception against the claim.
- The evidence in favour of the defence.
- The legal grounds of the statement of defence.

The defendant can bring a counterclaim which has to be submitted together with the statement of defence. The counterclaim has to fulfil the same conditions as the main claim or, if the statement of defence is not mandatory, at the first court hearing at the latest.

Set-off can be invoked either as a defence or within the counterclaim, depending on the nature of the set-off (legal or conventional).

4.2 What is the time limit within which the statement of defence has to be served?

As a rule, the statement of defence must be served within 25 days from the date of communication of the claim to the defendant. There are also particular cases in which the statement of defence has to be submitted in a shorter term or it is not mandatory.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Such a mechanism exists in our judicial system. The interested party may file a guarantee claim against a third party that may be held liable through a separate claim, with regard to the main claim.

4.4 What happens if the defendant does not defend the claim?

The failure of the defendant to respond to a lawsuit does not block the development of the case. The court vested with the claim will

issue a judgment regardless of the defendant's silence. However, this does not mean that the court will invariably side in favour of the claimant. In virtue of its active role and of the principle of establishing the truth, the court will impartially analyse the case and issue a judgment based on the facts, the evidence submitted and their legal and/or contractual interpretation.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction by raising an objection on jurisdiction which will have to be settled during the judicial inquiry phase.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There are several hypotheses when a third party can join ongoing civil proceedings.

A third party bearing an interest can voluntarily join an ongoing procedure, either to support one of the parties' positions ("accessory joinder claim"), or to settle its own right in connection to the ongoing procedure ("main joinder claim"). The accessory joinder claim may be filed at any moment during the civil proceedings, even during the appeals. The main joinder claim may only be filed in front of the first court, before the closure of the debates. As an exception, the main joinder claim may be filed during the appeal, with the other party's consent.

Another situation in which a third party can join an ongoing procedure is a forced joinder, by means of which any party can request participation in the proceedings, as can a third party which can make the same claims as the claimant. A forced joinder may be filed by the defendant within the term of submission of the statement of defence or, if the statement of defence is not mandatory, at the first court hearing at the latest. The claimant may file a forced joinder in front of the first court until the closure of debates.

A party in an ongoing procedure may also file a forced guarantee joinder against a third party that may be held liable through a separate claim, with regard to the main claim. The forced guarantee joinder may be filed within the same term as the forced joinder.

A defendant holding an asset for another, or exercising a right in the name of another, may submit a joinder claim against a third party within the term of submission of the statement of defence or, if the statement of defence is not mandatory, at the first court hearing at the latest.

There are also several particular cases in which the court may order a joinder, even in the absence of the parties' consent.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two open proceedings may be consolidated provided that there is identity between the parties or even when there are other parties involved and there is a strong connection between the object and the cause of the proceedings.

Also, a consolidation is possible when the same claim has been filed several times in front of different courts or even in front of the same court.

5.3 Do you have split trials/bifurcation of proceedings?

A bifurcation is possible in several cases. For example, the defendant's counterclaim may be split from the main claim and judged separately. Also, consolidated proceedings may also be split if only one of the claims is in such an advanced stage that it can be finalised.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Romania? How are cases allocated?

The cases are allocated at random, by means of an electronic procedure.

6.2 Do the courts in Romania have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts are held by several principles, among which is the settlement of the case in a reasonable term. The courts apply this principle when establishing the dates of the hearings.

The court also conducts the trial, usually in the presence of both parties and/or in the presence of their attorneys. The court invites each party to state its case, starting with the claimant. In virtue of its active role, the court may pose questions to the parties, invite the parties to address each other's arguments, etc. Debates (closing arguments) are held after the administration of evidence, usually during a single court hearing. At the end of the debates (closing arguments), the court may grant the parties the possibility to submit written conclusions.

6.3 What sanctions are the courts in Romania empowered to impose on a party that disobeys the court's orders or directions?

According to the nature of the disobedience, the court may suspend the proceedings (if the continuation of the proceedings is not possible as a result of the claimant's failure to fulfil their obligations) or order the payment of a fine.

6.4 Do the courts in Romania have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Following the settlement of all invoked exceptions, the courts are compelled to state on the case according to the parties' claims and may not strike out part of a statement of case or dismiss a case entirely.

6.5 Can the civil courts in Romania enter summary judgment?

Romanian civil procedure law does not provide for summary judgments.

6.6 Do the courts in Romania have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may order a stay of the proceedings in the following cases: the claimant fails to comply with their obligation; both parties ask for it; neither of the legally summoned parties is present and neither of them asked for the judgment to take place in their absence; the solution in the current proceedings depends on the existence or non-existence of a right that is an object of different proceedings; and a criminal investigation has started regarding a crime that may have an important influence on the judgment.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Romania? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

The Romanian Civil Procedure Code provides for a specific process which enables the court to order the production of documents from the parties if certain conditions are met. Thus, when a party claims that the opposing party holds a document relating to the dispute, the court may order its discovery. The request for discovery cannot be rejected if the document is a joint document of the parties, if the opposing party itself referred to said document in the proceedings or if, according to the law, it is obliged to submit it.

As a rule, if the court orders disclosure of a document, the parties must obey. However, the court will not order disclosure of a document that: contains strictly personal information regarding a person's dignity or private life; breaches a legal confidentiality obligation; and/or leads to a criminal investigation of the party, its spouse or a third degree relative.

7.2 What are the rules on privilege in civil proceedings in Romania?

Attorney-client communications and information received by an attorney fall under the attorney's obligation of confidentiality. The extent of the obligation may vary depending on the agreement of the parties, but a general obligation of confidentiality is applicable to all attorneys, regardless of whether they are external or in-house counsel.

7.3 What are the rules in Romania with respect to disclosure by third parties?

If the court orders disclosure of a document, a third party must obey. However, public authorities and public institutions may decline the disclosure of a document when it relates to national safety, public safety or diplomatic relations.

7.4 What is the court's role in disclosure in civil proceedings in Romania?

The court may order disclosure of documents to the parties in the proceedings, as well as to third parties. Failure to comply with the court's order may lead to an order of the payment of a fine.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Romania?

There are no restrictions on the use of documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Romania?

Each party in a trial is responsible for submitting evidence in favour of their claims or as a defence to the opposing party's claims. The claimant presents their proposal regarding the evidence in their claim, while the defendant indicates it in their statement of defence. Additional pieces of evidence may be submitted during the trial if there is the need for submission resulting from the debates, or the interested party was unable to propose it within the legal term due to justified reasons.

In order for a piece of evidence to be admissible, the following elements must be proven by the party claiming the admission of evidence: the evidence must be legal (in accordance with material and procedure law); plausible (realistic, in accordance with the laws of nature); pertinent (in connection with the object of the trial); and conclusive (regarding elements that may lead to a solution of the trial) for the litigation.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The admissible pieces of evidence provided by Romanian law are the following: written documents; witness statements; cross-examination of the parties; expert reports; and on-location inspection by the court.

It is not admissible to use witness statements to prove the existence or content of a judicial act of a higher value than RON 250, except for judicial acts made by a professional in the exercise of their professional activity (when the evidence is made against the professional), provided that the law does not require written evidence.

Expert testimony is a common type of evidence in civil trials, administered either following a party's request or the court's order. An expert report is usually presented in a written form but it is also possible for the court to hear the designated expert during the court hearing and record their statement.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The law provides for several interdictions regarding the persons who can give a witness statement. The following persons cannot give a witness statement: relatives of the parties up to the third degree; the spouse, ex-spouse, fiancée or partner of one of the parties; anyone who has animosity towards or an interest regarding one of the parties; anyone placed under judicial interdiction; and/or anyone who has a conviction for giving a false witness statement.

During the hearing established by the court, witnesses testify under oath. If a legally summoned witness fails to appear in front of the court, the court may issue a mandate for them to be brought to the court by the police.

A witness's oral statement is recorded by the court clerk and signed by the witness in front of the court. Written statements are not admissible as such but will be treated as written documents.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Experts are appointed by the court and owe their duties to the court. An appointed expert must be an impartial professional. However, it is the party who proposes the expert report evidence who has to pay the expert's fee. The court may grant to each party the assistance of a counsel expert who will owe his duties to the party and who will guard the party's interest.

In complex cases, the court may appoint an expert committee consisting of three experts.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Romania?

The parties' evidence proposal is analysed by the court and granted or rejected. No piece of evidence can be submitted in the absence of the court's approval.

When necessary, the court may have the initiative of proposing evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Romania empowered to issue and in what circumstances?

Romanian civil courts issue the following judgments: first court judgments ("*sentințe*"), on the merits of a case; second and third court judgments ("*decizii*"), settling the first and second appeal, as well as exceptional means of appeal; and orders ("*încheieri*"), issued during the proceedings.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

According to the parties' claims, the court may grant compensatory or punitive damages, legal or contractual interests, as well as judicial expenses.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced following an enforcement request addressed to one of the bailiffs exercising their profession within the territorial limits of the court that issued the judgment.

A foreign judgment is either duly recognised or prone to undergo a recognition procedure, according to the nature of the litigation. Thus, a foreign judgment is duly recognised when it relates to the personal status of the citizens of the state in which it was issued, if it has previously been recognised in the citizenship state of each party or if it was issued according to the applicable law, according to Romanian international private law, and is not contrary to Romanian international private law public order and the right to defence was respected.

In cases other than those stated above, foreign judgments are recognised following a judicial procedure, provided that several conditions are met: the judgment is final according to the law of the issuing state; the issuing court had competence to settle the trial; and there are reciprocity agreements regarding the effects of foreign judgments between Romania and the issuing state.

9.4 What are the rules of appeal against a judgment of a civil court of Romania?

As a rule, a first court judgment is subject to appeal. The request for appeal has to be filed within 30 days after the communication of the judgment to the parties.

The first appeal court renders one of the following solutions:

- dismisses the appeal and maintains the first court judgment;
- approves the appeal and annuls or modifies the first court judgment;
- approves the appeal and states on the merits of the case;
- approves the appeal and orders a new judgment by the first court or a court of the same degree; or
- approves the appeal, annuls the first court judgment and either states on the merits of the case or sends the file to the competent court.

The judgment issued by the court of first appeal is subject to a second appeal that can only be filed for particular reasons.

The law also provides for exceptional means of appeal in particular cases.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Romania? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Alternative dispute resolution, in the form of arbitration and mediation, has gained popularity in Romania in recent years.

Arbitration is more frequently used when one of the parties is of foreign nationality and/or when one or both parties are acting in a professional capacity.

Mediation has been intensely lobbied but still has not gained usage in a significant share of disputes. Starting from 2012, the law regarding mediation provided for mandatory participation in a meeting regarding the advantages of mediation for certain litigations. Since the sanction for filing a claim without complying with this obligation was the dismissal of the claim as non-admissible, most claimants complied.

This obligation has recently been invalidated by the Constitutional Court. In its Decision no. 266/2014, the Constitutional Court stated that the obligation to participate in such a meeting is an infringement of access to justice and is therefore non-compliant with the Romanian Constitution.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Civil Procedure Code regulates arbitration. Mediation is regulated by Law no. 192/2006 regarding mediation and the organisation of the mediator profession.

1.3 Are there any areas of law in Romania that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The law expressly exempts from arbitration litigations regarding the following matters: civil status; civil capacity; inheritance; family relations; and rights the parties cannot dispose of. The state and public authorities may conclude arbitral clauses only if they are authorised by law or international conventions to which Romania is a party. Public law judicial persons that also undertake economic activities may not conclude arbitral clauses if the law or their statute forbids it.

Mediation is not applicable in litigations regarding civil status, and any other rights the parties cannot dispose of.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Romania in this context?

Civil trials are governed by the parties' right of disposal. If the parties decide to resort to arbitration or mediation during the proceedings and there are no legal impediments to doing so, the Civil Procedure Code grants them the possibility to stay proceedings at their request.

If the parties have agreed to settle litigation by means of arbitration and at least one of the parties invokes the arbitral convention, the domestic court will not be competent to settle the litigation.

Before or during the arbitral proceedings, the parties may ask the domestic courts to order interim or provisional measures or to acknowledge the merits of the case. These measures will have to be communicated to the arbitral tribunal.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Romania in this context?

Arbitral awards are subject to an annulment claim expressly provided by the law. The competent court to settle the annulment claim is the Court of Appeal from the place where the arbitration took place.

A mediation agreement is binding for the parties in the same conditions as any other civil agreement. In the case of settlement of a pending litigation by mediation, the court will issue a final and enforceable judgment, subject to appeal.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Romania?

The main institution for alternative dispute resolution in Romania is the Court for International Commercial Arbitration functioning within the Chamber of Commerce and Industry of Romania.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The approach on arbitration has not changed much during the last few years, given that arbitration is a well-established and thoroughly regulated alternative dispute resolution method.

On the other hand, mediation has a more unstable trajectory, generated by the changes in legislation as well as by the fact that a successful mediation procedure involves reaching an agreement without the participation of an authoritative entity.

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Zamfirescu Racoți & Partners Attorneys at Law (ZRP) enjoys a reputation as one of the leading law firms in Romania, ensuring both business and litigation support and representation, with lawyers recognised for their scholarship, legal acumen and exceptional services to their clients.

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- Securities & Capital Markets
- Tax

Russia



Ivan Marisin



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Quinn Emanuel Urquhart & Sullivan, LLP

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Russia got? Are there any rules that govern civil procedure in Russia?

The Russian Federation is a civil law country that belongs to the continental legal system, with codified legislation divided into substantive and procedural legal law.

The main source of law is legislation, and precedent does not bind the court system, but clarifications and decisions of the higher courts have significant weight.

There are two codes governing civil procedure in Russia: the Civil Procedure Code (“CPC”); and the Arbitrazh Procedure Code (“APC”). The CPC applies in the courts of general jurisdiction, while the APC governs procedure in the arbitrazh courts (‘arbitrazh’ defines the state commercial courts). In the course of the 2014 judicial reform both codes have been significantly modified. There are discussions about adoption of the unified Civil Procedure Code that would embrace both codes.

1.2 How is the civil court system in Russia structured? What are the various levels of appeal and are there any specialist courts?

The civil court system consists of two branches: the courts of general jurisdiction; and the arbitrazh courts.

Courts of general jurisdiction can hear any civil matter not assigned to other courts. However, their focus is on non-commercial cases mostly involving individuals (as opposed to legal entities) such as, *inter alia*, disputes over personal property, damages claims, labour disputes, inheritance and other family law matters.

On the contrary, the arbitrazh courts resolve commercial disputes, including most business, corporate and tax matters of legal entities.

Both branches have a four-level court system headed by the Supreme Court with three appeal stages available – appellate, cassation, and supervisory review instances.

Full re-examination of a case is possible in appellate proceedings only. Cassation courts focus on whether substantive and procedural legal norms were applied correctly by the first instance or appellate courts. Supervisory instance reviews lower courts’ decisions and decrees for due process violations or for improper application of substantive legal norms. The supervisory instance is the last judicial stage available for review.

The system of the courts of general jurisdiction consists of single judge magistrate courts at the lowest level, district courts, regional courts (courts of subjects of the Russian Federation) and the Supreme Court. A trial court decision can be appealed within a month after its delivery, whereby an appellate decision may be challenged further by cassation applications filed to the presidium of a regional court and to the Judicial Chamber of the Supreme Court within six months after the appellate decision’s delivery. Previous court decisions can also be reviewed in a supervisory instance in the Supreme Court.

The arbitrazh courts include arbitrazh courts of the subjects of the Russian Federation, appellate arbitrazh courts and district arbitrazh courts. Until recently, the Supreme Arbitrazh Court was at the top of this hierarchy, however as of 6 August 2014 it was abolished and its functions were transferred to the Supreme Court. A trial court decision can be appealed in an appellate arbitrazh court within one month; in a district arbitrazh court by way of a cassation appeal within two months; and in the Judicial Chamber of the Supreme Court by way of a second cassation appeal within another two months. Judicial decisions can also be reviewed in the supervisory instance in the Supreme Court.

Both courts of general jurisdiction and arbitrazh courts may review their decisions based on new or newly discovered circumstances that could have not been known during the initial hearings (e.g., the transaction was recognised as invalid).

Since 3 July 2013 a specialised arbitrazh court dealing with IP disputes started operating. Sometimes it is also referred to as a ‘Patent Court’. The Patent Court deals with IP disputes either as a trial court or cassation court.

Answers to the below questions will apply to arbitrazh courts.

1.3 What are the main stages in civil proceedings in Russia? What is their underlying timeframe?

The main stages of civil proceedings include:

- filing a statement of claim;
- preparation for a trial;
- trial court proceedings;
- appellate proceedings in the appellate arbitrazh court;
- cassation proceedings in the district arbitrazh court;
- cassation proceedings in the Judicial Chamber of the Supreme Court; and
- supervisory review proceedings in the Supreme Court.

The following time limits are provided by law:

- three months to initiate and resolve a case in the arbitrazh court of the first instance, including preparation for trial;
- two months to resolve a case in the appellate arbitrazh court;
- two months to resolve a case in the district arbitrazh court;
- two months to resolve a case in the Judicial Chamber of the Supreme Court; and
- two months to review a case in supervisory proceedings.

Overall timeframes may be longer or shorter depending on the complexity of the dispute.

1.4 What is Russia's local judiciary's approach to exclusive jurisdiction clauses?

Russian courts should recognise exclusive jurisdiction clauses in favour of Russian courts, unless they contradict exclusive jurisdiction of foreign courts.

1.5 What are the costs of civil court proceedings in Russia? Who bears these costs? Are there any rules on costs budgeting?

Civil proceedings costs include court fees provided by the RF Tax Code and other case-related charges, including expenses on legal representatives, experts, interpreters and postal fees, etc.

Court fees have to be paid before filing a statement of claim. The filing fees vary from RUR 300 to a maximum of RUR 200,000.

Courts distribute costs between parties. The winning party may recover its court costs, including reasonable attorneys' fees, at the expense of the losing party. However, a court may decide to impose costs on a party that abused procedural rights causing unnecessary delay and/or otherwise abused the process.

There are no particular legal rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Russia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no particular rules about funding litigation in Russia.

Recovery of contingency fees through court proceedings may be problematic.

There are no particular rules pertaining to security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Russia? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In general, there are no constraints to assigning a claim or cause of action under Russian law, except for legislative prohibition on assigning claims closely connected with an individual, e.g., personal injury claims and alimony claims. Assignment of claim or cause of action is allowed at any stage of the proceedings.

There are also certain requirements as to the form of assignment. Under Russian law, an assignment must be in writing and the legal form of the assignment must be the same as that of the underlying agreement.

Russian law does not deal specifically with a third party financing the litigation, but does not prohibit it as such.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

A claimant is required to provide a copy of a statement of claim to a defendant and pay necessary court fees before initiating proceedings.

Other legal formalities may also be provided by contract or by law (*inter alia*, certain pre-action settlement proceedings may be required).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The general limitation period is three years. Certain exceptions apply, e.g.:

- a one-year limitation period applies to claims for the recognition of a voidable transaction as invalid;
- a one-year limitation period applies to claims in connection with sea freight contracts; and
- a two-month limitation period applies to annulment of decisions of members in a limited liability company.

Generally, limitation periods start to run when an interested party learned or should have learned about a violation of its rights. However, there may be exceptions to this rule, e.g., the limitation period for claims requesting challenging contract validity starts on the day of the contract's performance.

In the Russian legal system, limitation periods are governed by substantive law.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Russia? What various means of service are there? What is the deemed date of service? How is service effected outside Russia? Is there a preferred method of service of foreign proceedings in Russia?

A civil case starts by filing a statement of claim with the court of first instance. Since the end of 2010, electronic filing is possible in arbitrazh courts.

If the claim is accepted, the court has to send a copy of its ruling to notify all participants of the time of the preliminary court hearing. The ruling must be mailed by registered mail or telegram, by fax or by electronic mail message. In addition, arbitrazh courts post such judicial notifications online.

The service shall be made within a reasonable time before proceedings start, allowing the other side to prepare. Normally, the party is considered to be served on the date indicated on a registered mail receipt or on the date of a personal delivery receipt.

International service is conducted according to international treaties and Russian laws. For example, Russia has designated the Ministry of Justice as "Central Authority" for the purposes of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

3.2 Are any pre-action interim remedies available in Russia? How do you apply for them? What are the main criteria for obtaining these?

Arbitrazh courts have the right to grant pre-action injunctions. Usually collateral to secure the interests of the opposing party is needed (however, it is not a guarantee) for a preliminary injunction to be granted.

When a court decides to grant a preliminary injunction, it also sets a time limit of no more than 15 days for filing a claim for which the injunctive relief is sought. Parties may also seek preliminary injunctions in connection with a dispute to be considered in an international commercial arbitration.

3.3 What are the main elements of the claimant's pleadings?

Under the APC, the main elements of the claimant's pleadings should include:

- the name of the arbitrazh court to which the claim is addressed;
- the names of the parties and their addresses;
- the subject of the claim provided with legal norms supporting the claim;
- necessary background information (facts) with evidence supporting the facts;
- an amount of the claim, if it may be assessed;
- calculation(s) of the amount claimed (or contested);
- proof of fulfilment of any pre-action settlement procedures that might be provided by contract or law;
- evidence of any injunctive relief granted before the proceedings;
- proof of sending copies of the pleadings to the other parties and paying necessary court duty; and
- a list of exhibited documents.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The claimant may change the subject of a claim or its factual background (but not both) and the amount claimed. These changes may not be made after the court of first instance renders a decision on the merits.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

Under the APC, a statement of defence should contain:

- the name of the claimant and his address;
- the name of the defendant and his address (location, residence), date and place of birth, employment information, including address information, if the defendant is an individual;
- objections to each argument of a statement of claim with legal and factual basis provided;
- a list of exhibited documents;
- documents in support of the statement of defence;

- necessary contact information; and
- documents evidencing that copies of the statement of defence (with exhibits) have been sent to the other parties.

The defendant may file a counterclaim which may be considered in the same proceedings, if the claims are interrelated, if their resolution sets off both claims or if the counterclaim precludes satisfaction of the initial claim.

4.2 What is the time limit within which the statement of defence has to be served?

A statement of defence should be filed within a time period which enables the other side and the court to consider it before the court hearing.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may not pass on or share liability by bringing an action against a third party within the same proceedings.

For joining third parties to the case, please see question 5.1.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, the court may consider the case based on the available evidence presented by the claimant. Even though the defendant has the right to be heard in court, the presence of the defendant is not a necessary prerequisite for the court to render a decision.

4.5 Can the defendant dispute the court's jurisdiction?

A court's jurisdiction may be disputed and the lack of jurisdiction is the ground for termination of proceedings at any time prior to rendering a decision.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There are two types of third parties:

- a third party which has independent claims on the subject-matter of the dispute; and
- a third party without independent claims on the subject-matter of the dispute.

In order to join the proceedings, a third party having independent claims on the subject-matter has to file a statement of claim (see question 3.3). Such third party has generally the same legal status as the original claimant.

A third party without independent claims on the subject-matter may be engaged in the proceedings: (a) upon the request of such party; (b) upon the request of a party to the case; or (c) at the initiative of the court. A third party without independent claims may be engaged in the proceedings if a future court's decision may affect the third party's rights and obligations.

A third party can be joined into ongoing proceedings prior to rendering of the final decision.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Russian procedural law allows consolidation of several similar or related cases (e.g., if cases involve the same parties and matters) to resolve them in a single trial.

5.3 Do you have split trials/bifurcation of proceedings?

A court may split claims if considering them in separate proceedings seems reasonable. In certain instances, a court, upon the agreement of the parties, may consider the issues of liability and *quantum* in separate hearings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Russia? How are cases allocated?

The general rule of the APC is that a statement of claim shall be filed with a court at the defendant's location or place of residence.

In certain cases, other venues may be considered (e.g., if defendants are located in different regions or if the claim arises out of a contract where a place of its performance is indicated) or only exclusive jurisdiction is available (e.g., *inter alia*, claims in connection with immovable property should be filed within the area of its location).

The cases are allocated among judges, taking into account specialisation and workload of judges.

6.2 Do the courts in Russia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Arbitrazh courts may determine the procedure for hearing a particular case, stay or discontinue the proceedings, etc.

The parties may file various interim applications provided by the APC, for example, motions for engagement of third parties, issuance of an injunction, request to provide evidence and request for expert examination.

There are no particular rules regarding cost consequences of filing interim applications.

6.3 What sanctions are the courts in Russia empowered to impose on a party that disobeys the court's orders or directions?

There are two types of sanctions that Russian courts can impose:

- removal of the person who disobeys the court's orders or directions out of the court room; and
- fines for failing to comply with a court order. Amounts of fines are set in the APC.

Failure to execute judicial decisions may result in criminal and administrative liability.

6.4 Do the courts in Russia have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Russian law does not empower the courts to strike out part of a statement of case, but in certain instances the courts may leave the claim without consideration or terminate the proceedings (see question 6.6).

6.5 Can the civil courts in Russia enter summary judgment?

Russian law provides for a possibility of simplified proceedings in a limited number of cases, e.g., if the claims are of undisputed nature or for insignificant amounts.

6.6 Do the courts in Russia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Russian courts have powers to discontinue and stay the proceedings.

Arbitrazh courts should discontinue the case by leaving the claim without consideration (e.g., if a statement of case is not signed or signed by a person without an authority to sign it) or terminating the proceedings (e.g., if the case is not within jurisdiction of the court or the parties have reached a settlement).

In certain cases arbitrazh courts suspend proceedings, e.g., due to appointment of an expert examination or if a pending court's decision is necessary for the ongoing case.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Russia? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Russian law does not provide for a common law disclosure procedure.

The parties have to submit evidence in support of a claim or objections thereto.

Upon motion of one of the parties, Russian courts may order to produce specific documents, if the party cannot obtain them on its own. In certain instances, the court may request documents at its own initiative.

The court's assistance in preserving evidence can be sought at the pre-action stage if there is a risk that evidence will become unavailable.

7.2 What are the rules on privilege in civil proceedings in Russia?

No-one has to testify against him or herself, spouses or other close relatives. Communications between a client and an advocate (member of an advocate Bar association) are privileged and an advocate may not be summoned, or asked to testify, as a witness in connection with the facts related to providing legal assistance.

7.3 What are the rules in Russia with respect to disclosure by third parties?

The court may oblige third parties to produce specific documents (see question 7.1).

7.4 What is the court's role in disclosure in civil proceedings in Russia?

See question 7.1.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Russia?

There are no direct rules regarding the use of documents obtained by disclosure in Russia.

8 Evidence

8.1 What are the basic rules of evidence in Russia?

Rules of evidence are provided in the APC. In an action, each party shall prove the facts on which the claims and objections of the party are based. Evidence may be any admissible and relevant proof used to establish presence of the grounds for a claim or objections to it and/or necessary to render a final decision of the court correctly.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Courts admit written, oral, visual and other material evidence, including explanations of the parties, expert opinions, testimonies, sound and video recordings, print materials *et al.* Evidence must be relevant to the ongoing case. Certain circumstances are required by law to be proven only by specific evidence.

Expert opinions can be requested by a special court order. An expert should present its opinion in the form of a written statement as a response to questions asked by the court. After presenting the opinion, the expert may be asked to provide explanations on the opinion and to answer other questions of the parties.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A party can move to request the court to summon witnesses. A witness makes statements under oath.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Under Russian law expertise may be requested by the court (by its own initiative or at the request of the party). In this case, the court issues a ruling on assigning an expertise which should contain the grounds for carrying out expert examination, requisites of the expert (or expert organisation), questions for consideration, case materials being examined and the period for the expert opinion to be provided in writing.

The expert opinion should contain:

- the time and place of carrying out an expert examination;
- the grounds for carrying out an expertise;
- information about the expert;
- questions posed to the expert;
- the case materials provided and the object of the examination;
- the content and results of studies showing the techniques employed; and
- conclusions of the expert and some other elements.

At the request of a party to the case, or on the initiative of the court, an expert may be summoned to the hearing. Such expert owes his duties to the court.

The APC also provides for so-called consultation of a specialist, which is similar to expertise, but does not require special research and is given orally at the court hearing.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Russia?

See question 7.1.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Russia empowered to issue and in what circumstances?

Arbitrazh courts can render three types of judicial acts:

- *rulings* are issued by arbitrazh courts of any instance in order to settle procedural matters, such as the parties' motions or to discontinue or stay the proceedings;
- *judgments* are issued on the merits by the court of first instance; and
- *decrees* are issued by appellate, cassation and supervisory review instances.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The winning party may recover its court costs, including the court fees, at the expense of the losing party. Attorneys' fees are rarely compensated in full.

However, a court may decide to lay costs on a party that abused procedural rights causing unnecessary delay and other damage; a court may also consider damages caused by failure to comply with its interim measures.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic decision, which came into force, is subject to enforcement as provided by Russian Law "On Enforcement Proceedings", which establishes the detailed procedure for enforcement of court decisions. As a rule, court decisions are enforced on the basis of a writ of execution, which is issued by the court. There is no specific procedure for the recognition of a domestic decision.

A foreign court decision is recognised and enforced in Russia by state courts according to the international treaties and federal laws of Russia.

9.4 What are the rules of appeal against a judgment of a civil court of Russia?

Parties to a case and interested third parties may challenge judicial acts on appeal, in cassation or in a supervisory review instance. See also question 1.2.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Russia? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In addition to the courts, Russian law recognises the following alternative dispute resolution methods: (1) domestic arbitration; (2) international commercial arbitration; and (3) mediation.

Generally, civil and commercial disputes with few exceptions may be referred to either domestic or international commercial arbitration. However, institutional arbitration is more common in Russia than *ad hoc* arbitration.

Arbitral awards can be enforced in Russia pursuant to international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”) and the European Convention on International Commercial Arbitration, 1961 (“**European Convention**”), as well as domestic legislation.

Since 1 January 2011, intermediary (mediation) procedures are established by the Law on Alternative Dispute Resolution Procedure with Participation of the Intermediary (Mediation Procedure) (“**Law on Mediation**”). Mediation is an informal extrajudicial dispute resolution method where a mediator seeks mutually acceptable ways to resolve a conflict between the parties. Mediation has not yet become widely used.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

International commercial arbitration is governed by the International Commercial Arbitration Law (“**ICAL**”) (based mostly on the 1985 UNCITRAL Model Law), whereas domestic arbitration is governed by the Domestic Arbitration Tribunals Law. The Law on Mediation applies to mediation.

1.3 Are there any areas of law in Russia that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Several areas of law may not use alternative dispute resolution methods. For instance, bankruptcy, administrative (of public nature) and antitrust disputes may not be resolved through arbitration.

Mediation is limited to civil, labour (excluding collective employment disputes) and family cases, except for cases related to public rights and interests and interests of third persons that are not involved in the mediation procedure.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Russia in this context?

An arbitral tribunal or a party to arbitral proceedings (with the approval of the tribunal) may request the competent national court to collect certain evidence that is relevant to the case, and the court may fulfil such request within its competence and according to the rules of evidence.

Upon the request of a party, arbitrazh courts may grant injunctive relief for a pending arbitration if the court believes that a failure to do so could render enforcement of the award impossible or would substantially complicate its enforcement or cause substantial damage for the applicant.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Russia in this context?

Russian courts should refuse to consider cases covered by valid and effective arbitration clauses and should enforce the arbitral awards rendered thereunder.

Under Russian law, arbitral awards cannot be appealed. However, a party can file an application with the competent Russian court seeking that an award rendered in Russia be set aside. The grounds under which an arbitral award may be set aside are set forth in the ICAL and the APC and are similar to those set forth in the New York Convention.

Pre-action settlement procedure is not binding, unless agreed by the parties, except for cases provided by law. Courts should leave the claim without consideration, filed in violation of that procedure, if it is compulsory.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Russia?

The major alternative dispute resolution institutions in Russia are permanent arbitral institutions.

The International Commercial Arbitration Court (the “**ICAC**”) and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of Russia are the most well-known arbitration centres.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

There have been attempts to increase the weight of alternative dispute resolution methods, for example, the Law on Mediation was adopted in 2011 and various modifications pertaining to the domestic arbitration are being discussed.



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Quinn Emanuel is the premier business litigation firm, with over 700 lawyers in Los Angeles, New York, San Francisco, Silicon Valley, Chicago, Washington, D.C., Houston, Seattle, Tokyo, London, Mannheim, Moscow, Hamburg, Paris, Hong Kong, Munich, Brussels and Sydney.

The Moscow office limits its practice to business disputes in both Russian courts at all levels and all regions, and international arbitrations in all major arbitral centres around the world. The Moscow office is also active in conducting internal investigations for foreign companies facing both criminal investigations and civil lawsuits in their home countries.

South Africa

Brian Kahn



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has South Africa got? Are there any rules that govern civil procedure in South Africa?

South Africa's legal system has its origins in the common law of England and Holland. In recent times it has been increasingly modified by statutory law. The system is based on the adversarial method.

Prior to 1994, the South African government was elected by a minority of its citizens. Since 1994, it has become a multi-party democracy and adopted a constitution with an extensive Bill of Rights (*the Republic of South Africa Constitution Act 108 of 1996*).

In recent years there have been a number of statutory enactments based on the Bill of Rights. Traditional legal values and norms are continually measured against the constitution and litigants are free to raise constitutional issues in litigation. There are sophisticated rules and procedures for the courts which are continually being updated, revised and modified.

1.2 How is the civil court system in South Africa structured? What are the various levels of appeal and are there any specialist courts?

The South African civil court system operates on various levels. The lowest courts are Small Claims Courts, which are informal and determine minor disputes.

Above them are the District Magistrates' Courts, which determine claims of not more than R100,000. Above the district courts are Regional Magistrates' Courts, which determine claims of not more than R300,000.

Above the Magistrates' Courts are various divisions of the High Court that determine all other civil disputes. Every division has its own Appeal Court, which consists of a bench of either two or three judges, depending on whether the appeal is one from the Magistrates' Courts or from the High Court.

The Supreme Court of Appeal determines appeals from the High Court that are considered important enough to warrant its attention. A bench of the Supreme Court of Appeal consists of either three or five judges.

The highest court is the Constitutional Court, which hears all disputes in which a constitutional issue has been raised. It also serves as the highest appeal court. Its bench consists of 11 judges.

There are various specialist high courts, including land claims courts, commercial courts, tax courts, patent and trademark courts and labour courts. There are also specialist tribunals, which hear matters involving competition law issues.

1.3 What are the main stages in civil proceedings in South Africa? What is their underlying timeframe?

Proceedings are commenced by a party instituting action or application proceedings. Actions are commenced by the delivery of a summons with particulars of claim (*a statement of claim*). In applications (*either where disputes of fact are not anticipated or where prescribed by law*), proceedings are commenced by notice of motion supported by affidavit. The opposing party (*the defendant or the respondent*) will thereafter deliver a plea or an opposing affidavit and the party instituting the proceedings may thereafter reply. After all pleadings or affidavits have been delivered, either or both of the parties will apply for a date for the hearing.

In all trial matters in the High Court, pre-trial conferences must be held by the parties, which are required to discuss settlement of the matter and, if the matter cannot be settled, to limit where possible the issues in dispute. In applications a pre-trial conference is not a requirement prior to having the matter enrolled.

In trial actions parties are obliged to notify each other of the documents they intend using at trial and to provide each other with copies of such documents (*discovery*). Trials are conducted in front of a magistrate or judge and evidence is led.

From start to completion, the trial process is likely to take up to two years in the busier divisions whereas a matter brought on application may be disposed of in seven to eight months. Judgments are often reserved and handed down at a later stage. There is, however, a process for priority dates to be given in urgent matters. There is a separate process that allows urgent applications to be heard – sometimes on a few hours' notice depending on the exigencies of the matter.

1.4 What is South Africa's local judiciary's approach to exclusive jurisdiction clauses?

The South African courts will uphold exclusive jurisdiction clauses, subject only to the requirement that the court actually has an objective ground of jurisdiction to hear the matter.

1.5 What are the costs of civil court proceedings in South Africa? Who bears these costs? Are there any rules on costs budgeting?

There are no costs in the opening of court files or instituting proceedings other than the costs of service of documents by a sheriff. Professional legal fees are obviously paid for by litigants. As a general rule South African courts will order the unsuccessful litigant to pay the legal fees of the successful litigant, according to tariffs which in practice are between 50% and 60% of the actual costs incurred by the litigant. There are no rules on costs budgeting, as each matter is assessed on its own merits.

1.6 Are there any particular rules about funding litigation in South Africa? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fees are permissible, but subject to written contingency fee agreements between attorneys and clients which must in turn comply with the Contingency Fees Act 66 of 1997. This Act imposes strict limitations on such arrangements so as to ensure that litigants are not unduly impoverished or prejudiced.

Security for costs may be sought only against a party instituting legal proceedings and then only in certain instances. These are where the party instituting the proceedings is a foreigner to South Africa or where the claim is vexatious and an abuse of the process. Impecunious companies are no longer required to furnish security for costs simply by reason of such impecuniosity.

1.7 Are there any constraints to assigning a claim or cause of action in South Africa? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no major constraints to assigning a claim and/or cause of action. It is fairly common for claims to be ceded. It is wholly permissible for a non-party to litigation proceedings to finance those proceedings and the courts will not ordinarily enquire into the origin of funds used for litigation.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In general there are no formalities which must be complied with before proceedings are instituted. There are exceptions arising from certain statutes where letters of demand are required prior to the institution of action. For example, the National Credit Act 34 of 2005 requires a credit provider to make a written demand on a debtor prior to the institution of action.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

There are time periods within which proceedings can be initiated. Claims based on judgments and mortgage bonds should be instituted

within 30 years, claims based on bills of exchange or negotiable instruments within six years, and claims based on all other debts within three years. Prescription of debts is a substantive issue and a party wishing to raise it must do so in its pleadings.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in South Africa? What various means of service are there? What is the deemed date of service? How is service effected outside South Africa? Is there a preferred method of service of foreign proceedings in South Africa?

Civil proceedings are commenced by means of summons or application. The summons or application is served by the sheriff and the date of service is recorded on the sheriff's return of service. There are forms of substituted service (*alternate means of service*) with the leave of the court. Where legal proceedings in South Africa are against foreign litigants, the process is served abroad. South African courts recognise service outside of the country where the service is effected by a person who ordinarily is entitled to effect such service. (*South African law does not recognise a deemed date for service – service can be personal or via other means such as on a responsible employee at the defendant's place of work or home.*)

3.2 Are any pre-action interim remedies available in South Africa? How do you apply for them? What are the main criteria for obtaining these?

There are a number of interim remedies available in South Africa and these are normally sought on application to the court in question. They may include claims for an interim contribution to legal costs or access to minor children (*in divorce cases*), payment of interim medical costs in motor vehicle accidents or interim interdicts. There are also procedures relating to inspection and provision of documents (*discovery*).

An applicant must show an entitlement to the interim relief claimed, based on need and the necessity of the interim relief to the further conduct of the matter.

3.3 What are the main elements of the claimant's pleadings?

The essential elements of a pleading are the facts on which the claim is based. However, where claims are brought on application, the evidence to support the facts should also be set out in the affidavit.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended at any time until judgment on the matter. The only limitation on the entitlement to amend is where there is irreparable prejudice to the other side. Our courts recognise that other types of prejudice can often be cured if there is an adjournment or postponement of the proceedings coupled with an order for costs.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of a statement of defence are the factual allegations necessary to defeat a statement of claim. As a general rule, a defendant should either admit or deny or confess and avoid an allegation of fact in a statement of claim. Defendants are entitled to bring counter-claims and to raise a defence based on set-off.

4.2 What is the time limit within which the statement of defence has to be served?

Where the proceedings are brought by way of action, a plea is normally delivered within 20 days of the date on which notice of appearance to defend was given.

In application proceedings, an opposing affidavit is due 15 days after the date of notice of intention to oppose, save where the application is brought by way of urgency (*for example, to interdict a bank making payment of an instrument of debt*) in which the time limits are truncated – sometimes to a few days or even hours.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

If a defendant is entitled to claim either a contribution or an indemnity from a third party it may join that third party in the proceedings by means of a third party notice.

4.4 What happens if the defendant does not defend the claim?

If a defendant does not defend a claim, the plaintiff may apply for judgment by default.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant may dispute the jurisdiction of a court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can be joined in proceedings either by means of a third party notice as referred to above or by means of joinder, where it is shown to be appropriate or convenient for such third party to be joined.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The South African civil justice system allows for the consolidation of

more than one set of proceedings and the test is one of convenience aimed at avoiding a multiplicity of actions.

5.3 Do you have split trials/bifurcation of proceedings?

Splitting of trials is permitted in appropriate circumstances.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in South Africa? How are cases allocated?

There are a number of steps to be taken before cases are allocated.

In trial matters the pleadings must be closed before an application for a trial date will be considered.

In application proceedings cases will not be enrolled until the papers have been properly annexed and paginated and the applicant has delivered heads of argument. Urgent applications have truncated time periods designed to allow a matter that the court determines as urgent (*and where relief cannot be obtained in the ordinary course*) to be heard in accordance with other processes.

6.2 Do the courts in South Africa have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The High Court has the power to manage cases. Where case management is imposed the parties will be permitted to approach the assigned judge for interim rulings, the scheduling of pre-trial conferences and directions as to the further conduct of the matter.

There are a number of interim applications that parties can make, for example, relating to the furnishing of further particularity, the holding of pre-trial conferences and the furnishing of documents.

The court does not impose any costs on the parties where it orders case management.

6.3 What sanctions are the courts in South Africa empowered to impose on a party that disobeys the court's orders or directions?

Where a party disobeys a court's order or directions, the aggrieved party can apply to the court for an order declaring the other party to be in contempt. In extreme cases the court can impose a sentence of imprisonment.

Suspended sentences are more common, aimed at ensuring compliance with the order in future and acting as a deterrent to further disobedience.

The court also has the power to impose fines.

6.4 Do the courts in South Africa have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The court has the power to strike out a statement of case or part thereof, or dismiss a case entirely, on application by one of the parties.

6.5 Can the civil courts in South Africa enter summary judgment?

The courts have the power to enter summary judgment pursuant to an application by the plaintiff on notice to a defendant who has an opportunity to deliver an affidavit in opposition to the summary judgment application.

6.6 Do the courts in South Africa have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The High Court has the power to discontinue proceedings. This will generally take place if there has been an unacceptable or inordinate delay in the proceedings. A court will stay proceedings pending the outcome of other proceedings, e.g. arbitration proceedings.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in South Africa? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

All relevant documents in a matter must be made available by a party to an opposing party as part of the discovery process. The only documents that need not be produced are documents that are privileged. Confidential documents must be disclosed, although the courts have the power to limit the extent of access to them. Privilege must be claimed by a party, setting out the reasons therefor. There is legislation in South Africa, namely the Promotion of Access to Information Act 2 of 2000, which allow a party to request documents from either a privately owned company or a state entity pre-action.

7.2 What are the rules on privilege in civil proceedings in South Africa?

Privilege must be claimed by a party, setting out the reasons therefor. Generally, privilege can be claimed in respect of communications between attorney and client (*including communications in contemplation of legal proceedings*) and settlement negotiations.

7.3 What are the rules in South Africa with respect to disclosure by third parties?

Third parties that have documents or evidence relevant to a case can be compelled to testify and to produce documents at trial by means of subpoenas.

7.4 What is the court's role in disclosure in civil proceedings in South Africa?

Where a party fails to produce documents either in whole or in part, the aggrieved party may apply to the court for an order compelling disclosure/production of the documents, and in extreme cases, a postponement of the trial.

7.5 Are there any restrictions on the use of documents obtained by disclosure in South Africa?

In general there is no restriction on the use of documents obtained by disclosure. This general rule may be varied according to considerations of confidentiality, etc.

8 Evidence

8.1 What are the basic rules of evidence in South Africa?

Ordinarily evidence must be given by persons who have personal knowledge of the facts testified to. In trials, evidence is given under oath in the witness box and subject to cross-examination. In applications, the evidence is contained in the affidavits.

Unless documents are regarded as public documents, and in the absence of an agreement, a party wishing to rely on a document will have to testify about it.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Similar facts evidence is as a general rule not admissible and is regarded as being irrelevant. There are exceptions.

Hearsay evidence is generally not admissible, although the court has the power to accept hearsay evidence (*particularly in urgent matters*) where the court is satisfied that such evidence is inherently reliable and where it is in the interests of justice to admit such evidence.

Expert evidence as a general rule may not be tendered unless the party seeking to rely on such expert evidence has given the opposing party notice of the intention to lead such evidence and provided a summary thereof.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witnesses on matters of fact who testify in court must be sworn in and give evidence under oath. Witness statements are not required in trial proceedings but may be required in applications which have been referred for the hearing of oral evidence.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

As stated above, expert summaries are generally exchanged. An expert's duties are both to the client and to the court.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in South Africa?

The court is entitled to question witnesses.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in South Africa empowered to issue and in what circumstances?

There are a number of different types of judgments and orders, as well as rulings. Judgments may be final, provisional or interim. The court is often called upon to hand down interlocutory rulings and directions.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The South African courts are conservative when it comes to awarding damages. Punitive damages are not usually awarded. Claims which have been quantified bear interest from the date on which they became due. The court has a wide discretion on the question of costs, although as a general principle, costs follow the result. A court can order punitive costs against a litigant.

9.3 How can a domestic/foreign judgment be enforced?

Failing payment, domestic judgments are generally enforced by the issuing of a warrant of execution against assets (*first movable and thereafter immovable*) which are thereafter sold on auction. Foreign money judgments are enforced by means of provisional sentence proceedings. All other foreign judgments may be enforced by means of an application to the court.

9.4 What are the rules of appeal against a judgment of a civil court of South Africa?

An automatic right of appeal lies against a judgment of the Magistrates' Court to the High Court.

There is no automatic right of appeal against judgments of the High Court, where the party seeking to appeal must first approach the court that granted judgment and ask for leave to appeal. Should leave to appeal be refused, the unsuccessful party has the right to approach the Supreme Court of Appeal (*effectively by way of a petition*) for leave and the Supreme Court of Appeal grants or refuses leave as it may determine.

Where the issue in question is a constitutional issue, there is a right to approach the Constitutional Court for leave to appeal.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in South Africa? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In recent years litigants in South Africa have made increasing use of arbitration, mediation, umpires, referees and expert determination.

Arbitration proceedings are subject to the Arbitration Act 34 of 1965. However various other bodies have procedural rules that

may apply where the parties to the dispute agree thereon. High Court Rules (*in whole or part*) may also be incorporated into the procedural agreement between the parties.

There are various governing bodies in South Africa, including the Association of Arbitrators (*Southern Africa*) and the Arbitration Foundation of South Africa.

There are also mediation panels, ombudsmen and other specialist tribunals. Disputes involving construction and building are frequently determined by arbitration as most standard form contracts contain arbitration clauses.

In general the law relating to alternative dispute resolution (*both substantive and procedural*) is well entrenched and well implemented.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitrations may be expedited or informal. Mediation may be non-binding or binding depending on the parties' agreement (*a ruling in non-binding mediation often facilitates a settlement of the issue*).

All forms of alternative dispute resolution in South Africa depend on an agreement between the parties to refer their dispute to a particular alternative form of dispute resolution. In the absence of such an agreement, disputes must be determined by the court.

1.3 Are there any areas of law in South Africa that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

There are a number of matters that can only be heard by the courts, including liquidations of companies, sequestrations of individuals and divorce. Other than these, arbitrators have the power to determine most issues.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to South Africa in this context?

A court has the power to order a party to submit to arbitration only if there is a pre-existing agreement binding on that party which obliges it to submit to arbitration.

In certain cases where values of assets are required a court may order an expert valuation to be conducted by an independent third party, which will be binding on the litigants.

Where a party raises any alternative dispute procedure as a necessary precursor to litigation, a court will, if satisfied, postpone the action to enable the alternative dispute resolution process to run its course. A court may make orders pertaining to the future conduct of a matter, involving arbitration or mediation, etc., only where the parties have agreed to this. The court does not have any inherent power to order parties to submit to mediation or arbitration.

- 1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to South Africa in this context?**

An award by an arbitrator or a mediator is binding once handed down. If the other party fails to comply with the award, it can only be enforced after it is made an order of the court.

Appeals from arbitration awards arise only where the parties have expressly agreed that there should be a right of appeal. In such cases the appeal would ordinarily lie to an appeal tribunal, the composition of which has been agreed to by the parties. Absent an appeal the only basis to attack an arbitration award is on review. The grounds of review are limited.

2 Alternative Dispute Resolution Institutions

- 2.1 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?**

Yes they do.

3 Trends & Developments

- 3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?**

South Africa, in common with many Commonwealth and Western countries, is increasingly turning to alternative dispute resolution processes (*more particularly arbitration and binding mediation*) to resolve disputes.

The processes that exist in South Africa for the airing of such disputes via alternative dispute resolution processes are sophisticated and function exceptionally well.



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Brian has arbitrated and litigated locally and internationally and been involved in large and small commercial transactions. He acts for listed entities, large private companies, family conglomerates, entrepreneurs and individuals. He has established firm collegial and professional relationships with colleagues throughout the world; many of whom refer matters to him on behalf of their offshore clients where he has acted either alone or as co-counsel. He has, on behalf of clients and colleagues, travelled over the years to: Abu Dhabi; Argentina; Austria; Australia; Botswana; Canada; Dubai; England; Finland; France; Germany; Holland; Hong Kong; Ireland; Iraq; Jordan; Kenya; Kazakhstan; Lesotho; Namibia; Poland; Russia; Scotland; Singapore; the USA; and Zambia.



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South Africa



Brian Kahn, the managing partner of Brian Kahn Inc. ("BKI"), commenced practice in 1969, and when the law relating to the incorporation of professional practices changed, he established an incorporated company. BKI is a boutique-style firm and is considered medium size by South African standards. We employ 28 professional and support staff, a mirror of the rainbow nation.

In 1997, BKI developed its own office building which it named "Umlilo House". The source of and inspiration for the name (which means "fire" in Zulu), emerges from the vision and culture of the firm, which is dynamic, progressive and effective in achieving success for its clients.

BKI has an excellent reputation for being dynamic, passionate and successful. We specialise in commercial law, labour law, commercial litigation and dispute resolution, including media law. Our Litigation and Dispute Resolution department specialises in complex litigation and arbitration, including multi-jurisdictional litigation, and covers areas such as company disputes (shareholder and partner disputes), bankruptcy and insolvency (restructuring and reckless trading), business fraud and misrepresentation, due diligence and forensic investigations, property and construction disputes, mining disputes, employment and labour law. We have acted for government departments and organs of state in South Africa and former heads of state in Africa.

We are able to assist clients in complex disputes across a wide range of areas, advising on strategies to limit potential exposure to litigation and assess pre-litigation solutions.

Spain



Julio Parrilla



Arancha Barandiarán

Dentons

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Spain got? Are there any rules that govern civil procedure in Spain?

Spain's legal system is a civil law system, being the sources of law regulated in the Spanish Civil Code (laws, custom and general principles of law).

Civil procedure is governed by the Spanish Code of Civil Procedural Law, approved by Law 1/2000, of 7 January. It is also necessary to mention that voluntary or non-contentious proceedings (mainly related to family law) or the recognition of foreign judgments rendered outside the EU are still governed by the former Spanish Code of Civil Procedural Law approved by Royal Decree on 2 February 1881.

1.2 How is the civil court system in Spain structured? What are the various levels of appeal and are there any specialist courts?

The Civil Court system is regulated by the Organic Law no. 6/1985 on the Judicial Authority Organisation, and hierarchically structured into:

Magistrate's Courts, which decide on minor claims under 90 euros and carry out functions connected to Civil Registry.

First Instance Courts, which examine disputes which are not expressly attributed to another area of law and appeals against Magistrate's Courts' decisions and **Commercial Courts**, specialised Courts on insolvency proceedings, transports, IP, trademarks, fair and unfair competition or company conflicts.

High Courts of Appeal (Civil Chambers), one for each province, dealing with appeals against the judgments rendered by First Instance and Commercial Courts on matters over 3,000 euros.

The Supreme Court (Civil Chamber), which rules on cassation appeals and extraordinary appeals for infringement of procedural law filed against High Courts' decisions.

The Constitutional Court, deciding on proceedings in which constitutional rights are claimed to have been breached.

1.3 What are the main stages in civil proceedings in Spain? What is their underlying timeframe?

Ordinary trials ("*juicio ordinario*") are followed before the First Instance/Commercial Court. These proceedings usually take around

a year until a judgment is rendered. They consist of (i) pleadings of a claim filed by the plaintiff, (ii) admission by the Court and service to the defendant, (iii) a statement of defence challenging the complaint filed by the defendant, (iv) First Hearing to remedy any procedural fault and propose evidence to be practised in the Trial (witnesses, experts, interrogatories of the parties, etc.), (v) Trial, and (vi) judgment.

Oral trials ("*juicio verbal*") are established for certain issues and disputes under 6,000 euros. The complaint is filed before the First Instance/Commercial Courts and admitted by the Court. When it is served to the defendant, he is already informed about the date of the Trial scheduled in which he will be able to oppose (orally) the claim. The admission and practice of evidence (documentary evidence, witnesses, experts, etc.) will be agreed and carried out within the act of the Trial. A judgment will be rendered after the hearing. The whole procedure might take around six to eight months.

In addition, there is also the possibility of filing an application for an order for payment ("*juicio monitorio*") established for uncontested debts. If the defendant does not oppose such an application or pay within a term of 20 working days, the claimant will be granted access to an enforcement procedure (around three to four months after the application has been filed).

1.4 What is Spain's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are valid and enforceable, provided that they have been freely agreed by the parties.

However such clauses cannot be invoked in some disputes in which jurisdiction is mandatorily imposed and mainly related to real estate and rights *in rem*, inheritance, incapacitated persons, protection of the right to honour, privacy and image, lease agreements, condominiums, damages caused by vehicles, corporate decisions, intellectual property, unfair competition, patents and trademarks, contractual general conditions, third parties' rights *in rem*, insurance, certain financial agreements, consumers, applications for an order for payment procedure, payment notes, and agency and distribution agreements.

1.5 What are the costs of civil court proceedings in Spain? Who bears these costs? Are there any rules on costs budgeting?

The main costs that a party must face are payment of judicial taxes and Court Agent and Lawyers' fees, which are both mandatory

figures in all disputes except for, primarily, disputes under 2,000 euros, pre-action interim measures and applications for an order for payment procedure.

Each party assumes its own costs while the proceedings are pending. When a final decision is rendered a “loser pays” rule generally applies, meaning that the successful party will be entitled to recover his legal costs, however some limitations pursuant to the guidelines provided by Bars may be established.

Court Agents’ costs are calculated based on the rates approved by the Royal-Decree no. 1373/2003, of 7 November, and the guidelines established by Bars (even if not mandatory) are often used in order to budget Lawyers’ fees.

1.6 Are there any particular rules about funding litigation in Spain? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fees and security for costs are permitted even if this is still an unfamiliar practice.

1.7 Are there any constraints to assigning a claim or cause of action in Spain? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no constraints to assigning a claim or cause of action, even if when it is done while the proceedings are already pending it has to be authorised by the Court and the counter-party is entitled to oppose such an assignment.

In addition, when a disputed claim is assigned, the debtor is granted the right to reimburse the outstanding debt, interests and costs within a term of nine days since payment was required by the assignee.

Third party funding, even if not legally barred, is also an unfamiliar practice in Spain.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

A power of attorney must be granted before a Notary Public (and, if necessary, legalised with The Hague Apostille) in order to authorise Lawyers and Court Agents to act on behalf of the party.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Spanish Civil Code states the limitation periods to be applied to the different classes of claims; the most relevant ones being: (i) a 15-year limitation period to be applied for contractual claims (with some exceptions); and (ii) a one-year limitation period for tort claims.

Regarding their calculation, they might also vary depending on the particular circumstances of each case but the general principle stated in the Spanish Civil Code is that limitation period is calculated from the day in which the action become exercisable.

Time limits are considered to be a substantial law issue to be resolved in the judgment to be rendered.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Spain? What various means of service are there? What is the deemed date of service? How is service effected outside Spain? Is there a preferred method of service of foreign proceedings in Spain?

After the complaint has been filed into the Courts’ registry and allocated, the Court Clerk of the Court in charge will carry out a quick examination on jurisdiction, capacity and legal representation of the claimant and the kind of proceedings to be engaged.

The Court Clerk will issue a decision admitting the complaint and opening a new case file, ordering the service to the defendant.

Service must be mandatorily supervised by the Court Clerk and it is carried out by the notification services of the Courts in the domicile of the defendant, the date of service being noted. Later communications will be addressed to the Court Agents appointed by the parties.

The valid date of service is meant to be the date in which the defendant has received full and clear copy of the complaint and attached evidence, translations included if necessary.

Court Clerks will be in charge of ordering and coordinating any service to be effected outside Spain and those ordered from foreign authorities to be carried out in Spain.

In connection to international service, Regulation (EC) no. 1393/2007 and the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters apply in Spain.

3.2 Are any pre-action interim remedies available in Spain? How do you apply for them? What are the main criteria for obtaining these?

When an urgent situation occurs, the claimant is entitled to request from the First Instance or Commercial Court the adoption of pre-action interim measures. If such pre-action interim measures are granted, the claim will have to be filed within a term of 20 working days.

The application is filed before the competent Court of First Instance/ Commercial Court (attaching all available documentary evidence) and, if it is evidenced that “extreme urgency” applies, it will be granted “*inaudita parte*” (without hearing the defendant).

When the Court believes that there is no extreme urgency or it has already granted the injunction “*inaudita parte*”, the defendant will be granted a term of 10 working days to oppose the injunction application or the injunction granted “*inaudita parte*”.

If there is opposition, the parties will be summoned to a hearing before the Judge, who will render a decision subject to appeal before the competent High Court of Appeal.

The plaintiff must provide enough evidence on:

- (i) an urgent situation or need, so the interim measure request cannot be postponed until the claim is filed;
- (ii) having a “*prima facie*” case (or “*fumus boni iuris*”), that is, that the object of the claim appears to be sufficiently grounded; and
- (iii) the existence of danger in delay (“*periculum in mora*”), that is, that the mere lapse of time during the dispute until a final judgment is rendered might render such judgment ineffective.

It is also necessary to provide a security for compensation for any damages the injunction may cause to the defendant if the claim is not successful.

3.3 What are the main elements of the claimant's pleadings?

The claim shall be structured as follows:

- (i) a clear identification of the claimant and, if applicable, the Court Agent and Lawyer acting on behalf of the party and providing legal advice;
- (ii) a clear identification of the defendant and the domicile in which service must be fulfilled;
- (iii) an ordered (numbered) list of the facts giving rise to the claim, including references to the documents or means of evidence attached to the claim;
- (iv) the legal grounds of the claim, including a separate reference to the capacity and legal representation of the parties, jurisdiction and proceedings to be followed; and
- (v) a clear and ordered (numbered) list of the requests made to the Court.

Original documentary evidence, translated into Spanish (if necessary), and the expert report shall be attached to the complaint.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The claimant will be entitled to extend the scope of its claim or sue new co-defendants only if the defendant has not filed his statement of defence and the time limit within which such statement has to be filed has not expired.

In order to preserve the defendant's right to defence, he will be granted a new term for filing his statement.

After the defendant has filed his statement, it is possible to introduce minor or side amendments to the pleadings, but no substantial changes to the terms and grounds of the claim will be accepted.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The statement of defence must follow the same requirements established for the pleadings of claim according to question 3.3 – exposing his reasons to oppose the claim and admitting or denying the facts giving rise to the claim. Original documentary evidence, translated into Spanish (if necessary), and the expert report shall be attached to the statement.

The defendant is entitled to counterclaim or raise his rights of set-off including, successively, in his statement of defence and his own pleadings of claim pursuant to question 3.3.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed within a term of 20 working days (excluding Saturdays, Sundays and bank holidays) after the complaint has been served.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Applying the mechanism stated in question 5.1 for forced intervention, it is possible to bring a third party into the proceedings in order to share liability and, if the defendant considers that he should be replaced by a new co-defendant, he will be entitled to request such a replacement to the Court.

The replacement will have to be authorised by the Judge and the claimant will be entitled to oppose it.

4.4 What happens if the defendant does not defend the claim?

The Court will declare the defendant to be in default and will serve its decision to him, informing about the date and hour of the First Hearing scheduled. No further Court decisions will be served to the defendant until a judgment is rendered.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant is entitled to challenge the jurisdiction of the Court to rule over a dispute within a term of 10 working days after the complaint has been served to him (five working days in proceedings of "*juicio verbal*").

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The addition of third parties into ongoing proceedings can be voluntary, when a direct and legitimate interest in the result of such proceedings is proven, or forced, when expressly allowed by the law (e.g. disputes on construction defects).

The forced intervention requested by the claimant will be included in the pleadings of claim (the third party will not have, however, the status of co-defendant). When it has been requested by the defendant, it has to be filed before the Court within the term agreed for filing the statement of defence (or five days before the Trial in the case of "*juicio verbal*").

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The consolidation of two connected and ongoing proceedings is allowed when:

- (i) the Court which shall rule has jurisdiction and competence to rule over the accumulated procedure;
- (ii) both proceedings are being handled under the same kind of trial; and
- (iii) the law does expressly allow the consolidation or does not expressly prohibit it.

The consolidation will always be agreed when two proceedings are closely connected and the judgment to be rendered in one of the

proceedings might have preliminary effects on the other one or, in cases of being followed separately, two contradictory judgments might be rendered.

5.3 Do you have split trials/bifurcation of proceedings?

When two actions have been unduly consolidated into the same claim, the Court, prior to the admission, or the defendant, when the pleadings are served and provided that the Court agrees, are entitled to request that one of the actions brought be dropped. If the claimant does not fulfil such request, the proceedings will be terminated.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Spain? How are cases allocated?

The allocation of cases inside a jurisdiction among Courts of an equal level is established by the rules proposed by the board of Judges of such jurisdiction and approved by the Government Chamber of the High Court.

However, as a general principle and irrespective of specific rules of allocation, depending on the subject of the dispute, cases are assigned respecting the order of entry into the Registry of the Courts.

6.2 Do the courts in Spain have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Court Clerks are entitled to issue any decision required to speed up the proceedings and will verify the payment of judicial taxes, being entitled to terminate a procedure in case of default. Courts shall also supervise that the errors of procedure made by the parties are rectified.

During the proceedings the parties are entitled to apply for interim measures (requirements have already been outlined in question 3.2) and the adoption of measures to protect evidence when it is susceptible to being destroyed or altered.

In connection to costs, it depends if the counter-party has opposed or not, but the Court will decide as explained in question 9.2.

6.3 What sanctions are the courts in Spain empowered to impose on a party that disobeys the court's orders or directions?

A party disobeying a Court's order can be held in contempt, subject to be fined and even charged with a criminal offence, depending on the seriousness of the disobedience.

6.4 Do the courts in Spain have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

There is no power given to Courts in Spain.

6.5 Can the civil courts in Spain enter summary judgment?

When the parties agree on the facts and their dispute is focused on legal issues, the Court is entitled to render a judgment after the First Hearing has been held and without further need of a Trial.

In addition, when the defendant has partially recognised some of the requests made in the pleading of the claim, the Court, without need of a First Hearing or Trial, is entitled to render a judgment on those specific demands.

6.6 Do the courts in Spain have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The Court is entitled to stay the proceedings in the following cases:

- The Judge's abstention to manage the case.
- If the consolidation of proceedings in different stages is agreed, the most advanced procedure will be stayed until the second one reaches the same procedural stage.
- Agreement between the parties, during a maximum period of 60 working days, provided that no general or third party interests are harmed.
- The jurisdiction of the Court has been challenged.
- The passing of a party.
- Ongoing civil or criminal preliminary proceedings.
- The transmission of the object in dispute.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Spain? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

All the documents supporting the pleadings of claim or the statement of defence must be attached to them when filed before the Court.

The possibility of disclosing additional documents at a later stage of the proceedings is restricted to those connected to new facts or statements made during the proceedings or dated after the filing of the briefs.

The possibility of requesting the disclosure from third parties is stated in question 7.3.

It is possible to obtain pre-action disclosure of documents related to the capacity, presentation or legitimation of the defendant, last wills when requested by a heir, coheir or legatee, documents and accounts of a company or community when requested by a shareholder or a co-owner, civil liability insurance policies when requested by an injured party, medical records, documents related to the origin and distribution of goods which infringe intellectual or industrial property rights and bank, financial, commercial and customs information when a business activity is infringing intellectual and industrial property rights.

7.2 What are the rules on privilege in civil proceedings in Spain?

Official documents declared to be confidential or secret are excluded from the obligation of disclosure (public interest privilege).

In addition, an "attorney-client privilege" is recognised, providing protection for confidential attorney-client communications (this is also applicable to other professionals such as doctors and journalists, and those exchanged among attorneys in the course of negotiations to settle a dispute).

7.3 What are the rules in Spain with respect to disclosure by third parties?

If agreed by the Court, the disclosure of documents from third parties and the counter-party can be requested, provided that they are connected to the subject of the dispute and the documents to be produced are sufficiently identified.

Government and other public bodies must also disclose any documents requested by the Courts, unless classified as secret or confidential.

7.4 What is the court's role in disclosure in civil proceedings in Spain?

The disclosure of documents by the counter-party, third parties and government or public bodies must be agreed by the Court, upon a party's request, which will decide on the basis of (i) considering that such disclosure is relevant for the purposes of the proceedings, and (ii) the documents to be produced are sufficiently identified.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Spain?

There are no legal provisions concerning the use of documents obtained in the course of a procedure.

8 Evidence

8.1 What are the basic rules of evidence in Spain?

- In general terms, each party shall have the burden of proving the facts relied on to support his claim, defence or counter-claim, unless in some specific disputes where such burden is reversed (e.g. defective product disputes).
- The evidence, unless in exceptional cases, will have to be proposed or requested by the parties.
- Evidence unconnected to the subject of the dispute, deemed to be irrelevant for its resolution or which might imply an activity prohibited by law will not be admitted.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

- Interrogation of parties.
- Public and private documentary evidence.
- Expert reports.
- Interrogation of witnesses.
- Court's inspection.
- Reproduction of words, sounds or images by means of filming, recording or others.

Experts can be appointed by the party or the Courts. When the expert has been appointed by the party, the expert report must be attached to the pleadings of claim or the statement of defence. If the impossibility of attaching the report is justified, it will have to be announced in such briefs and the report will have to be filed before the Court at least five working days before the First Hearing is held. In the First Hearing, if the defendant has raised statements which could not have been predicted when the complaint was filed or there are additional/new statements, the claimant will be entitled to appoint or request the appointment by the Court of an expert.

His report will have to be filed at least five working days before the Trial. The expert might be required to appear in the Trial in order to ratify his report and answer questions or clarifications requested by the parties.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witnesses proposed and admitted by the Court at the First Hearing must be brought, or summoned by the Court upon the party's request, to declare before the Court in the Trial. Witnesses will declare one by one, in the order agreed by the Court, and will not be authorised to attend other witness interrogations before they are examined.

Witnesses' statements can be admitted as documentary evidence but they are not considered proper witness evidence provided that there has been no cross-examination, immediacy or oral exposition before the Court.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are no particular provisions in connection to instructing expert witnesses, preparing expert reports or giving expert evidence.

The expert, even when appointed by the party, takes an oath stating that he has been objective in his report and is aware of the criminal sanctions which could be imposed in the case of failing in his duty as an expert.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Spain?

The Court shall decide on the admission or inadmissibility of the evidence proposed by the parties and will also issue the summons to witnesses or experts and orders to request disclosures of documents from third parties.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Spain empowered to issue and in what circumstances?

Court Clerks are entitled to issue:

- "*Diligencias de Ordenación*", when the decision to continue with the due course of the proceedings is addressed.
- "*Decretos*", when the pleadings of claim are admitted and a reasoned decision in those procedural steps within the scope of the competence of the Court Clerk is requested.
- "*Diligencias de constancia, comunicación o ejecución*", when a specific fact or act must be reflected in the file case.

The Judge is entitled to render the following procedural decisions:

- "*Providencias*", when, according to the law, the decision is referred to procedural issues and an "*auto*" is not required.
- "*Autos*", when deciding on an appeal filed against "*providencias*" or "*decretos*" which have been decided on the admission or inadmissibility of the complaint, the counter-claim, consolidation of proceedings, admission or

inadmissibility of evidence, Court approval of settlements, mediation agreements, injunctions and the nullity or invalidity of procedural acts.

- “*Sentencias*” (judgments), to render a decision on the proceedings in First Instance or appeal, and to decide on extraordinary appeals and proceedings for the review of final judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Only damages or actual loss can be compensated and these must be proven, so no punitive damages can be awarded by the Courts. The only amounts to be discretionarily fixed by the Courts, but traditionally set very low, are “moral damages”. Moral damages can only be awarded when expressly allowed by law and they compensate personal suffering outside the economic sphere.

The payment of interests is regulated by the provisions of the Civil Code and the Spanish Code of Civil Procedural Law, so the Courts cannot impose them discretionarily.

Finally, the rules to impose the costs of the litigation are established in the Spanish Code of Civil Procedural Law (in general terms, “loser pays” rule). However, the Court is entitled to decide that each party shall bear its own costs if the case raised doubts about the facts or the legal grounds applicable to the dispute.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforced by filing an enforcement claim before the Court that rendered the judgment. The Court will issue an enforcement decision and will grant the enforced party a 10-day period (five days in case of provisional enforcement) to challenge the enforcement.

The procedure for placing charges or seizing the debtors’ assets depends on different facts. If the creditor is aware of any available assets (such as properties, bank accounts, outstanding credits against third parties, etc.) which can be seized, they will be directly identified in the enforcement complaint (this usually speeds up the proceedings). Otherwise, the Court, upon request of the creditor in its enforcement complaint, will deliver different orders to tax authorities, bank entities, etc., to provide all available information on debtors.

In connection to foreign judgments rendered in the European Union, within the scope of Regulation No. 44/2001, a Member State’s judgment will be enforced in Spain (without any prior registration) provided that it has been declared enforceable in such Member State. On 10 January 2015, a new European Regulation 1215/2012 will come into force improving and accelerating the enforcement procedure of European foreign judgments.

The enforcement application is filed before the Spanish First Instance Courts (the jurisdiction is determined by the domicile of the party whom the enforcement is sought), provided that it is not dealing with any matter reserved to the jurisdiction of Commercial Courts.

Once the Court has rendered its enforcement decision, it is served to the enforced party, which will be granted a term to challenge the enforcement.

In the case of enforcement of foreign judgments rendered outside the EU or outside the scope of Regulation No. 44/2001, and in the absence of a bilateral treaty, prior recognition of the decision under the provisions of the Spanish Code of Civil Procedural Law approved by Royal Decree on 2 February 1881 is needed, which

requires such judgment to be final, respectful in regards to public order and the defendant’s rights (problems might arise in the case of judgments rendered in default) and rendered in a country in which Spanish judgments are also recognised (principle of reciprocity).

9.4 What are the rules of appeal against a judgment of a civil court of Spain?

An appeal in writing can be filed before the First Instance or Commercial Courts against the judgment rendered within 20 working days after the judgment has been served; the other party having the possibility of opposing/requesting the dismissal of the appeal.

The case is sent to the High Court of Appeal, which usually takes between eight and nine months to render a judgment (in writing). The decision rendered by the High Court of Appeal, when the legal requirements are met, can be subject to a cassation appeal or an extraordinary appeal for infringement of procedural law; the other party having the possibility of opposing/requesting the dismissal of the appeal.

The case will then be sent to the Supreme Court, which takes an average of one year to decide about the admission of a cassation appeal/extraordinary appeal for infringement of procedural law. This includes an examination to check that all legal requirements for filing such an appeal have been fulfilled. If the appeal is admitted, it takes an average of three years to render a decision on the merits of the appeal.

Against the decision rendered by the Supreme Court and for cases in which there has been a breach of constitutional rights, a claim can be filed before the Constitutional Court. The Constitutional Court applies very restricted criteria about the admission of constitutional claims. It usually takes about three or four months to get a decision over such an admission and around five years to render a decision on the merits of the case, if admitted.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Spain? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

- a) **Arbitration:** occurs when the parties have submitted the dispute to a sole arbitrator or an arbitration panel. The arbitration award has binding effects. The parties can agree that the arbitration shall be governed by *rules of law or equity*: (i) arbitration in law (resolves conflicts through legally reasoned decisions, strictly applying the legal rules applicable in any particular case to its conclusion). Arbitration in law awards must be well founded in law. This is the type of arbitration applied by default, i.e. in the absence of express agreement otherwise by the parties in conflict. It is ideal for resolving disputes over the interpretation of contractual clauses and all other disputes involving matters governed by rules of law; or (ii) arbitration in equity (which resolves disputes on the basis of arbitrator knowledge and honest belief in accordance with their natural sense of justice).

The award is in both cases enforceable in the same way as a Court ruling. The type of arbitration chosen does not affect the procedure, but does affect the way the arbitrator considers issues and finally resolves the dispute.

- b) **Mediation:** by means of the mediation process, the parties try to reach an agreement to settle the dispute with the intervention of a third party (the mediator). If the parties reach an agreement, it would be binding and enforceable in the same way as a Court ruling. However, the process does not have to be completed. Even if the initiation of a mediation process was foreseen in an agreement in order to settle the dispute, the parties are entitled to close the mediation process at any time before reaching an agreement.
- c) **Expert determination:** although there is no legal provision that regulates the expert determination as an alternative dispute resolution method, some technical contracts state the expert determination as a dispute resolution method.
- b) **Enforcing the arbitration award:** the Courts shall enforce the awards in the same way as a Court ruling.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Spain in this context?

- a) **Arbitration:** the arbitration award is binding on the parties in the same way as a Court ruling. In fact its binding effect is even stronger than a First Instance ruling. Whereas a First Instance ruling could be challenged before a higher Court which is entitled to review the assessment of the evidence, an arbitration award can only be challenged under very restrictive and limited grounds (such as nullity of the arbitration award, breach of the procedure for the appointment of the arbitrator, etc.).
- b) **Mediation:** the mediation process is ruled by the Spanish Mediation Act and is a voluntary action, and the parties are entitled to discontinue the mediation process whenever they choose.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration is governed by the Spanish Arbitration Act n° 60/2003, of 23 December.

Mediation is governed by the Spanish Mediation Act in civil and commercial matters n° 5/2012, of 12 July.

Court Mediation is governed by the Spanish Civil Procedure Act n° 1/2000, of 7 January.

1.3 Are there any areas of law in Spain that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Yes. ADR methods are not contemplated in administrative or labour matters.

There is no specific regulation in Spain allowing alternative dispute resolution methods on criminal matters. Notwithstanding the above, the EU Council Decision 2012/29/EU of the European Parliament and of the Council of 25 October 2012 sets forth that Member States shall promote mediation in criminal cases.

Notwithstanding the above, since the implementation of the Spanish Mediation Act concerning Civil and Commercial matters, many judges have tried to promote the use of mediation as an ADR.

Furthermore, the Spanish Code of Civil Procedural Law states a mandatory attempt for mediation by the First Instance Court/ Commercial Court at the beginning of the First Hearing.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Spain in this context?

Courts provide specific support to arbitration both to improve the efficiency of the process and to enforce the arbitration award.

- a) **Improving the efficiency of the process:** the Courts are entitled to (i) refuse to admit a legal claim when there is submission to arbitration, (ii) appoint arbitrators whenever the parties have not submitted the matter to an arbitration body, (iii) adopt interim measures before the arbitration has started or once the arbitration has started, and (iv) assist the arbitrator in reviewing and evaluating evidence (to request the exhibition of any document, etc.).

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Spain?

- a) **International Courts:**
- Corte Internacional de Arbitraje de la Cámara de Comercio Internacional (ICC)* with premises in Barcelona.
- b) **National Courts:**
- Corte Civil y Mercantil de Arbitraje (CIMA)*.
 - Tribunal Arbitral de Barcelona (TAB)*.
 - Corte Española de Arbitraje (CEA)*.
 - Corte de Arbitraje del Colegio de Abogados de Madrid (ICAM)*.
 - Corte de Arbitraje de la Cámara de Comercio de Madrid*.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Since the implementation of the Spanish Mediation Act concerning Civil and Commercial matters, many institutions in the legal sector (law firms, academic institutions, arbitration institutions) have started to promote the use of mediation as an ADR through participation in associations (*Gemme*), the creation of working groups, etc.

In particular, any national institutions which have arbitration Courts (such as the Chamber of Commerce, the Bar Association) have implemented mediation departments in order to meet a potential future demand for mediation which may surface within the next few years.

However, despite the Spanish Mediation Act being enforced for over two years, the current scope of the implementation of mediation as an ADR system is still unknown as there is no concrete and updated data on this issue.

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Dentons will measure success by the service it provides: whatever the scale or scope of clients' business needs, Dentons will provide the attention its clients need and deserve.

Sweden



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Sweden got? Are there any rules that govern civil procedure in Sweden?

Sweden is governed by the civil law tradition. The rules that govern civil procedure are found in the Code of Judicial Procedure (the “Code”, *Sw. Rättegångsbalken*).

1.2 How is the civil court system in Sweden structured? What are the various levels of appeal and are there any specialist courts?

There are three types of courts in Sweden:

- the general courts, consisting of district courts, courts of appeal and the Supreme Court;
- the administrative courts, i.e. administrative courts, administrative courts of appeal and the Supreme Administrative Court; and
- certain specialised courts, or specialised units within courts, which try various matters such as the Labour Court, the Market Court, the Environmental Court and the Patent Appeal Court.

This chapter will only cover the rules on litigation in the general courts, i.e. not the rules in the administrative and special courts, and only commercial dispute resolution, i.e. not family law or criminal law.

1.3 What are the main stages in civil proceedings in Sweden? What is their underlying timeframe?

Civil proceedings are initiated by the claimant submitting a claim form to the court. Thereafter, the court orders the respondent to reply to the claim. Following exchange of pleadings between the parties, the court holds a preliminary hearing in order to analyse any uncertainties and investigate the possibilities of reaching an amicable agreement. If no agreement is reached, the court normally orders the parties to submit their final schedule of evidence within a certain timeframe and sets a date for the final hearing. After the final hearing, the court delivers a judgment which can be appealed.

The proceedings in the district court last for approximately one year if the case is less complex, and two or more years if it is a complex case. If the court of appeal grants permission to appeal, it will decide the case within approximately another two years.

1.4 What is Sweden’s local judiciary’s approach to exclusive jurisdiction clauses?

The parties could enter a written agreement to settle a current or future dispute in a certain court or enter into an arbitration agreement. Such agreement is binding if one of the parties, normally the defendant, makes reference to it and if there are no peremptory regulations on jurisdiction in the Code (such as exclusive jurisdiction for claims assignable to real estate). As regards parties in the European Union Member States, there are specific rules on jurisdiction clauses in the Brussels I Regulation (EC) No. 44/2001 (“Brussels I”).

1.5 What are the costs of civil court proceedings in Sweden? Who bears these costs? Are there any rules on costs budgeting?

The parties are not responsible for the court’s costs, save for the application fee of approximately €50, which must be paid by the claimant. As a general rule, Sweden applies the costs in the cause rule in civil proceedings. However, there are exceptions, e.g. if the winning party has litigated negligently or brought an action which is unnecessary. There are no rules on costs budgeting in Sweden.

1.6 Are there any particular rules about funding litigation in Sweden? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no particular rules concerning funding litigation in Sweden. According to the Code of Conduct of the Swedish Bar Association (the “Code of Conduct”), contingency fees/conditional fees are not permitted in Sweden. Examples of certain cases where contingency fees could be allowed are group actions and other cases where access to justice may be denied if contingency fees are not allowed. However, exceptions are very seldom allowed in practice.

There are no rules regarding obtaining security for future litigation costs in Sweden. Nevertheless, if a party wins a case in the district court, the losing party is required to pay the costs in accordance with the judgment. The winning party can apply for execution of the judgment or obtain security for the judgment even if the judgment is appealed to the court of appeal.

However, a defendant may order a claimant domiciled outside the EU or the EEA to provide security for future litigation costs that might be awarded to the defendant.

1.7 Are there any constraints to assigning a claim or cause of action in Sweden? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

If a party assigns a pending claim to another party, the assignor must notify the other party about the assignment. It is permitted for a non-party to finance litigation without being a party to the proceeding, although in such an event, the winning party might not be able to recover its litigation costs from the losing party since those costs have already been secured through the non-party financier.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The Code does not contain any such formalities. However, there is a requirement under the Code of Conduct that proceedings cannot be initiated unless the opposite party has been given a reasonable time to consider the claim and has also been given an opportunity to enter into an amicable agreement. An undisputed claim should be pursued via the Enforcement Service (Sw. *Kronofogdemyndigheten*) through summary proceedings in order to obtain an enforceable decision.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Time limits are treated as a substantive law issue in civil proceedings. The limitation period is calculated from the date of the origin of the claim. As a general rule, a 10-year limitation period applies to a claim if the limitation period is not postponed by limitation termination actions. As regards consumer claims, the limitation period is limited to three years if the claim is held by a trader in the course of his professional activities.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Sweden? What various means of service are there? What is the deemed date of service? How is service effected outside Sweden? Is there a preferred method of service of foreign proceedings in Sweden?

The claimant must submit a claim form to the court. If the claim form fulfils the legal requirements stated in question 3.3 below, the court will issue a summons against the defendant. Subsequently, the claim form, along with the order for preparatory proceedings, will be served on the defendant.

Most commonly, documents are served by mail with a return receipt. Due to a recent amendment, there is now the possibility to serve documents electronically, but this method of service is at the court's discretion. The deemed date of service is when the recipient receives the documents. When regular service is unsuccessful, service can be made by a process server or by public notice. When the recipient is a legal person, service can be made by sending a message to the legal person's registered address, with a control message being sent the next day.

If the recipient is not domiciled in Sweden, service will take place according to the applicable law in the recipient's country, assuming that such is not contrary to Swedish general principles of law. There are various international agreements on service, e.g. Regulation (EC) No. 1393/2007 and the 1974 Nordic Convention.

3.2 Are any pre-action interim remedies available in Sweden? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies are available in Sweden. Upon application by the claimant, the court may order a provisional attachment of so much of the opponent's property that the claim may be assumed to be secured on execution. The main criteria is that the claimant can show probable cause to believe that there is a money claim or a superior right to certain property that either is, or can be made, the basis of judicial proceedings. Furthermore, it must be reasonable to suspect that the opposing party will evade payment of the debt.

The application for such an order is submitted to the court that has jurisdiction over the dispute. When no proceedings are pending, an application will be made in writing. In principle, the defendant will be ordered to answer the application. However, if any delay would jeopardise the applicant's claim, the court may immediately impose an interim order. As a main rule, the applicant must deposit security with the court for the loss that the opposing party may suffer.

The court may also order other measures deemed necessary to secure the applicant's right, for example, through a prohibition order.

3.3 What are the main elements of the claimant's pleadings?

The written claim form must include a distinct claim, a detailed description of the material facts invoked as the basis of the claim and the circumstances rendering the court competent to hear the case. The claim form must also include a preliminary statement of evidence, stating what is to be proven by each item of evidence. Written evidence should be enclosed with the application. Finally, the claim form should include details required to effect service, such as the names and addresses of the parties.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The general rule is that the action, once instituted, may not be amended. The claimant may, however, amend his claim in light of a circumstance that occurred during the proceedings or of which he only became aware subsequent thereto. The claimant may also request a declaration of the existence or non-existence of a certain disputed legal relationship.

Additionally, the claimant may claim interest or other ancillary obligations dependent upon the principal obligation, and present a new claim based essentially on the same ground. Such a claim may be dismissed if it is raised after the main hearing has commenced if such cannot be considered without inconvenience, and may not be presented for the first time in a superior court.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defendant's statement of defence must contain any objections regarding procedural impediments that the defendant desires to make and to what extent the claimant's claims are admitted or contested. If the claimant's claim is contested, the defendant is required to provide the basis for contesting the claim and give his position to the circumstances in the case, and a preliminary schedule of evidence and what will be proven by each item of evidence.

A counterclaim is advanced through a claim form. The counterclaim can be joined in one proceeding with the original claim if the two claims concern the same or a related issue. A defence of set-off can be brought by the defendant without having to issue a separate claim form.

4.2 What is the time limit within which the statement of defence has to be served?

The Code states that the statement of defence must be served immediately. However, there is no specific time limit. The court usually orders the defendant to submit his response within 14 or 21 days from the date of service, but the defendant could request an extension if more time is needed.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A party who wishes to claim rescission, damages or joint responsibility in a similar claim from a third party may institute proceedings against the third party for joint adjudication with the main claim.

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to comply with a court-sanctioned judgment in default order within the prescribed time limit, the court can deliver a default judgment based on the claimant's submissions.

The defendant may seek reversal of the default judgment before the same court within one month after the judgment has been delivered.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant must object to the court's jurisdiction in his first submission to the court. In the absence thereof, the court will normally be considered competent. However, if there are preemptory regulations on jurisdiction, the court will try its own jurisdiction. If another court is seized with jurisdiction, the court will note the claimant accordingly. In these cases, the court could, with the claimant's consent, submit the claim to the relevant court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party can either be brought into a pending trial upon his request, or by the request of one of the parties. Should the request be made by one of the parties in the pending trial, the third party cannot object to having the proceedings that he has become a party to being adjudicated on a consolidated basis with the other proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two or more proceedings may be consolidated according to the provisions in the Code. In order for the court to consolidate different proceedings, they need to be based on substantially the same circumstances. The consolidated proceedings can be aimed at the same defendant or different defendants, or by different claimants against the same defendant.

5.3 Do you have split trials/bifurcation of proceedings?

When several claims that could be separated are joined in one proceeding, the court may give a separate judgment on any of the claims. When a single claim is accepted, a separate, partial judgment may be given regarding that part.

If adjudication of one claim depends on the adjudication of another claim joined in the same proceeding, a separate intermediate judgment may be given for that other action. A separate judgment on a circumstance of immediate importance to the outcome of the case or on how the application of law is to be judged when determining the matter at issue may also be delivered when it is appropriate in regards to the investigation. It is not unusual that the court delivers a separate judgment on liability. The court may order a stay of proceedings on the remaining issues in the case until the separate judgment becomes final.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Sweden? How are cases allocated?

All civil cases are allocated to the district court as first instance, regardless of the value of the claim. Expedited claims (Sw. *FT-mål*) have certain specific procedural rules, e.g. concerning legal costs. In some exceptional cases, special tribunals have sole jurisdiction (e.g. in relation to environmental law and labour law).

The court has an internal case allocation system. The general rule is that cases should be randomly allocated. There are exceptions, e.g. claims pertaining to a specific kind of subject-matter can be handled in the same division.

6.2 Do the courts in Sweden have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court decides on the time frames for the case with due consideration for what is suitable for every specific case and usually after communication with the parties. If it is of benefit for the case, the court will provide the parties with a specification of the issues which should be dealt with during the course of the proceedings. The court will also make a written summary of the parties' positions as understood by the court. The court may order the parties to submit material for the summary.

The court may, in the exercise of its inherent discretion, direct a party to finally determine the claim or defence and to state the evidence invoked in support thereof. Due to a recent amendment, such an order can also be given to set a cut-off date to the preparation of the case before a final hearing. After expiration of the time for such a statement, the party may only invoke a new circumstance or new evidence under specific, limited circumstances.

A party which negligently fails to comply with any interim orders will be penalised in costs, irrespective of whether that party is ultimately successful. The costs are determined by the court in connection with the final judgment.

6.3 What sanctions are the courts in Sweden empowered to impose on a party that disobeys the court's orders or directions?

If a party fails to respond to a court order or direction or refuses to answer a relevant question, the party's behaviour can have evidentiary consequences. The court is empowered to issue a penalty for non-compliance if a party disobeys the court's order in a hearing, but this is unusual in commercial trials.

6.4 Do the courts in Sweden have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

If the claimant's statement of case does not constitute a legal basis for the purported cause of action or if it is otherwise clear that the case is unfounded, the court may exercise its inherent discretion and give judgment.

The Code offers no means to disregard a submission that is submitted to the court after the date set by the court (with the exception stated under question 6.2 above).

6.5 Can the civil courts in Sweden enter summary judgment?

There is no specific application for summary judgment that the parties can make. However, the court can deliver a judgment without having a main hearing, provided that none of the parties requests a main hearing and it is not necessary considering the circumstances in the case. A judgment can also be delivered in connection with the preparatory hearing, either if both parties agree and it is otherwise suitable, or if the outcome of the case is obvious.

6.6 Do the courts in Sweden have any powers to discontinue or stay the proceedings? If so, in what circumstances?

If it is of extraordinary importance for the adjudication of a case that an issue pending adjudication in another proceeding should be determined first, the court may stay the proceedings pending removal of the impediment. The same applies if another impediment of considerable duration to trial is encountered.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Sweden? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

As a general rule, all documentary evidence that a party invokes must be provided to the counterparty and the court during the pre-trial procedures following commencement of an action but pre-action disclosure is not possible under Swedish procedural law.

The Code contains rules regarding the possibility to obtain an order for discovery prior to the judgment.

Parties are not required to disclose all documentary evidence in their possession unless the counterparty makes an application for disclosure of a specific document or item of evidence. Such a request may only be granted if the document or item of evidence in question is deemed by the court to be of significance for adjudication of the case.

7.2 What are the rules on privilege in civil proceedings in Sweden?

The Code contains rules on when, e.g. a lawyer or a doctor can refuse to disclose certain documents. The court will not grant the party's request to provide the specific document if such conditions apply.

7.3 What are the rules in Sweden with respect to disclosure by third parties?

On request by any of the parties, the court may order a third party to provide a written document either without, or subject to, a penalty for non-compliance. Such request may only be granted if the specific document or evidence is assumed by the court to be of importance as evidence. Before the court issues such an order, the third party will be afforded an opportunity to state its views and is entitled to compensation for its costs and any inconvenience caused thereby.

7.4 What is the court's role in disclosure in civil proceedings in Sweden?

As stated under questions 7.2 and 7.3 above, the court's main role is to determine whether the requested piece of information is of evidentiary significance.

If the court assumes a public document to be of importance as evidence, the court may also, on the application of a party, order the document to be placed at the court's disposal. However, some exceptions apply, such as documents containing information subject to secrecy pursuant to the Secrecy Act or documents containing trade secrets.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Sweden?

No, there are no restrictions.

8 Evidence

8.1 What are the basic rules of evidence in Sweden?

The basic rules of evidence in Sweden consist of the following three principles:

- the free evaluation of evidence;
- the principle of orality; and
- the principle of immediacy, which means that all evidence must be put forward at the main hearing.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In accordance with the principle of free evaluation of evidence, the main rule is that all evidence is admissible. It is up to the court to determine the significance of each item of evidence and what has been proved in the case.

The court may reject evidence if a circumstance that a party offers to prove is immaterial to the case, or if an item of evidence is unnecessary or of no evidentiary value. The court may also reject an item of evidence if it can be presented in a less costly or troublesome way.

Expert evidence is generally accepted.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

According to the principle of orality, a witness is required to give his testimony orally. However, in some cases, the witness may give evidence over the telephone or via video link. A written statement of witnesses may not be invoked. However, a witness may use written notes to support his memory with the court's consent.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are no specific rules regarding instructing expert witnesses. An expert may either be appointed by the court or called by a party. Before the court appoints an expert, the parties should be invited to state their views thereon. The expert is always required to take an oath before giving evidence. The same principle of orality as for witnesses of facts applies, with the exception that an expert can present a written statement of opinion with the court's consent.

Unless the court prescribes otherwise, experts are required to submit a written opinion within a prescribed period set by the court. The opinion must state the reasoning and circumstances upon which the conclusions in the opinion are founded and the opinion may be viewed by the parties.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Sweden?

The court has a passive role in the parties' provision of evidence. The court may ask a witness questions, although usually this is to clarify uncertain and ambiguous statements.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Sweden empowered to issue and in what circumstances?

When the court rules on the merits of the matter at issue, it delivers a judgment. A settlement of the dispute can be confirmed by a consent judgment if the parties so request. The court can also issue decisions or orders in relation to procedural or interim issues, and final decisions.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The district courts have the power to make rulings on damages, interest and litigation costs. Rules governing damages are found in the Tort Liability Act (Sw. *Skadeståndslagen*). Interest is determined either contractually or in accordance with the Interest Act (Sw. *Räntelagen*).

9.3 How can a domestic/foreign judgment be enforced?

Foreign judgments can be enforced by application to Svea Court of Appeal, which is the only court competent to hear matters involving recognition and enforcement of foreign judgments. The general rule is that foreign judgments are not recognised or enforced in Sweden. However, there are many exceptions to this rule since Sweden has acceded to numerous international conventions regarding enforcement, e.g. Brussels I.

A domestic or enforceable foreign judgment can be enforced by the Enforcement Authority (Sw. *Kronofogdemyndigheten*) through seizure. The Enforcement Authority enquires with relevant authorities and/or companies, such as banks, or visits the debtor's property to investigate whether he has assets to seize. Seized property is then sold. The debtor's salary can also be subject to an attachment of earnings order whereby part of the debtor's salary is paid directly to the Enforcement Authority.

9.4 What are the rules of appeal against a judgment of a civil court of Sweden?

A judgment and a decision can normally be appealed within three weeks after being rendered. Certain decisions have specific rules governing appeal. A first instance district court judgment or decision is appealed to the relevant court of appeal. The court of appeal either allows or dismisses the appeal. Normally, a court of appeal judgment or decision can be appealed to the Supreme Court. However, the rules governing permission to appeal are quite strict.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Sweden? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is widely used in Sweden. The arbitration board's competence is based upon an arbitral agreement between the parties. Arbitration is common since the parties have a greater degree of control over the proceedings than in the general courts and since the proceedings are prompt, flexible and confidential.

Mediation has become increasingly important over the last few years in Sweden. The parties mediate because of a mediation agreement or mediation can be ordered by the court, with both parties' consent, during the course of pending litigation.

Tribunals, Ombudsmen and Expert Determination are available in certain areas of law, e.g. regarding consumers.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Ad hoc arbitration proceedings are based on the Arbitration Act (Sw. *Lagen om skiljeförfarande*). Institutional arbitration proceedings are based on the Stockholm Chamber of Commerce ("SCC") Arbitration Rules. The SCC also provides Rules for Expedited Arbitration, which have been tailored for minor and less complex disputes. The SCC rules are available in different languages on the Institute's website – www.sccinstitute.se.

Mediation is now a statutorily recognised means of dispute resolution following the entry into force of the Mediation Act (Sw. *Lagen om medling i vissa privaträttsliga tvister*) on 1 August 2011.

1.3 Are there any areas of law in Sweden that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Alternative dispute resolution is subject to the parties' agreement. In some cases, it has been considered unreasonable for a company to enter an arbitration agreement with a consumer if the consumer risks bearing the arbitration costs.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Sweden in this context?

An arbitration clause is an impediment to an action. Hence, if the claimant initiates a claim in court, the defendant can object to the

court's competence. However, if both parties agree on settling the dispute in court, they can disregard their arbitration agreement.

Mediation is not compulsory. However, the court has an obligation to investigate the possibilities of reaching an amicable agreement. Experience suggests that some judges are more vigorous and willing than others to pursue this avenue of dispute resolution.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Sweden in this context?

An arbitration award is enforceable and may only be challenged on formal grounds by a party on application to the Court of Appeal in Stockholm (Sw. *Svea hovrätt*).

An agreement reached through mediation can be rendered enforceable by the court after application from the parties, provided that all parties that entered into the agreement consent thereto.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Sweden?

The SCC provides dispute resolution services for both national and international disputes. The SCC also provides a Mediation Institute.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The use of arbitration as a means of alternative dispute resolution is constantly increasing. Mediation is not yet as widely used.

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Switzerland

Bär & Karrer AG

Matthew Reiter



Simone Stebler



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Switzerland got? Are there any rules that govern civil procedure in Switzerland?

Switzerland is a civil law jurisdiction. Accordingly, the primary sources of legal authority are written codes and statutes, whereas case law is of less importance than in common law jurisdictions.

Civil procedure in Switzerland is primarily governed by the Swiss Code of Civil Procedure (“SCCP”). The SCCP comprehensively governs civil procedure in Switzerland and domestic arbitration proceedings. Further important sources of civil procedure are the Swiss Federal Act on Private International Law (“PILA”) and the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (“Lugano Convention”) dealing with the question of jurisdiction in cross-border matters. The PILA moreover regulates international arbitrations with a seat in Switzerland.

1.2 How is the civil court system in Switzerland structured? What are the various levels of appeal and are there any specialist courts?

Generally speaking, the Swiss court system consists of three layers of instances: the courts of first instance (at a cantonal level); the upper courts (second instance; also at a cantonal level); and the Swiss Federal Supreme Court as the third and last instance. In exceptional cases, however, a single instance (e.g. the upper court or a specialist court) decides a dispute on the cantonal level (with the possibility to appeal to the Federal Supreme Court). The structure of the (first and second instance) civil court system varies from canton to canton.

In general, cantonal courts have jurisdiction in all areas of the law, including federal law. Cantons are, however, free to have specialist courts such as a court for labour law matters, a court for landlords and tenants, and specialised commercial courts. While most cantons have specialist courts for labour and tenant law matters, only Zurich, Bern, St. Gallen and Aargau have a commercial court. In addition, the Federal Patent Court decides all civil law disputes concerning patents on a first instance level.

The Federal Supreme Court, as Switzerland’s highest court, safeguards the application of federal and constitutional law. Proceedings before the Swiss Federal Supreme Court are governed by the Swiss Federal Tribunal Act.

1.3 What are the main stages in civil proceedings in Switzerland? What is their underlying timeframe?

Generally, proceedings before a court of first instance can be divided into the following stages:

- Presentation of the facts and legal arguments (usually in the form of two rounds of written submissions). Together with their pleadings, the parties must also file documentary evidence and offer any other evidence (e.g., witness testimony) on which they rely.
- Taking of evidence by the court to the extent that evidence other than documentary evidence has been named. Before evidence is taken, the court indicates the admissible evidence and designates the party bearing the burden of proof. The taking of evidence takes place during an oral hearing. Thereafter, the parties may comment on the result of the taking of evidence.
- Issuance of the judgment.

Courts may also hold instruction hearings at any time during the proceedings. Such hearings are mainly held to prepare for the main hearing or to facilitate a settlement.

The average length of litigation before first instance courts is between one and two years in commercial cases, and approximately up to one year in simpler cases before specialist courts for labour law and for landlord and tenant matters. In complex cases, the duration of the proceedings may be longer.

1.4 What is Switzerland’s local judiciary’s approach to exclusive jurisdiction clauses?

Domestic and foreign parties may agree on the court that shall have jurisdiction *ratione loci* over an existing or future pecuniary dispute (“*vermögensrechtliche Streitigkeit*”) arising from a particular legal relationship. Unless the parties’ agreement provides otherwise, the agreed court’s jurisdiction is exclusive. The parties’ freedom to agree on the court competent *ratione loci* is excluded or limited in a few instances only.

The designated Swiss court must honour an exclusive jurisdiction clause, unless none of the parties is domiciled in a Member State of the Lugano Convention and the law applicable to the merits of the case is not Swiss law.

1.5 What are the costs of civil court proceedings in Switzerland? Who bears these costs? Are there any rules on costs budgeting?

Court fees and attorneys' fees are regulated by the cantons individually. In Switzerland, litigation costs are generally reasonable. In pecuniary disputes the court and attorneys' fees mainly depend on the amount in dispute. Other factors, such as the type and course of the proceedings and the complexity of the case, are also taken into consideration. Swiss courts may order a claimant to make an advance payment up to the amount of the expected court costs.

In general, all expenses arising from the litigation are to be borne by the losing party. If no party fully prevails, the court will divide the costs proportionally between the parties.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Switzerland? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Agreements on contingency fees are not permissible for proceedings before Swiss courts. On the other hand, incentive payments can be agreed as long as the hourly fee covers the attorney's costs.

As regards security for costs, in certain cases and upon the respondent's request, Swiss courts may order the claimant to provide security for the respondent's attorneys' fees. This may be the case if the claimant has no residence in Switzerland, appears to be insolvent or owes costs from previous proceedings. To the extent, however, the Hague Convention of 1954 on Civil Procedure or of 1980 on International Access to Justice or other treaties apply which forbid security for costs for the sole reason of a claimant's foreign domicile, Swiss courts cannot order a claimant to provide security for costs on that ground.

1.7 Are there any constraints to assigning a claim or cause of action in Switzerland? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In general, the assignment of a claim is permitted and valid, unless one of the following exceptions apply:

- In few instances, the law forbids the assignment (mainly with regard to employment contracts, claims of the borrower or tenant regarding the usage of the leased item or claims connected to a person's status as heir).
- The parties agreed that a claim shall not be assigned.
- Moreover, an assignment is prohibited if a claim is so closely connected to the person of the assignor that an assignment would significantly alter the existence, the content or the purpose of the claim.

The Swiss Federal Supreme Court in principle allowed litigation funding through a third party. It is important to note, however, that litigation funding must not unduly interfere in the client-attorney relationship. The attorney's independence needs to be ensured at all times.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The SCCP generally requires a claimant to initiate conciliation proceedings before filing a claim with the first instance court. There are several exceptions to this rule, for example in summary proceedings, or if a dispute falls within the jurisdiction of a commercial court. Instead of conducting conciliation proceedings, the parties may agree to mediate.

If no amicable settlement is reached, the conciliation authority grants a temporary authorisation to proceed with the claim ("*Klagebewilligung*"). Generally speaking, a claimant must file the claim with the competent court within three months from the date of notification of this authorisation. Once the authorisation expires, the claimant must commence new conciliation proceedings if it wishes to pursue the claim.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Swiss law treats limitation periods as a substantive law issue. The general limitation period for contract claims is 10 years from the date of maturity. However, for certain types of contractual claims, the limitation period is five years (e.g., claims for periodic payments or claims of employees) or less (e.g., two years for warranty claims under a contract for the sale of goods).

Tort claims become time-barred one year after the aggrieved party obtained knowledge of the damage and of the tortfeasor. In any event, such claims are time-barred 10 years after the occurrence of the damaging event. The same limitation period applies to claims based on unjust enrichment.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Switzerland? What various means of service are there? What is the deemed date of service? How is service effected outside Switzerland? Is there a preferred method of service of foreign proceedings in Switzerland?

Proceedings are commenced by the claimant submitting the statement of claim with the court. In Switzerland, the courts take care of the service of submissions of the opposing party, summons, rulings and other decisions. Service of summons, rulings and other decisions are effected by (registered) mail or other means against confirmation of receipt. Other documents may be served by regular mail. With the consent of the person concerned, service may also be effected electronically.

Service is accomplished when the document has been received by the addressee or an authorised person. Service is also deemed to have been effected on the seventh day after the failed attempt to serve a registered letter, or on the day of refusal to accept service in case of personal service.

Swiss courts can instruct foreign parties to provide a domicile for service in Switzerland. If service must be effected outside Switzerland, the channels of judicial assistance as per the Hague Conventions of 1954 and 1965 or other treaties must be used.

3.2 Are any pre-action interim remedies available in Switzerland? How do you apply for them? What are the main criteria for obtaining these?

In order to secure monetary claims, a creditor can seek to attach the debtor's assets in accordance with the Federal Debt Collection and Bankruptcy Act ("DEBA"). The creditor must show to the court that, *prima facie*:

- the creditor has a claim;
- a statutory ground for attachment exists (e.g., foreign domicile of the debtor, provided that the claim has a sufficient connection with Switzerland or is based on a recognition of debt; the debtor is attempting to conceal assets); and
- the debtor has assets situated in Switzerland.

A court may also grant interim measures for all other claims, if the applicant shows that in the absence of the requested interim measure it would suffer irreparable harm. Moreover, the applicant must show that it is likely to prevail on the merits of the underlying cause of action. In cases of exceptional urgency, interim measures may be granted *ex parte*.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim to be filed by the claimant must be dated and signed and in essence contain the following:

- the prayers for relief;
- a statement of the value in dispute; and
- a detailed account of all factual allegations and of the evidence offered for each allegation.

The statement of claim usually contains legal arguments as well.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Reductions of the prayers of relief (with prejudice) are permissible at any time. Other amendments of the prayers of relief (including additional claims) are only allowed if they (i) are submitted with the party's second round of pleadings, (ii) are subject to the same type of procedure and venue, and (iii) the new claim is closely connected to the original action or the opposing party agrees with the amendment. After the second round of pleadings, no amendments are admissible, unless they are based on new facts and evidence and the prerequisites mentioned before (ii-iii) are met.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

The main elements of a statement of defence are essentially the same as mentioned above under question 3.3. Moreover, the statement of defence must state which of the claimant's factual allegations are accepted and which are disputed.

The respondent may file a counterclaim in the statement of defence if the court is competent to deal with the counterclaim (either because of a jurisdiction clause or statutory ground, or because there is a factual connection between the claim and the counterclaim), and if the counterclaim is subject to the same type of procedure as the main claim. For Euro-international disputes, it is required that the counterclaim is based on the same contract or facts.

Set-off defences are available in Switzerland. A set-off defence should be raised with the respondent's second pleading at the latest.

4.2 What is the time limit within which the statement of defence has to be served?

The court sets a time limit for filing the statement of defence. In deciding on the time limit, the court considers the volume of the statement of claim and the complexity of the case. The average time range for the filing of the statement of defence is 20 to 60 days.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A party may notify a third party of the dispute ("*Streitverkündung*") if, in the event of losing the case, the party might take recourse against or be subject to recourse by the third party. The notified third party may decide (i) not to react to the notification, (ii) to intervene in favour of the notifying party, or (iii) with consent of the notifying party, to proceed with the litigation in the latter's place. As a general rule, if the notifying party loses the case, the decision will also have effect on the notified party. The notified party's liability will be the subject of a subsequent litigation. It is also possible for the notifying party to integrate the litigation between it and the notified party into the main proceedings ("*Streitverkündungsklage*").

4.4 What happens if the defendant does not defend the claim?

If the statement of defence is not filed in time, the court will set a short period of grace. If the respondent again fails to submit the statement of defence, the court will decide the case if it is in a position to do so. Otherwise, the court shall summon the parties to the main hearing. If the defendant fails to attend the hearing, the court shall decide on the basis of the submissions on file and, as a general rule, may rely on the claimant's representations.

4.5 Can the defendant dispute the court's jurisdiction?

The court's jurisdiction can be disputed. It is important to note that as soon as the defendant submits arguments on the merits without in the first place disputing the court's jurisdiction, the defendant enters an appearance and submits to the court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Broadly speaking, joinder is available if the facts or the legal basis of the claims are connected and if the claims are subject to the same type of proceedings.

For the notification of third parties see question 4.3.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Swiss courts have discretion to consolidate two sets of proceedings if the facts are closely connected and if the consolidation simplifies the proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

In order to simplify the proceedings, Swiss courts have discretion to limit the proceedings to individual issues or prayers for relief.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Switzerland? How are cases allocated?

Courts allocate the cases among the judges in accordance with their internal policies. Cases should be distributed “blindly” or “mechanically” between the different judges of the court in order to ensure independence. Some courts take a flexible approach and distribute the cases randomly but in consideration of the strengths and specialised areas of the judges.

6.2 Do the courts in Switzerland have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have the power to direct and efficiently manage the proceedings pending before them. Swiss courts namely have the power to consolidate separately filed claims, to separate jointly filed actions or to bifurcate proceedings. If factually connected claims are pending before different courts, the subsequently seized court may transfer the case to the court seized first, given the latter court’s agreement. Moreover, at any time during the proceedings, the courts have the power to facilitate an attempt at amicable settlement.

During the proceedings, the parties can file procedural motions or apply for interim measures (e.g. preservation of evidence, request for a stay). The prerequisites for interim measures to be granted during proceedings are the same as set out under question 3.2. Usually, the costs for such applications are allocated at the end of the proceedings in accordance with the general principle that costs should follow the event.

6.3 What sanctions are the courts in Switzerland empowered to impose on a party that disobeys the court’s orders or directions?

During hearings, if any person disrupts the hearing, the court may order the person to pay a reprimand or a disciplinary fine. The court may also exclude the person from the hearing.

Other than that, as far as the parties are concerned, disobeying the procedural duty to cooperate does not result in sanctions or constraints. However, the party risks procedural disadvantages, such as the drawing of adverse inferences or a default judgment. If a third party refuses to cooperate without justification, the court may order disciplinary fines or adopt other measures. Furthermore, disciplinary fines and criminal sanctions may be imposed for wilfully lying during the examination of the parties or for not telling the truth while testifying.

6.4 Do the courts in Switzerland have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

A court may order a party to rectify formal defects of its written submission, e.g., if the submission is incomprehensible or incoherent. If the defect is not rectified, the submission will not be taken into consideration. Courts may also not take into consideration any querulous or abusive submissions. Generally, late or unsolicited submissions will also be disregarded.

6.5 Can the civil courts in Switzerland enter summary judgment?

Parties cannot move for a summary judgment and the courts do not have the possibility to issue a summary judgment as known in the U.S. for example. However, after reviewing the parties’ submissions and documentary evidence, a court can issue its judgment on the merits of the case without hearing witnesses or taking other evidence, if it can anticipate the assessment of evidence (i.e., in cases where no material issues of fact remain to be proven or where the evidence offered is irrelevant).

6.6 Do the courts in Switzerland have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Once a court has decided that all procedural requirements are met, it may not discontinue the proceedings without rendering a decision on the merits.

However, Swiss courts may stay the proceedings – upon request or *sua sponte* – if appropriate. This may be the case if the decision depends on the outcome of other proceedings or if the parties are engaged in settlement negotiations.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Switzerland? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

The SCCP does not provide for a pre-trial discovery phase. That

being said, in specific and narrowly described circumstances, the taking of evidence as a form of precautionary measure pre-action is possible. Moreover, during proceedings the parties may request the production of a specific document which is in the possession of the opposing party or a third party.

7.2 What are the rules on privilege in civil proceedings in Switzerland?

Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to produce documents in their possession.

Swiss law, however, provides for certain privilege rights in order to protect family members of a party and certain professionals (e.g., attorneys, physicians) from a request for disclosure or from giving testimony. In-house lawyers may not invoke the legal profession privilege.

Generally speaking, privilege may only be invoked by the person bound by the privileged secret (e.g., the attorney). However, documents which are in the possession of the client because they have been sent to it by the attorney are privileged as well.

7.3 What are the rules in Switzerland with respect to disclosure by third parties?

Third parties have a duty to cooperate in the taking of evidence, unless they can invoke a legal privilege. This includes, in particular, the duty to truthfully testify as a witness, to produce physical records where required or to allow an examination of their person or property by an expert.

7.4 What is the court's role in disclosure in civil proceedings in Switzerland?

Only courts can order a witness to appear or a party or a third party to produce documents.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Switzerland?

Swiss courts must take the appropriate measures to protect legitimate interests of any party or third parties, e.g., business secrets. For instance, the court may restrict access to certain documents.

8 Evidence

8.1 What are the basic rules of evidence in Switzerland?

As a general rule, the burden of proving the existence of an alleged fact rests on the party that derives rights from that fact. The Swiss courts are free in assessing the evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The SCCP provides for the following types of evidence:

- witness testimony;
- documents;
- expert opinions;

- written statements (“*schriftliche Auskunfte*”);
- inspections; and
- party assertions and testimony (“*Partei- und Beweisaussage*”).

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Parties must name the witnesses on which they rely in their submissions. The court will then order the witnesses to appear and testify orally. Witnesses will be questioned by the court, but the parties have the right to ask additional questions. Witness statements or depositions are generally not admissible evidence.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Upon request or *ex officio* and after hearing the parties, a Swiss court may obtain an opinion from an expert witness. The court will instruct the expert and submit the relevant questions to her/him. The parties will have the opportunity to comment on the questions to be put to the expert. Thereafter, the court will provide the expert with the necessary files and set a deadline for the submission of the opinion. After the expert has rendered its opinion, the parties may ask for explanations or submit additional questions. The expert has a contractual relationship with the court and owes his duties to the court.

Parties are free to submit reports prepared by their own experts. However, such reports are not given more evidentiary weight than party pleadings.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Switzerland?

Upon (sufficiently reasoned and specified) application by one of the parties, the court has the power to order the opposing party or a third party to produce a specific document. The court may also order witnesses to appear and testify. Moreover, as mentioned, the court will question the witnesses. The court also appoints experts (see question 8.4).

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Switzerland empowered to issue and in what circumstances?

Courts can render interim decisions, final decisions or partial decisions. Interim decisions are typically rendered to decide upon the competence of a court or questions of prescription. Interim decisions allow for substantial saving of time and costs as they are used where a higher court could potentially issue a contrary decision that would put an immediate end to the proceedings.

The final decision is the actual decision on the merits. Their content depends largely on the claims submitted by the parties, i.e. whether the parties asked for a judgment for damages, for a specific performance or for a declaratory judgment. Partial decisions are a specific kind of final decisions, namely decisions with regard to only part of a claim.

Moreover, courts can issue procedural orders to manage the proceedings.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Swiss courts cannot award punitive damages. Damages are strictly compensatory and courts may thus only grant damages in the amount of the incurred loss.

Unless the parties have stipulated otherwise, a statutory interest rate of five per cent *per annum* applies to monetary claims. A court will only award interests in the presence of a respective prayer for relief.

As regards costs, see question 1.5.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The recognition and enforcement of foreign judgments depends on the country where the judgment was rendered and on whether or not that country has signed a treaty with Switzerland. For example, a judgment rendered in a Member State of the Lugano Convention will be recognised and enforced in Switzerland without review of the substance of the judgment, save for certain narrowly defined exceptions. In absence of an international instrument, the recognition and enforcement is governed by the PILA. Under the PILA, final decisions rendered by a competent court will generally be recognised and enforced, unless they violate fundamental principles of Swiss law.

The rules governing the enforcement of any judgment, domestic or foreign, also depend on the nature of the judgment. The rules for the enforcement of monetary judgments are set out in the DEBA. According to the DEBA, monetary judgments are enforced in an expedited procedure. The enforcement of non-monetary judgments is subject to the provisions of the SCCP.

9.4 What are the rules of appeal against a judgment of a civil court of Switzerland?

Generally speaking, a decision of a first instance court may be appealed to the upper cantonal court within 30 days of the service of the decision. The threshold amount in dispute for an appeal in pecuniary matters is CHF 10,000. With some exceptions, an appeal has suspensive effect. The grounds for appeal are the incorrect application of the law or the incorrect establishment of the facts of the case.

A decision of an upper cantonal court may be appealed to the Swiss Federal Supreme Court, if the amount in dispute is at least CHF 30,000, or if the matter involves a question of law of fundamental significance. As a general rule, the appeal must be filed within 30 days after notification. The Swiss Federal Supreme Court only re-examines questions of law. An appeal based on erroneous fact finding may only be made where the lower court's findings are obviously wrong or in violation of Swiss law.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Switzerland? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration has a long-standing tradition in Switzerland. Swiss courts are known to respect and enforce arbitration agreements and awards. Arbitration is the only alternative to court litigation where it is possible to achieve a final, binding and enforceable resolution of a dispute. Switzerland is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").

Mediation has traditionally been used as a means of (non-binding) dispute resolution in family law matters. Recently, mediation has become more popular for the amicable resolution of commercial disputes. Generally speaking, in mediation proceedings an impartial third party seeks to help resolve a dispute by facilitating settlement negotiations. The mediator has no authority to impose a binding solution on the parties. Swiss courts cannot order parties to resort to mediation, but they can encourage them to do so.

Expert determination (frequently used in relation with price adjustment disputes in M&A transactions) and proceedings before an ombudsman (for example, in banking matters) are further means of alternative dispute resolution available in Switzerland.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

As far as arbitration is concerned, a distinction has to be made between domestic and international arbitration. International arbitration, i.e. an arbitration where at least one of the parties has its residency outside Switzerland when concluding the arbitration agreement, is governed by the 12th Chapter of the PILA. Rules governing domestic arbitration are set out in the SCCP.

As regards mediation, the SCCP only governs the relationship between mediation and state court litigation, but does not regulate the process itself. The parties are thus free to structure the mediation as they see fit.

1.3 Are there any areas of law in Switzerland that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

As a general rule, any pecuniary dispute may be submitted to international arbitration. Domestic arbitration and mediation is available for all claims that parties may freely dispose of. Claims that first and foremost affect a party's personal rights cannot be arbitrated. This includes marriage, paternity, child adoption, divorce or separation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Switzerland in this context?

Swiss courts may assist with the constitution of an arbitral tribunal, e.g. appointment, removal or replacement of arbitrators. The state judges' assistance can also be requested if a party does not voluntarily comply with provisional measures ordered by the arbitral tribunal. Moreover, Swiss courts will assist in the taking of evidence or provide any further assistance.

If a respondent invokes an arbitration agreement, a Swiss court must decline to hear the case, unless the agreement to arbitrate is null and void, ineffective or incapable to be performed or if the tribunal cannot be constituted due to reasons attributable to the respondent.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Switzerland in this context?

Arbitration awards are binding and enforceable in Switzerland. International and domestic arbitral awards can only be appealed before the Swiss Federal Supreme Court. In domestic arbitration, the parties are free to agree to the jurisdiction of the high court of the canton at the seat of the arbitration instead. The grounds for attacking an arbitral award are limited to *ordre public* (international awards), arbitrariness (domestic awards) and certain essential procedural rights (domestic and international awards).

Settlements reached through mediation are generally treated as extrajudicial settlement agreements and have the binding force of an ordinary contract. To the extent mediation was conducted in the context of judicial proceedings, the settlement agreement may be ratified by the Conciliation Judge or the court. In this case, the settlement agreement has the effect of a final and binding decision.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Switzerland?

The most widely known Swiss provider of arbitration and mediation is the Swiss Chamber's Arbitration Institution (www.swissarbitration.org). This institution has adopted unified rules of arbitration and mediation and provides respective services.

Most Swiss arbitration practitioners are members of the Swiss Arbitration Association ("ASA"; www.arbitration-ch.org), which is a non-profit association committed to promoting arbitration.

Besides the Swiss Chamber's Arbitration Institution, other private institutions offer mediation services, e.g., the Swiss Chamber of Commercial Mediation, the Swiss Mediation Association and also the Swiss Bar Association.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Currently, Switzerland's international arbitration law is being reviewed. The aim of this revision is to maintain Switzerland's long-standing tradition of a modern and arbitration-friendly venue. For this purpose, Chapter 12 PILA shall be moderately revised and updated, mainly by incorporating the established case law of the Swiss Federal Supreme Court.

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Practice areas: Arbitration and Litigation.

Languages: German and English.



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Tunisia

Achour Law Firm

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Tunisia got? Are there any rules that govern civil procedure in Tunisia?

Tunisia has a civil law jurisdiction. The most rules governing civil procedure are set forth in the Code of Civil and Commercial Procedures (*Code de procédure civile et Commerciale*) (hereafter the “CCCP”).

1.2 How is the civil court system in Tunisia structured? What are the various levels of appeal and are there any specialist courts?

The Tunisian civil Court system is structured around three levels of jurisdiction.

At the level of first instance, there are general jurisdictions: the Tribunal of First Instance and the Cantonal Tribunal and specialised jurisdictions (mainly, the Chamber of Commerce and Chamber of Labour).

The Tribunal of First Instance and the Cantonal Tribunal both have general jurisdiction over disputes involving private interests, save for disputes falling within the exclusive jurisdiction of another Court by virtue of law.

The allocation of matters between the Tribunal of First Instance and the Cantonal Tribunal is based on the global amount of the claims according to the claimant request. Where claims are below the DNT 7,000 threshold, then the *Cantonal Tribunal* has jurisdiction over the dispute; where claims are above such threshold, then the *Tribunal of First Instance* has jurisdiction over the dispute.

Regardless of the amount of the claim, the *Tribunal of First Instance* has exclusive jurisdiction over certain specific matters, notably personal status and parental authority, citizenship, divorce, real estate disputes, successions, intellectual property and patent issues, commercial lease issues and *exequatur*. The Tribunal of First Instance also has exclusive jurisdiction over certain specific matters, notably landlord and tenant disputes which do not relate to commercial leases, rural disputes, neighbourhood disputes and consumer credit disputes.

The Chamber of Commerce has jurisdiction over commercial matters, which notably includes litigation between shareholders of a commercial company and insolvency proceedings.

Their main characteristic is that they are composed of judges but also of traders, which have an advisory opinion and are elected among the professional community.

The Chamber of Labour has exclusive jurisdiction over individual labour law litigations, i.e. disputes between an employee and their employer and relating to the performance of the employment contract.

The Chamber of Labour is composed of non-professional judges, two of whom are elected among the employee’s community and two among the employer’s community.

At the level of second instance, there are nine Courts of Appeal, which have jurisdiction over any appeal lodged against a decision rendered by a Court of First Instance, except those rendered by the Cantonal Tribunal where the global amount of the claim is lower than DNT 7,000. For these very minor cases, the sole remedy available against a decision of first instance is to bring proceedings directly before the Court of First Instance.

At the top of the Tunisian civil Court system is the Court of Cassation. The Court of Cassation is divided into a criminal section and a civil section. The Supreme Court is not a third degree of jurisdiction since it does not reassess the case on the merits. Discussions before the Court of Cassation relate only to points of law, which implies that proceedings before it are only initiated against decisions which wrongly applied the law. In cases where the decision is quashed by the Court of Cassation, the case can be referred back to a Court of Appeal (or a Court of First Instance in minor cases where no appeal was allowed) to be heard again on the merits.

1.3 What are the main stages in civil proceedings in Tunisia? What is their underlying timeframe?

In Tunisia, a civil lawsuit is generally initiated by serving summons on the defendant. The claimant is required to have such summons served by a court bailiff. Once served, these summons have to be filed with the tribunal in order to apply to the jurisdiction.

During the lawsuit, the parties exchange their report under the control of the judges. They provide written remarks and evidence until the case is ready for trial.

Once the case is ready for trial, a pleading hearing is scheduled.

The purpose of the pleading hearing is to put forward the main arguments raised by each party. Pleading hearings therefore usually do not last more than an hour. Although the law enables the tribunal to hear witnesses, in practice this possibility is never used by magistrates, who prefer written testimonies.

Once the tribunal has heard the case, it determines a hearing date at which its decision will be made available. The length of the period between the pleading hearing and the date on which the decision is rendered may vary, according to the complexity of the case and the workload of the tribunal, from one week to sometimes more than a month.

Once the judgment is issued, the party that intends to rely on its content must notify this to the opposing party by way of signification (service of process). To this end, an original copy of the judgment has to be obtained from the tribunal's registry and served on the other party by a court bailiff. The purpose of this signification is to trigger the recourse delays and render the decision final and enforceable provided no appeal is lodged against it.

A civil judgment has to be served within a maximum period of 20 years as of the date on which it was rendered, otherwise the claim is time-barred.

The defaulting party that has been summoned does not have any specific right of recourse against the judgment. A party that is domiciled abroad is granted a delay of two months to appear. The defaulting party may also file an appeal before the Court of Appeal.

Summary proceedings are also available to claimants in order to obtain interim measures before, or in view of, a trial on the merits. These interim measures do not prejudice the merits of the claim, which will be initiated afterwards. These summary proceedings are initiated by way of summons to appear before a single magistrate.

All proceedings conducted before the other jurisdictions of first instance are similar to these standard proceedings, which apply before the Tribunal of First Instance. Proceedings before the Chamber of Labour are, however, less formal. Given the excessive workload of most Tunisian jurisdictions, proceedings generally take one year on average before Courts of First Instance.

Once a decision of first instance is rendered, either party may decide to file an appeal against it.

The time limit for appeal is 20 days, extended by a month where the party on which the judgment is served is domiciled abroad. It runs from the date on which the judgment was served.

The appeal has a suspensive effect, which means that the judgment may not be enforced until the end of the appeal proceedings, unless it is enforceable in nature. A judgment may be enforceable in nature either by virtue of law in certain specific matters (such as insolvency or summary proceedings) or because a party asked the tribunal to have its judgment benefit from provisional enforcement. Where the judgment is enforceable in nature it can be enforced as of its signification, regardless of any pending appeal. In certain limited circumstances, however, summary proceedings may be initiated before the First President of the Court of Appeal in order to obtain an order suspending the enforceability until the end of the appeal proceedings.

The Court of Appeal performs a complete re-examination of the factual, as well as the legal, aspects of the case. The procedure is similar to the one that applies in first instance; the case is prepared for the trial during an instruction phase. The parties are only prohibited to file new claims that have not been expressed before the tribunal, unless such claims tend to the same purpose. Save for that limitation, the parties may produce new evidence and exchange written briefs until the case is ready to be heard. Then a pleading hearing is scheduled. The average length of proceedings before the Court of Appeal is around 14 months.

The ruling of the Court of Appeal may be challenged before the Court of Cassation. However, this jurisdiction does not re-examine the entire case, but only the application of law made by the Court of Appeal (or by the tribunal in minor cases where appeal is not allowed). In addition, the recourse before the Court of Cassation has no suspensive effect on the ruling issued by the Court of Appeal.

The recourse before the Court of Cassation has to be filed within 20 days as of the signification of the ruling issued by the Court of Appeal. The proceedings before the Court of Cassation are conducted by a specific kind of attorney who has a monopoly of representation before this jurisdiction.

The filing of a recourse triggers a month-long period for the petitioner to file its briefs. Once the briefs are filed, the respondent has a month-long period to answer in writing. The case is then heard by a single chamber, a combined chamber or even by the plenary chamber of the Court of Cassation, depending on the complexity of the question of law raised by the recourse.

The Court of Cassation then issues a ruling, which may either:

- i) dismiss the recourse, which renders the ruling of the Court of Appeal (or the judgment of the tribunal if no appeal was allowed) final; or
- ii) quash the ruling.

In the case the ruling (or judgment) is quashed, the case is referred back to another Court of Appeal (or tribunal if no appeal was allowed), before which the case is heard once again.

1.4 What is Tunisia's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are allowed in contracts entered into between merchants. Any such clause contained in a contract entered into with a non-merchant party, which includes consumers, is not valid. A non-merchant party can only be sued before the jurisdiction that is determined in accordance with the rules set forth by the Code of Civil and Commercial Procedures. The same principles apply to arbitration provisions.

Disputes relating to real estate shall in any case be brought before the jurisdiction where the property at stake is located.

1.5 What are the costs of civil court proceedings in Tunisia? Who bears these costs? Are there any rules on costs budgeting?

The legal costs of civil proceedings are classified by the CCCP under two types of expenses:

- the costs, which mainly include:
 - court fees and taxes;
 - translation costs;
 - witnesses' indemnification;
 - experts' and technicians' fees; and
 - bailiffs' fees; and
- lawyers' fees.

1.6 Are there any particular rules about funding litigation in Tunisia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Any person residing in Tunisia and having insufficient resources to enforce or protect his/her rights may benefit from legal aid. Such legal aid is also available to non-residents where international treaties so provide. It is not available to commercial companies.

The process for obtaining legal aid usually takes several months, although an accelerated procedure is available for urgent cases. Access to this procedure is means-tested (currently full legal aid is available to persons with a monthly income of less than DNT 250). The applicant also needs to justify their chances of success, although in practice few applications are dismissed. When granted, the application is transmitted to the chairman of the local Bar, who appoints a counsel to act on behalf of the party benefiting from legal aid. Legal aid covers the costs and the costs of enforcement of any judgment. The counsel receives a lump sum compensation from the State. If the party

benefiting from legal aid is unsuccessful, it is not, based on lack of means, protected from an order to pay the successful party's costs.

Partial contingency or conditional fee arrangements are permitted under Tunisian law.

Disputes related to costs are brought before the local Bar, which must rule on the matter very soon. Its decision may be appealed to the President of the relevant Court of Appeal.

Given the limited scope and effect of the rules on costs, there are no specific provisions in Tunisian law regarding security for costs. Claimants domiciled outside Tunisia are not required to provide security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Tunisia? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Under Tunisian law, a claim may be assigned from a party to another. Other causes of action may not be transferred; the claimant is required to have a legitimate interest in the success or dismissal of a claim.

However, pursuant to provisions of the Civil Code, the assignee is vested with regard to third parties, including the debtor, only once the assignment has been served upon the debtor. In addition, in the event that the claim assigned is subject to a pending litigation, the assignee must be wary.

The financing of judicial proceedings by a third party encompasses two different situations: a loan or an investment rewarded only in the event these proceedings are successful. Consequently, for non-credit-institutions, this type of financing can only be resorted to on an exceptional basis. On the contrary, there do not appear to be any constraints regarding the financing of judicial proceedings compensated by retribution conditioned upon the successful outcome of these proceedings.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

As a general matter, there is no specific formality to comply with before initiating civil proceedings in Tunisia.

By exception, prior to initiating a civil liability case against a lawyer, the appointed lawyer is bound to submit their draft writ of summons to the chairman of their order. A failure to comply with such ethical obligations will never invalidate the summons, but can result in the professional liability of the claimant's attorney being engaged.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Most of the various applicable limitation periods are 15-year terms (for civil and commercial claims in both tort and contracts matters), however different limitation periods remain that are applicable in certain circumstances, or in certain specific matters.

Most of the limitation periods applicable before civil Courts are set forth in the Civil Code, article 384 and subsequent. Some specific delays applying to commercial disputes are also provided for in the Commercial Code.

As a general principle, the statute of limitation starts running from the date on which the facts giving rise to the cause of action occurred. However, where the claimant was not aware of these facts, the statute of limitation starts running from the date on which said claimant became aware of these facts or should reasonably have been aware thereof.

The statute of limitation does not start running where a claimant is facing a legal, contractual or *force majeure* impossibility to file a claim. Where the claim is conditional upon a certain event, the statute of limitation is also suspended, for as long as such event does not occur.

The statute of limitation is interrupted where the debtor acknowledges the right of the claimant or where proceedings are initiated (even where these proceedings are summary proceedings or proceedings initiated before a Court which has no jurisdiction to hear the case), and for as long as such proceedings are still pending. It is also interrupted where enforcement measures are implemented.

The suspension of the statute of limitation does not cause the time period that has already lapsed to start anew; whereas at the end of an interrupted period, the whole statute of limitation starts running again.

The duration of a limitation period may be contractually agreed upon by the parties to a contract, provided that it is not more than 15 years.

The main specific limitation periods applicable before civil Courts are as follows:

- any enforceable judicial decision may not be enforced after 20 years, unless the statute of limitation applicable to the claim which gave rise to such decision is more than 20 years;
- liability claims initiated against construction companies and their subcontractors are time-barred 10 years after the final certificate of the work performed is issued;
- personal injury claims are time-barred after three years;
- claims brought by a merchant against a consumer on the basis of a sale of goods are time-barred after one year; and
- claims brought by the purchaser of goods because of the existence of hidden defects affecting the use of these goods have to be initiated within seven days from the discovery of these hidden defects.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Tunisia? What various means of service are there? What is the deemed date of service? How is service effected outside Tunisia? Is there a preferred method of service of foreign proceedings in Tunisia?

In Tunisia, a civil lawsuit is generally initiated by serving summons on the defendant.

However most of the time, serving a summons is required by law and service of process can only be performed by a bailiff.

As a general principle, service must be personal on the defendant. Service on a corporate entity is deemed personal where the process is delivered to its legal representative, to the latter's proxy or to any other person empowered for this purpose.

Where personal service is impossible to perform, the summons may be delivered either at the domicile of the defendant or, if no place of domicile is known, at his place of residence, by leaving a copy of the summons to any person there (a member of the family, employee, neighbour or guardian). However, such copy may be left only on condition that the person present accepts it, gives his surname, first names and capacity. The bailiff must leave, in any event, at the place of domicile or residence of the addressee, a dated delivery notice informing him of the delivery of the copy and indicating the nature

of the process and the identity of the claimant, as well as providing information relating to the person to whom the copy was left.

Where no one can, or is willing to, receive the copy of the summons, and if it appears, from the inquiries made by the bailiff (which have to be detailed in the writ of service), that the addressee lives at the address indicated, then the service will be deemed to have been made at the place of domicile or residence of the addressee. The bailiff must leave a similar dated delivery notice to that mentioned above at the Cantonal Tribunal or Police Station and then send the defendant a registered letter informing him of this. This notice must also state that a copy of the process shall be collected as soon as possible from the Cantonal Tribunal or Police Station by the interested party or by any person specially authorised. The bailiff is bound to keep a copy of the summons at his office.

Service of process is deemed to have occurred on the date upon which the bailiff went to the domicile or residence of the addressee.

No service may be made before 6 o'clock in the morning or after 6 o'clock in the evening or on Sundays, public or non-working days.

Service on a foreign citizen who is residing, or is present, in Tunisia, or on a Tunisian branch of a foreign entity, is performed in the same manner as stated above.

Where the summons is directed to a person domiciled outside of Tunisia, it is served by a bailiff; provided no specific international treaty is applicable, the summons is generally served by the bailiff via registered letter. Service is deemed to have been performed on the date upon which the summons was sent.

3.2 Are any pre-action interim remedies available in Tunisia? How do you apply for them? What are the main criteria for obtaining these?

Prior to initiating a civil trial on the merits, the claimant may apply for the authorisation to implement protective attachments over its debtor's tangible or intangible assets (i.e. attachments over bank accounts, shares, inventory, provisional registration of charge over the debtor's business, shares or property). The authorisation to proceed with such protective attachments is granted by the President of the Court, provided that the applicant is able to demonstrate on an *ex parte* basis:

- i) that it has a claim against the debtor which is *prima facie* grounded; and
- ii) that there exists a serious risk that the amount of such claim may not be able to be recovered.

Application for such interim measures is made before the Court of the jurisdiction of the defendant's domicile or in which the assets to be attached are located.

Where proceedings on the merits are not already initiated, they should be commenced within one month as of the date upon which protective attachments are implemented, failing which, such attachments may be cancelled.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleadings are the summons and subsequent written briefs. The summons must clearly indicate the Court before which the case is brought, the identity of the defendant, a presentation of the facts giving rise to the dispute, the legal grounds on which the claim is based and the relief sought. The summons shall also contain a list of all evidence supporting the claim.

Subsequent written briefs must contain the factual and legal arguments of the parties. Each party is required to communicate

to the other the documentary evidence which it intends to use in support of its arguments.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Each party may freely amend its briefs throughout all of the instruction phase. Once the case is ready for trial and the instruction phase is closed, parties are, in principle, prohibited from raising new arguments or producing additional evidence. The Court that monitors the case schedule may, however, decide to reopen the instruction phase or to accept late evidence, provided the other party is given the possibility to examine such evidence or argument and to discuss it.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A defendant's written briefs must contain all his factual and legal arguments, as well as a list of all evidence in support of his defence. The documentary evidence in support of such a defence has to be communicated to the claimant.

Counterclaims can be filed by the defendant. Set-off defence is available, except in certain situations, such as insolvency proceedings, where such a defence is either prohibited or admitted only in certain very specific circumstances (i.e. claims must be reciprocal and arise from the same contract).

4.2 What is the time limit within which the statement of defence has to be served?

The defendant is not required to file its statement of defence prior to the first hearing before the Court. At this first hearing, the Court will ensure that the defendant has been provided with all of the claimant's documentary evidence mentioned in its statement of claim and then define the procedural schedule and set the date upon which the statement of defence has to be served. The Court may issue injunctions in order to force the parties to comply with such procedural schedule, failing which it may close the instruction phase, thus preventing the failing party to raise its arguments.

By exception, in accelerated proceedings, the case is supposed to be pleaded on the date of the first hearing. The statement of defence shall therefore be prepared and served on the adverse party within a reasonable delay prior to the hearing date (the length of such delay depends on the date upon which the defendant was served the summons).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Where a contractual or legal guarantee exists, or where liability is joint and several, the defendant may serve a summons to a third person to join the proceedings as co-defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, a judgment may be

rendered against him on the sole basis of arguments raised by the claimant and of the documentary evidence produced by the latter.

If the defendant was duly summoned, then the latter may only appeal the judgment before the Court of Appeal.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may challenge the Court's jurisdiction, provided such a defence is raised before any other argument on the merits; otherwise, it is not admitted.

The defendant is also required to indicate the Court which it considers to have jurisdiction over the case.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may voluntarily join a pending civil trial either in first instance or before the Court of Appeal. The purpose of such voluntary intervention can be to file a claim which is specific to the third party or to support the claim brought by one of the parties to the litigation.

A third party may also be forced to join a pending litigation under certain circumstances.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two sets of proceedings may be consolidated upon request of one of the parties or by the sole decision of the Court provided there is a close link between the two proceedings such that their consolidation renders the administration of justice more efficient.

Consolidation is, however, impossible where it may result in the violation of the exclusive jurisdiction of another Court.

The decision to consolidate, or the refusal to consolidate two sets of proceedings, relates to the administration of justice and may therefore not be challenged.

5.3 Do you have split trials/bifurcation of proceedings?

Splitting of proceedings may be ordered by the Court according to the same conditions as the consolidation of two sets of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Tunisia? How are cases allocated?

Cases are allocated between civil Courts by combining two sets of rules:

- **Subject-matter jurisdiction rules**, which determine whether the case should be brought before a Court (Cantonal Tribunal, Court of First Instance) depending on the global amount of the claims (see question 1.3 above) or before a specialised Court (the Chamber of Commerce for commercial disputes,

the Chamber of Labour for employment disputes (see question 1.3 above)).

- **Territorial jurisdiction rules**, the principle being that the claimant must file its claim before the courts in the territorial area of the defendant's domicile (specific rules may, however, apply in real estate matters, succession disputes, contractual disputes, etc.).

6.2 Do the courts in Tunisia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Cases are managed solely and entirely by the Court. Before the Court of First Instance, a formal instruction phase is conducted by a judge specifically appointed to prepare the case in view of the hearing. Before other Courts of First Instance, there is no such formal instruction phase. However, the Court proceeds with an informal instruction of the case by postponing hearings in order to allow parties to exchange their briefs, arguments and documentary evidence.

Parties may apply for summary proceedings in order to obtain interim measures before or in view of a trial on the merits (see question 1.3 above).

Some protective attachments may also be obtained on an *ex parte* basis (see question 3.2 above).

6.3 What sanctions are the courts in Tunisia empowered to impose on a party that disobeys the court's orders or directions?

In order to ensure the efficiency of its order, a Court may sentence the disobeying party to the payment of an *astreinte*, which is basically a daily fine due to the Court until the order is complied with.

6.4 Do the courts in Tunisia have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The Tunisian CCCP does not provide for the possibility to apply for a strike out of part of a statement before the case is ruled on the merits. As a consequence, all claims will be dealt with in the decision on the merits.

6.5 Can the civil courts in Tunisia enter summary judgment?

The CCCP does not provide for the possibility for Courts to enter into summary judgments. Where the case is rather simple, the instruction phase may be accelerated so that the Court may hear the case rapidly and issue a judgment.

Orders issued in the context of summary proceedings do not qualify as summary judgments, since they do not have *res judicata* and are therefore not decisions on the merits.

6.6 Do the courts in Tunisia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The CCCP provides for several hypotheses of suspension, some of which are mandatory (for instance, where an interlocutory question is raised and the answer depends on the exclusive jurisdiction of another Court).

Where criminal proceedings are pending and may have an influence over the outcome of civil proceedings, civil Courts may order a stay of proceedings.

Civil Courts are also vested with a general power to decide the suspension of the proceedings where they consider that it is necessary for a proper administration of justice.

The decision ordering a stay of proceedings may be appealed under very restrictive circumstances.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Tunisia? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Under Tunisian law, each party is required to prove the facts on which its arguments rely. However, there is no duty of disclosure whatsoever. Each party therefore decides freely which evidence it wants to disclose or not. Tunisian civil proceedings are governed by the adversarial principle, which implies that, when rendering their judgment, civil Courts may only take into account evidence that has been disclosed during the proceedings and that the adverse party could examine in time. The Court may therefore refuse any late disclosure, although most of the time it will prefer to postpone the hearing in order to allow the evidence to be produced and then let the other party examine it.

Upon request of a party, the Court may also conduct enquiries in order to obtain evidence that has not been disclosed by the other party. Evidence may also be obtained by the Court from third parties, provided no legal privilege applies. Parties, as well as any third party requested to provide evidence by the Court, are legally bound to cooperate.

7.2 What are the rules on privilege in civil proceedings in Tunisia?

Correspondence and documents exchanged between lawyers and between lawyers and their clients are strictly privileged. A client may therefore not release its counsel from legal privilege in order to be able to produce this kind of document, regardless of whether they may be useful to his case. Counsels may, however, waive this privilege in advance by exchanging letters marked as "official". However, an official letter cannot refer to previous privileged correspondence or discussions.

Correspondence and documents exchanged between parties themselves are not confidential *per se*. Confidentiality agreements that may have been signed between the parties or between one of the parties and third parties may not prevent the Court from requesting the disclosure of documents, subject to the confidentiality agreements.

7.3 What are the rules in Tunisia with respect to disclosure by third parties?

The CCCP does not contain specific rules applying to the disclosure of evidence by third parties.

7.4 What is the court's role in disclosure in civil proceedings in Tunisia?

The CCCP does not contain specific rules applying to the disclosure of evidence by third parties.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Tunisia?

No specific restrictions apply to documents obtained in the context of civil proceedings. They may therefore be used by the parties afterwards.

8 Evidence

8.1 What are the basic rules of evidence in Tunisia?

Each party to a civil trial bears the burden of proving the facts on which its arguments rely by producing supporting evidence.

Evidence is mainly documentary. Although oral evidence is allowed, it is almost never used before Tunisian jurisdictions. Testimonies are usually produced in writing.

Each party must provide the other party with a copy of the documents on which it relies in order to allow the documents to be examined and discussed in a timely fashion, and to allow for the production of counter-evidence.

These documents shall also be provided to the Court in order to allow the Court to examine evidence in view of the pleadings.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

With exception to the restriction relating to oral evidence mentioned above, any kind of evidence may be produced by the parties, regardless of its probative value. The strength of the evidence produced by the parties will be freely assessed by the Court when making its decision.

Parties tend to frequently use expert evidence, especially where the case is very technical. Parties may produce private expertise although they may prefer to request the appointment of a Court expert.

Expertise performed by a Court-appointed expert has generally a stronger probative value since an adversarial process is conducted to ensure that each party has the possibility to discuss the expert's findings and make its observations in the course of the expertise, as well as prior to the finalisation of the expert's report.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

As mentioned above in question 8.1, witnesses' depositions are permitted under the CCCP. However, in practice, Courts never use this possibility and witness statements are produced in writing by way of a hand-written statement, drafted according to specific forms established for that purpose.

Witnesses may also be heard by the Court-appointed expert, where an expertise is ordered.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Pursuant to the CCCP, an expert may be appointed by the Court prior to any proceedings or, once the proceedings have been initiated, in connection with a factual question which requires the insight of an expert. While carrying out his investigations, the expert must

imperatively observe the adversarial principle, failing which, his report may be declared void. The observance of this principle confers to the report a particularly strong probative value. On the other hand, it is always possible for the parties to resort to a “private” expert in order to consolidate their position. Contrary to the judicial expert, the elaboration of his report is not subject to the adversarial principle which, necessarily, affects its probative strength. Generally, if one party resorts to a “private” expert, the other/others shall also do so in order to respond to the technical report filed before the Court.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Tunisia?

See answer to question 7.4 above.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Tunisia empowered to issue and in what circumstances?

Interim measures, such as protective attachments, freezing injunctions and provisional payments, are generally provided for by an order issued by a single judge in the context of summary proceedings or on an *ex parte* basis. Such order has no *res judicata* and therefore does not prejudice the merits of any claim which may be initiated afterwards.

Decisions on the merits generally take the form of a judgment issued by a Court at the end of regular or accelerated proceedings.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Since punitive damages are not admitted under Tunisian law, the Courts may only sentence the losing party to pay compensatory damages.

Interest starts running at the legal rate from the date upon which the judgment is issued.

Contractual interest starts running at the contractual rate from the date upon which a formal letter requesting the payment due under the contract is sent to the debtor. If no such letter is sent, contractual interest starts running from the date upon which the summons is served on the debtor.

The Court can also sentence the losing party to pay the costs and the lawyers’ fees (see question 1.5 above).

9.3 How can a domestic/foreign judgment be recognised and enforced?

Judgments sentencing a party to pay an amount of money may be enforced by seizing, and ultimately selling, the property of the debtor (personal assets, bank accounts, real estate, shares, etc.). Seizures can only be carried out by a bailiff holding an enforceable copy of the judgment.

Should the debtor fail to pay the amounts owed, then insolvency proceedings may be triggered against him (specific proceedings apply to non-merchant persons/entities).

Foreign judgments may be enforced in accordance with the International Private Law Code. In practice, an application is made before the Tribunal of First Instance, on an *ex parte* basis in order to obtain the *exequatur*. Such proceedings are *inter partes* proceedings and the Court has wider powers to appreciate whether *exequatur* should be granted or not.

Once the foreign judgment is declared enforceable, it is considered as a domestic judgment. Any bailiff may therefore proceed with enforcement measures.

9.4 What are the rules of appeal against a judgment of a civil court of Tunisia?

Once a decision of first instance is rendered, either party may decide to file an appeal against it.

The time limit for appeal is 20 days, extended by a month where the party on which the judgment is served is domiciled abroad. It runs from the date on which the judgment was served.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Tunisia? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is used in Tunisia and has been for a long time. The Arbitration Code sets forth rules applicable to both institutional (under the aegis of an institutional entity) and *ad hoc* (where the procedure governing the arbitration is determined by the arbitrators) arbitration.

Conciliation is not actively promoted in Tunisia as an alternative dispute resolution method. This method is based on voluntary submission of the parties. Conciliation may be conducted under the aegis of a conciliator, but also between the parties without intervention of any third party. Conciliation can be conducted either on a contractual basis or under the aegis of an institution. It can also be initiated in the context of a pending trial, or before any civil trial has been commenced, thus qualifying as judicial conciliation or mediation.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Tunisian arbitration rules are set forth in the Arbitration Code. The code provides for rules applicable to domestic as well as international arbitration.

Tunisian rules relating to conciliation are set forth by the Center for Conciliation and Arbitration of Tunis (*Centre de Conciliation et d’Arbitrage de Tunis*).

1.3 Are there any areas of law in Tunisia that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

According to the Arbitration Code (Provision 7), no arbitration is permitted in:

- matters affecting public policy;
- disputes relating to nationality;
- disputes relating to personal status, with the exception of questions arising therefrom concerning pecuniary obligations;
- matters where no arbitration is permitted; and
- disputes concerning the State, State administrative agencies and local authorities, with the exception of disputes arising in international relations of an economic, commercial or financial nature.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Tunisia in this context?

Tunisian Courts may provide assistance to parties that wish to use alternative dispute resolution.

For example, the assistance of the President of the Tribunal of First Instance may be sought when the parties face difficulties in constituting the arbitral tribunal. Tunisian Courts may also be asked to issue interim measures or protective attachments, regardless of a pending arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Tunisia in this context?

International arbitration awards may not be appealed, whereas domestic arbitration awards may be appealed before the Court of Appeal. Annulment is, however, a possible recourse against both domestic and international awards on very limited grounds, namely where: the arbitral tribunal lacks jurisdiction; the tribunal was not duly constituted; the tribunal exceeded its mission; the tribunal breached the adversarial principle; and the award is contrary to public policy.

Mediation and conciliation are generally conducted on a voluntary basis. There is therefore no specific sanction against a party that refuses to enter into a mediation or conciliation. By exception, where the parties contractually agree to mediate or conciliate prior to initiating litigation, the Court may declare their claim inadmissible where no conciliation or mediation attempt was performed.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Tunisia?

Tunisia has several alternative dispute resolution institutions. The best known is the Tunis Center for Conciliation and Arbitration.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Currently there are no trends or current issues in the use of the different alternative dispute resolution methods worth mentioning.



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Achour Law Firm is a full-service Tunisian law firm comprising several professionals specialised in all aspects of business and commercial law. The firm was established in order to serve a worldwide clientele requiring advice and assistance in legal matters.

Achour Law Firm combines legal expertise across a broad range of disciplines, with the firm's substantial local knowledge enabling it to provide an in-depth understanding of clients' commercial needs and priorities. We always try to enhance the quality of our service by actively listening to each of our clients, keeping fully abreast of global business developments and constantly seeking ways to incorporate the latest technology.

Our law firm is strengthening its international exposure to offer an excellent meeting point, not only to its European clients, but also to its foreign clients. Thanks to a strategic alliance with several international consultants firms, our Tunisian and foreign clients benefit from local support in their establishment in many countries in the world.

Turkey

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Turkey got? Are there any rules that govern civil procedure in Turkey?

Turkey's legal system is based on civil law. Civil procedure is governed by the Code of Civil Procedure ("the CCP") dated 01.10.2011 and numbered 6100. There are also some specific procedural rules regulated by the Turkish Commercial Code and the Code of Labour Courts, etc.

1.2 How is the civil court system in Turkey structured? What are the various levels of appeal and are there any specialist courts?

Civil courts of first instance and civil peace courts are the main courts for civil disputes for the first instance stage. However, for disputes requiring special expertise, there are also some specialist courts such as the commercial court, land registration court, labour court, enforcement court, consumer court, civil courts for intellectual and industrial property rights and family court.

The CCP introduces a three-tier court system; namely first instance courts, regional appellate courts and courts of appeal. However, the regional appellate courts are not operational, since the judicial infrastructure is yet to be set up. Therefore, the current system is a two-tier court system.

1.3 What are the main stages in civil proceedings in Turkey? What is their underlying timeframe?

An action is filed with a petition by the plaintiff. Under Turkish law there are two types of procedures. Written procedure is the main type, whereas the simple procedure, as the name suggests, is a simplified version. In the written procedure, the usual circle of submissions is possible for the parties where pleading, response, rebuttal and rejoinder can be filed. In the simple procedure, however, only pleading and response petitions can be filed by the parties and no further exchange of petitions can be carried out.

The main stages of the civil proceedings are (i) exchange of petitions, (ii) preliminary proceedings, (iii) examination phase, and (iv) oral proceedings.

There is no specific timeframe for the courts to complete the above mentioned stages and to render their decision. Therefore, the timeframe of the proceedings depends on the nature of the dispute, but in general it takes around 1.5 to two years. The appeal stage can take 1.5 years and the revision of a decision phase takes a further six months as well.

1.4 What is Turkey's local judiciary's approach to exclusive jurisdiction clauses?

Merchants and/or public entities can agree on an exclusive jurisdiction clause unless there is exclusive jurisdiction provided by the law. A jurisdiction clause or agreement shall be deemed valid if it is clearly expressed and written.

1.5 What are the costs of civil court proceedings in Turkey? Who bears these costs? Are there any rules on costs budgeting?

Application fees, litigation expenses (such as notification fees, expert fees and witness fees) and official attorney fees are the main costs of civil court proceedings. In principle, litigation costs should be paid by the plaintiff who initiates the proceedings. However, the court may also decide the party requesting a procedural transaction should bear the relevant expenses.

At the end of the proceedings, the losing party shall refund the litigation costs and official attorney fee determined as per the Minimum Attorney Fee Tariff. However, in principle, the professional fee which is agreed between a party and its attorney cannot be refunded.

With regard to costs budgeting, most of the litigation costs are determined by the Code of Fees and Charges and also the secondary tariffs.

1.6 Are there any particular rules about funding litigation in Turkey? Are conditional fee arrangements permissible? What are the rules pertaining to security for costs?

The CCP enables those who cannot afford litigation expenses to request legal aid from the court. It is permissible for the attorneys to enter into fee arrangements with their clients. However, the agreed fees cannot be lower than the minimum amounts set out by the Official Tariff. The attorney fees can also be determined over the value of the claim set forth with the proceedings. However, it cannot exceed 25% of the total value of the matter of the dispute.

As to security for costs, a plaintiff who is a Turkish citizen/entity shall provide security if he is not resident in Turkey or if it is documented that he is having serious financial difficulties.

Plaintiffs who are foreign persons/entities are also obliged to provide security unless there is an agreement or reciprocity between Turkey and the plaintiff's state.

1.7 Are there any constraints to assigning a claim or cause of action in Turkey? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In principle, the parties can assign a claim or cause of action to a non-party before or during the proceedings if such assignment has not been restricted by the court through an injunction.

A non-party can finance litigation proceedings pursuant to the liberty of contract principle and general provisions of the Code of Obligations.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There is no particular formality to be followed before initiating proceedings. The plaintiff can initiate proceedings by filing a petition and depositing the application fee.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

As per the Code of Obligations the principle statute of limitation is 10 years. This period is calculated starting from the due date of the obligation.

However, the statute of limitation is five years for some claims, such as: lease payments; principal interest; salary; claims arising out of attorney; agency, commission and brokerage agreements (except commercial brokerage); claims between a company or its shareholders and its managers, representatives or auditors; accommodation fees in hotels, pensions, etc.; catering costs in restaurants and similar places; claims arising out of minor artwork and small-scale retail sales; claims between the shareholders arising out of a shareholding agreement; and claims arising out of works contracts, except those that arise out of improper performance or non-performance due to a contractor's gross fault.

The statute of limitation for tort claims is two years as of the date on which the plaintiff becomes aware of the tortious act, damage and the person committing it, within the upper limitation of 10 years.

Time limits are treated as a substantive law issue. Expiration of the statute of limitation as a plea should be raised by the defendant. This is to say that the court cannot *ex officio* take into consideration time limits.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Turkey? What various means of service are there? What is the deemed date of service? How is service effected outside Turkey? Is there a preferred method of service of foreign proceedings in Turkey?

Civil proceedings commence with the submission of the plaintiff petition to the court. Subsequently, the court serves the plaintiff petition alongside with the opening record on the defendant's residence address via the Official Postal Service.

The post officer notes the date when the addressee receives the notification and this date is deemed the date of service. However, the deemed date of service differs in some specific circumstances where the post officer is required to follow certain procedures, e.g. when the addressee refuses to receive the notification, the addressee cannot be found at the address or the address of the addressee is unknown.

Notifications outside Turkey are made with the help of foreign authorities in accordance with the international agreements on legal assistance. In the absence of such agreement, the notifications are made according to domestic provisions.

Foreign proceedings are served via the Ministry of Justice and relevant prosecution office in accordance with the international agreements.

3.2 Are any pre-action interim remedies available in Turkey? How do you apply for them? What are the main criteria for obtaining these?

As a pre-action interim remedy, for non-monetary claims, a party can apply for interim injunction and where it proves that the acquisition of a right can become significantly difficult or impossible, or the delay is likely to cause serious damage, the court accepts the application in return for a security for compensation of the possible losses of the counterparty, which is generally 15% of the claimed amount in practice. The same conditions apply to provisional attachment for monetary claims.

3.3 What are the main elements of the claimant's pleadings?

Plaint petition should include the following: the name of the court; the names and addresses of the parties; the ID number of the plaintiff; the names and address of the parties' attorneys; the subject of the litigation; factual grounds; evidence; legal reasons; claims; and the signature of the plaintiff or the attorney.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Parties can amend their pleadings until the exchange of petitions stage is completed. However, with the explicit consent of the counterparty, it is possible to amend the pleadings in all stages of the proceedings.

In addition, during the same course of the proceedings, each party is entitled to amend their pleadings only once by an oral or written request even after the exchange of petition stage and without consent of the defendant.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The response petition should include the same main elements as the plaintiff petition. The preliminary objections, namely jurisdiction objection, arbitration objection and judicial division of work, should also be filed with the statement of defence.

The defendant can file a counter action in the scope of the same proceedings provided that (i) principal action is pending and (ii) there is a connection between the principal and counter action, or (iii) there is a set-off relation between the claims of the parties. However, where the defendant's grounds of defence are set-off, it can also choose to file it as a plea with its response petition.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant shall submit its response petition to the court within two weeks as of the service of the plaintiff petition. However, upon request, the court may grant a time extension of up to one month for the written procedure and up to two weeks for the simple procedure.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The defendant is not entitled to share liability by bringing an action against a third party during ongoing proceedings. However, as explained below in detail, the defendant can request from the court to notify the third party in order to ask it to intervene in the proceedings.

4.4 What happens if the defendant does not defend the claim?

Where the defendant fails to file a defence, it is deemed as if it has denied all claims of the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction with its response petition as a preliminary objection. However, if there is exclusive jurisdiction for the subject of the case, the court shall *ex officio* examine its jurisdiction and the defendant can dispute the court's jurisdiction in any phase of the proceedings.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A party to the case, considering a subsequent recourse action to be filed by or against it, may request the court to notify the proceedings to a third party.

Even if there is no notification, a third party may request from the court to join ongoing proceedings as an intervenor if the decision to be rendered may affect its rights and/or lead to a recourse action.

An intervenor can choose the party with whom he acts. The intervenor is bound by the actions performed, claims, defences and evidence submitted by that party.

In any case, the court shall render its decision for the main parties of the case. The effect of the intervention occurs between the intervenor and the related party in the case of a recourse action. In such a recourse action, the intervenor cannot challenge the decision rendered for the main case.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Connected cases filed before civil courts of the same level and specialisation can be consolidated upon the request of the parties or *ex officio* during all stages of the proceedings. A connection exists if both cases are based on similar grounds or if a decision rendered in one case would affect the other.

5.3 Do you have split trials/bifurcation of proceedings?

The court may decide, upon request of the parties or *ex officio*, to split the cases in any phase of the proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Turkey? How are cases allocated?

As explained under question 1.2 above, civil courts of first instance have jurisdiction for all civil disputes except those that fall under the jurisdiction of civil courts of peace, and disputes requiring special expertise are allocated to specialist courts.

6.2 Do the courts in Turkey have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have the power to take any measures for management and conduct of the case and along with the parties of the case, third parties and other public authorities must comply with and respond to the court's orders and requests.

As interim applications, the parties can request procedural steps such as hearing witnesses or holding expert examination, apply for temporary legal protections referred to under question 3.2 above or request the necessary correspondence to be made for showing documents/evidence.

In principle, the party making the interim application shall pay the relevant expenses and the court can take a measure using the court expenses paid in advance.

6.3 What sanctions are the courts in Turkey empowered to impose on a party that disobeys the court's orders or directions?

In the case of non-compliance with the court's orders or directions, a judge can expel the parties from the courtroom, impose fines, order disciplinary detention or decide a witness to be brought to the court by force.

Attorneys of the parties can neither be expelled from the court nor detained; instead, the court can notify the Bar Association or prosecution office if necessary.

6.4 Do the courts in Turkey have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts in Turkey do not have the power to strike out a statement of case. However, the court can partially accept or dismiss a claim at the end of the proceedings with its decision on the merits.

6.5 Can the civil courts in Turkey enter summary judgment?

For cases subject to simple procedure, the court can form its decision without holding a trial.

6.6 Do the courts in Turkey have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Courts shall discontinue the proceedings if:

- the plaintiff waives the case;
- the defendant accepts the case;
- the parties settle;
- the legal interest of the plaintiff or subject of the case disappears; or
- neither party attend a hearing or one of the parties does not attend and the other one declares that he/she will not pursue the proceedings.

If there are matters which should be resolved by another court or authority in order to continue the proceedings and render a decision, the court can stay the proceedings until the preliminary question is resolved.

In case the preliminary question should be resolved by the Constitutional Court or the Court of Jurisdictional Disputes, the court shall stay the proceedings.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Turkey? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There is no full disclosure mechanism under Turkish law. In principle, disclosure obligation is limited to the evidence on which either one of the parties base their allegations. However, parties are entitled to request the court to collect evidence from the counter party or from third parties and institutions.

Disclosure pre-action is limited to requesting the collection of evidence such as discovery, expert examination or witness testimonies.

There is no obligation of disclosure specified according to different classes of documents.

7.2 What are the rules on privilege in civil proceedings in Turkey?

Since there is no compulsory full disclosure mechanism, there is no specific privilege regulated under Turkish law either. On the other hand, as per the Attorneys' Code, attorneys are prohibited from disclosing information received from their clients. In order for an attorney to testify regarding such information, consent of the client is required. Yet even then, the attorney may use the right of exemption from testifying.

7.3 What are the rules in Turkey with respect to disclosure by third parties?

If any document constituting evidence is under possession of a third party, the court can order the disclosure of such evidence which is deemed mandatory to prove the allegations of the parties. If ordered by the court, third parties are obliged to disclose such documents and if not, explain the reason for failure to disclose. If the court does not find the explanations sufficient, the court can hear the third party as a witness.

7.4 What is the court's role in disclosure in civil proceedings in Turkey?

In principle, courts are obliged to clarify the dispute where there are mistakes of fact or legal ambiguities or contradictions. In this regard, the court is entitled to question the parties and demand explanations from them, as well as order disclosure of documents by parties of the dispute or third parties.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Turkey?

There are no restrictions as to the use of documents obtained upon disclosure. However, parties may request that the documents and information submitted to the court be kept confidential.

8 Evidence

8.1 What are the basic rules of evidence in Turkey?

In principle, evidence must be submitted by the party having the burden of proof. The parties are not allowed to withdraw evidence they have submitted without the express consent of the counter party.

The parties should list and submit all their evidence or at least the information as to evidence that is not in their possession within the period of exchange of petitions. A peremptory term of two weeks is granted to the parties in the preliminary examination hearing, to submit the evidence listed in petitions or at least provide information for the collection of evidence that is not in their possession. In the event that the deficiencies regarding submission of evidence are not completed within this period, the court decides that the relevant

party is deemed to have renounced the right to rely on such evidence. Parties may request submission afterwards, unless late submission was made for the purpose of extending the duration of proceedings or caused by the fault of the party requesting late submission.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All means of proof can be accepted as evidence unless they are provided unlawfully. Under Turkish law, the court is bound by some means of proof such as final judgments; and cannot make an assessment whether or not they reflect the truth as long as they are valid. On the other hand, witness testimony, expert opinion, discovery, professional opinion and also evidence that are not listed by the law are not binding and are left to the court's discretion.

Voice records and electronic records such as e-mail correspondence are defined as a "document" but they are not binding and are also left to the court's discretion.

In cases specified by the law, the means of proof can only be in the form of a "deed", which is an instrument created for the purpose of representing a legal record of a status or action. In this regard, claims against a deed can only be proven with another deed.

The court can decide to conduct an expert examination either *ex officio* or upon request of either party in cases where special and technical knowledge is required to solve the disputes. In principle, expert evidence is inadmissible on subjects that may be solved with the general and legal knowledge of the judge.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A party who wants to call witnesses of a fact should inform the court about the facts to be proven and submit the list of witnesses, including their names and addresses. If a witness is not residing in the province where the hearings are held, then the court may issue an order to the judge in the province where the witness resides to take such witness's testimony.

In principle, witnesses are not allowed to use written notes during their depositions. Other witnesses cannot be present in the court room while one of the witnesses is heard.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The court can appoint experts either *ex officio* or upon request of either party. Experts owe their duties to the court. Rather than being heard as a witness, experts submit their opinions to the court in writing. However, it is also possible, yet rare in practice, for the court to rule that the experts shall provide their opinions orally before the court.

Experts are chosen from the expert list prepared by each civil jurisdiction commission in the relevant judicial locality. In principle, the court chooses a sole expert, yet assigning an expert committee is also possible. The court determines the limits of the examination subject, questions which the expert is required to answer and the timeframe in which the report should be submitted.

On the other hand, parties may also submit professional opinions as evidence. Such professionals owe their duties to the party that is their client.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Turkey?

As explained above, courts can order the disclosure of evidence from the parties, third parties or institutions upon request of the parties. The courts can also appoint experts, hear witnesses and carry out discovery.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Turkey empowered to issue and in what circumstances?

Courts may issue interim decisions and final decisions. The final decisions may be in the form of (i) declaratory decisions determining the existence or absence of a right or a relationship between the parties, (ii) orders to give something, perform or refrain from doing something, and (iii) constitutive decisions which are changing, revoking or creating a legal status or position.

Additionally, courts may also order preliminary injunctions. The court may order a preliminary injunction if there is a concern that an inconvenience or serious damage would occur as a result of a delay or a change in the current situation, which would result in difficulty or impossibility regarding acquisition of a right.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court may order pecuniary damages and non-pecuniary damages. The court is bound by the request of the parties and cannot decide anything exceeding or differing from the request. Similarly, the collection of the interest cannot be ordered by the court *ex officio*; the interest should have been requested by the parties.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The party whose rights were recognised by a domestic court decision can apply to any enforcement office in Turkey in order to enforce the decision.

In case of recognition/enforcement of foreign judgments, the following requirements must be met:

- The decision must be final and binding according to the law of the state where the decision was rendered.
- The subject matter of the decision must be out of the scope of the Turkish courts' exclusive jurisdiction.
- The decision must not be in evident contradiction with the Turkish public order.
- The counter party's right of defence must be respected and complied with.

In addition, for the enforcement of foreign decisions there must be reciprocity between Turkey and the state where the decision was rendered.

In principle, the courts examine the existence of the recognition and/or enforcement requirements *ex officio*.

9.4 What are the rules of appeal against a judgment of a civil court of Turkey?

The grounds for appeal are: (i) wrongful application of the law or the agreement between the parties; (ii) absence of preliminary requirements to file an action; (iii) unlawful dismissal of evidence; and (iv) the existence of procedural mistakes or deficiencies affecting the judgment.

In principle, all final decisions of the courts of first instance can be appealed. Interim decisions, however, can only be appealed along with the final decision. It should be noted that only decisions concerning a movable or debt amounting to or exceeding TRY 2,080 can be appealed. Similarly, a hearing can only be requested before the Court of Appeals, if the value in dispute is equal to or over TRY 21,220.

Aside from exceptional time limits set by area-specific legislations such as the Labour Code, the time limit to file an appeal is 15 days from the notification of the decision for decisions rendered by the courts of first instance, and eight days for decisions rendered by the courts of peace.

A decision by the court of appeal can also be challenged by the parties by way of requesting the revision of the decision from the same chamber of court of appeal which ruled over the appeal. In principle, a revision of the decision can be requested within 15 days from the notification of the court of appeal decision and only if the value in dispute is equal to or over TRY 12,690.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Turkey? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Methods of alternative dispute resolution such as arbitration and mediation are available, and arbitration is the most frequently used method of ADR in Turkey.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The main legislation regulating international arbitration is the International Arbitration Code numbered 4686, which is essentially based on the UNCITRAL Model Law.

The CCP regulates domestic arbitration but it is not applicable to international arbitration unless stated otherwise in the International Arbitration Law.

Turkey is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the ICSID Convention and the European Convention on International Commercial Arbitration of 1961.

Mediation is regulated under the Mediation in the Civil Disputes Code numbered 6325 and dated 22.06.2012.

1.3 Are there any areas of law in Turkey that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Disputes arising from or relating to rights *in rem* in immovable properties that are located in Turkey, and disputes that cannot be subject to the parties' will, such as disputes relating to criminal, administrative or family law, are not arbitrable or subject to mediation. In terms of labour law, only re-instatement cases can be arbitrable, provided that the parties execute the arbitration agreement after the termination of employment.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Turkey in this context?

Parties can apply to the courts for interim measures and attachments prior to or during the arbitration proceedings, provided that such application does not constitute a contradiction to the arbitration agreement between the parties.

The arbitrator or arbitral tribunal may also decide to grant an interim measure or attachment upon the request of either party during the arbitration proceedings, unless otherwise agreed. If a party fails to abide by the restrictions imposed by an interim measure or attachment, then the other party may request the assistance of the competent court.

If either party files a lawsuit in the court despite the presence of an arbitration agreement, the court can only dismiss the case based on the arbitration agreement if it is invoked by the parties.

The parties may agree to apply for mediation prior to or during the litigation process. The court may encourage but cannot order the parties to mediate.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Turkey in this context?

Arbitral awards cannot be appealed for a review of the dispute on the merits; they can only be set aside with an application of the defendant to the competent court of first instance. Filing an action in order to set aside an arbitral award does not prevent or stop the execution of the arbitral award, since arbitral awards become enforceable at the moment they are rendered. However, the decision on setting the award aside can be appealed.

The agreement that the parties reach at the end of the mediation process is binding. The parties may request that the court gives an annotation on the enforceability of the agreement and request the enforcement of the agreement with this annotation.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Turkey?

There are two major bodies that currently provide services for domestic arbitration in Turkey: the Istanbul Chamber of Commerce; and the Union of Chambers of Commerce, Industry, Maritime Trade and Commodity Exchanges of Turkey. In addition, the Istanbul Arbitration Centre, which was recently established with the law numbered 6570 on January 1, 2015, will soon become operational and provide arbitration or ADR services for all private disputes of both foreign and domestic nature.



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She is also experienced in areas where commercial and criminal laws overlap. She has advised several multinational companies in relation to white collar crimes. Her practice also includes labour law issues and she has advised clients in relation to employment contracts, restructuring facilities and related litigation.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

With the enforcement of the recent law establishing the Istanbul Arbitration Centre and the Mediation in Civil Disputes Code, Turkey is expected to show progress in becoming more arbitration-friendly and to focus on making arbitration and ADR methods more accessible.

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Ukraine

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Ukraine got? Are there any rules that govern civil procedure in Ukraine?

Ukraine is a civil law country. In Ukraine civil disputes may be resolved by courts of four jurisdictions: (1) Civil (general); (2) Commercial; (3) Administrative; and (4) Criminal. Courts of each of the named jurisdictions operate in accordance with the process Codes, respectively the: (1) Civil Process Code; (2) Commercial Process Code; (3) Administrative Process Code; and (4) Criminal Process Code. Jurisdiction of the General Civil courts encompasses all disputes under jurisdiction of Ukrainian courts except disputes that fall under jurisdiction of other courts according to provisions of the law. Administrative courts have competence over disputes arising out of public legal relations involving an official or a state body, along with private entities or persons. Commercial courts consider disputes involving legal entities and entrepreneurs that arise out of business relations exhaustively named by this Code. In addition to that, Criminal courts in Ukraine are competent to consider civil disputes arising out of criminal offences and they do so in the same process with the consideration of relevant criminal offences.

1.2 How is the civil court system in Ukraine structured? What are the various levels of appeal and are there any specialist courts?

The court system of Ukraine consists of courts of general jurisdiction and a court of constitutional jurisdiction. All courts except the Constitutional Court of Ukraine form the system of general jurisdiction courts, which are also called specialised courts, meaning a specialisation on Civil (general), Commercial, Administrative and Criminal cases. The Constitutional Court of Ukraine is the only court of constitutional jurisdiction. All courts of general jurisdiction are divided by specialisation, instance levels and by territorial competence. Disputes are primarily considered by the first instance of courts. Courts of the first instance that consider Civil and Criminal cases are local courts (district and town courts). Commercial and Administrative courts of the first instance are regional courts (their jurisdiction covers areas that include many localities). Each type of court has its appeal vertical, divided into instances:

- a) Courts of the first instance – respective regional Courts of Appeals.

- b) Regional Courts of Appeals – High Specialised Court (also called Courts of Cassation).

- c) Courts of Cassation – the Supreme Court of Ukraine.

Appeals to the Supreme Court of Ukraine may be filed on limited grounds only.

1.3 What are the main stages in civil proceedings in Ukraine? What is their underlying timeframe?

1. The main stages in general Civil courts are the following:
 - 1.1. First instance – the general maximum term is two months from the commencement of procedure, with few exceptions. There is the possibility to prolong the term for up to 15 days on special grounds.
 - 1.2. Court of Appeals – the maximum term is two months from the commencement of procedure for definitive resolutions and 15 days for procedural and interim resolutions, with the possibility to prolong the term for up to 15 days on special grounds.
 - 1.3. Court of Cassation – the maximum term is one month from the commencement of procedure for definitive resolutions and 15 days for procedural and interim resolutions.
2. The main stages in Commercial courts are the following:
 - 2.1. First instance – the general maximum term is two months from the commencement of procedure, with few exceptions. There is the possibility to prolong the term for up to 15 days on special grounds.
 - 2.2. Court of Appeals – the maximum term is two months from the commencement of procedure for definitive resolutions and 15 days for procedural and interim resolutions.
 - 2.3. Court of Cassation – the maximum term is one month from the commencement of procedure for definitive resolutions and 15 days for procedural and interim resolutions.
3. The main stages in Administrative courts are the following:
 - 3.1. First instance – the general maximum term is one month from the commencement of procedure, with few exceptions.
 - 3.2. Court of Appeals – the maximum term is one month from the commencement of procedure for definitive resolutions and 15 days for procedural and interim resolutions, with the possibility to prolong the term for up to 15 days on special grounds.
 - 3.3. Court of Cassation – the maximum term is one month from the commencement of procedure.

Consideration of appeals in the Supreme Court of Ukraine in all cases is limited to one month from the commencement of procedure.

1.4 What is Ukraine's local judiciary's approach to exclusive jurisdiction clauses?

Parties to a cross-border contract may provide for an exclusive jurisdiction clause that will be recognised and supported by Ukrainian courts unless a dispute falls under mandatory jurisdiction rules set forth by the applicable laws, first of all the Law of Ukraine "On Private International Law". As regards the jurisdiction of Ukrainian courts, any agreement referring the dispute to a particular Ukrainian court shall not be recognised in Ukraine because the competence of Ukrainian courts is determined by procedural laws.

1.5 What are the costs of civil court proceedings in Ukraine? Who bears these costs? Are there any rules on costs budgeting?

The costs of court proceedings consist of court duty and the expenses of the litigating parties. While amounts of court duties are set forth by the law, expenses vary from case to case. The court duties are usually payable by the party that initiates a proceeding or some procedural actions in advance and vary depending on court jurisdiction, instance and the nature of the claim or motion. E.g. a pecuniary lawsuit in the general Civil court of first instance would be subject to a court duty of a min. EUR 13 and max. EUR 197 (if transferred from UAH to EUR as of 15 Jan 2015). The same lawsuit in the Commercial court would entail a min. EUR 99 and max. EUR 3,944 court duty; in the Administrative court – min. EUR 99, max EUR 263. Statements of appeals and cassation are mostly subject to a percentage of court duty of first instance (50% in most cases). As a rule, courts allocate all officially confirmed costs of proceedings between parties depending on the final judgment and in proportion to upheld claims. It also should be noted that court may decide not to recognise some expenses of a party as a cost of proceeding, thus refusing to reimburse it on account of a failing party. There are no legislative binding rules on court costs budgeting for private entities. State entities apply court budgeting rules as a part of general budgeting rules introduced in relation to them.

1.6 Are there any particular rules about funding litigation in Ukraine? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no particular rules on litigation funding in Ukrainian law, with the exception of state legal aid, where those eligible for aid may receive it from the authorised state authorities. Any fee structure, including hourly rates, task-based billing, conditional or contingency fees, is permitted in Ukraine. All of these fee structures are used in practice. The law does not stipulate any particular amount of fees or limit the fees. There are no specific rules pertaining to the security of lawyers' costs. Insurance of litigation costs is available on a voluntary basis. Third-party funding is allowed. However, it is impossible to have legal fees and other litigation-related expenses compensated unless they are actually paid/made specifically by the party to the proceedings and no later than the day when the proceedings are finalised, which usually means the date of the court decision. Courts also use discretion in deciding whether legal fees that are claimed for compensation are reasonable or not.

1.7 Are there any constraints to assigning a claim or cause of action in Ukraine? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Ukrainian law allows assigning of claims except for claims specifically mentioned by the law and claims inseparable from particular persons. In general, a claim can be assigned in the course of proceedings. After the assignment of rights in disputed legal relationships, the court will replace the assigner who is the party to litigation by the assignee. All actions that have already been performed in court proceedings by the assigner are valid and legally binding for the assignee. However, it may be problematic to assign a claim when a judgment has already been made without obtaining a separate judgment recognising such an assignment as far as the law enforcement service acts on the basis of court resolutions but not of private contracts.

Ukrainian legislation does not contain strict rules obliging particular participants to litigation to finance proceedings personally. As a rule, it is enough for the court that necessary fees were paid by the party to the proceedings and the acceptable evidence proving this fact was filed with the court. However it should be noted that a non-party would not be entitled to reimbursement of costs on account of the failing party.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The constitution of Ukraine sets forth that the courts of Ukraine have jurisdiction over all and any relationships taking place in Ukraine. Process regulations provide for some formalities that a claimant must comply with prior to the start of a procedure, and these formalities vary depending on jurisdiction (Civil, Commercial, Administrative or Civil within Criminal process), the kind of process and the instance. There are also several sorts of relationships (specifically listed by law) where the completion of specific pre-litigation procedures is required as a condition precedent to the commencement of a court procedure – more often this is a requirement to send a claim to the defendant and to give a definite period of time for a response.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The statute of limitations is generally treated as a substantive law issue, however the lapse of a limitation period does not result in the termination of the civil relationship and impacts only the rights of a person to seek a remedy in courts. The general limitation period is three years from the time when a claimant learned, or could have learned, of the infringement upon his rights – this term applies in all cases unless another term is set forth by law. Parties to contractual relationships may extend the limitation period between themselves unless otherwise specifically provided for by law, however it is not permitted to reduce it. In most cases courts may apply limitation periods provided that a party to the dispute demands so and before a definitive judgment is delivered. Under the circumstances set forth by law, a limitation period may be

suspended for a certain period or discontinued and then restarted. There are also a few specific areas where no limitation period is applicable.

In administrative proceedings the limitation term is six months from the time when a claimant learned, or should have learned, that his rights were infringed upon. In some cases, including those related to possible monetary relations between the state bodies and a legal entity or an individual (fines, penalties, etc.), a one-month term for filing an administrative claim is applicable.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Ukraine? What various means of service are there? What is the deemed date of service? How is service effected outside Ukraine? Is there a preferred method of service of foreign proceedings in Ukraine?

Commercial, civil and administrative dispute resolution proceedings are commenced through the filing of a statement of claim, to which the claimant must attach documents specifically required by the process of law.

In commercial proceedings, before filing a claim with the court a claimant must serve a copy of the statement of claim with all annexes on the defendant and attach evidence of the above to the statement of claim when filed. In civil and administrative proceedings the court serves a copy of the statement of claim upon the parties itself. Thus the claimant must also attach to its statement of claim the number of copies corresponding to the number of parties. Commercial, General or Administrative courts commence their proceedings and schedule a court session (the first one as well as the following) by issuing a ruling. The court must serve all parties through means of communication that provide a record of the notification.

The courts prefer using registered mail as a communication method, but on some occasions they also use other methods, especially when parties require so. The deemed date of service is the day when a party receives a communication. Both service of Ukraine court proceedings abroad and service in Ukraine of overseas court proceedings are effected through legal mechanisms set forth by the applicable international treaties of Ukraine. Such treaties include e.g. the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Hague Convention on Civil Procedure and the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, etc. Depending on the applicable treaty, service abroad and from abroad may be arranged through the Ministry of Justice of Ukraine or directly through relevant courts.

3.2 Are any pre-action interim remedies available in Ukraine? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies are available mostly in commercial litigation proceedings (i.e. in Commercial courts). In commercial proceedings they include:

- (i) the provision of evidence;
- (ii) the observation of premises related to the disputed matter; and
- (iii) arrest of assets.

In order to obtain pre-action interim remedies, an interested party should file a motivated motion with the court; the latter has the

authority to uphold the motion as well-grounded or to dismiss it as not sufficiently grounded.

A claimant must file a statement of claim within five days following the court ruling on granting pre-action interim remedies. If the claimant fails to do so, pre-action remedies terminate.

Also, in any type of proceedings various interim measures aimed at securing the claim are available after the claim is filed, such as seizure of assets, prohibition of certain actions, obligation to perform certain actions, suspension of a government agency's decision, etc.

3.3 What are the main elements of the claimant's pleadings?

In all proceedings there are mandatory requirements regarding the formal and substantive part of pleadings that reflect specifics of commercial, civil and administrative proceedings. In all of them the main elements form a descriptive part (the name of the court, the details of the parties, the amount or non-monetary definition of the claim), a part for the substantiation of claim (references to applicable laws, a description of circumstances, consideration of evidence and proof etc.) and a request for relief. It is very important to correctly formulate a request for relief, as in practice courts formulate their resolutions based on how a request for relief has been worded and there is no concept of implied conditions when interpreting a court resolution.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A claimant may amend the subject and grounds of his claim prior to the commencement of consideration of the case on merits and may reduce or enhance the amount of his claim prior to the delivery of a definitive resolution.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In administrative proceedings there is no concept of counterclaim and set-off. This is allowed in civil and commercial proceedings, where a defendant can file a counterclaim prior to the start of consideration of the case on merits and set-off may be a part of such reciprocal claims. Courts allow counterclaims to be attached to the proceeding and be considered simultaneously with the initial claim if the counterclaim has enough connection with the initial claim and their separate consideration would be less efficient than joint.

A statement of defence is allowed in all proceedings and its main elements are mostly similar to those of pleadings, with differences dictated by the nature of the defence.

4.2 What is the time limit within which the statement of defence has to be served?

There is no statutory time limit for serving the statement of defence by the defendant. Normally the statement of defence should be submitted before the court commences consideration of the case on the merits.

However, after the commencement of consideration of the case on the merits, the parties of proceedings may additionally substantiate their case in their explanations, motions, etc.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Process law in Ukraine allows a party to be substituted on the defendant's side and to engage additional defendants. Each of the civil, administrative and commercial process Codes has rules on such actions. Formally, these would not constitute a passing on of liability or an action by a defendant against a third party; instead they work as involvement by the court of a new or additional defendant.

4.4 What happens if the defendant does not defend the claim?

In this case a court would consider the matter on the basis of presented evidence. If a defendant accepts the claim then the court would uphold the claim unless this would infringe other persons' rights, in which case the court should consider the case, disregarding acceptance of the claim by the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

Defendants are not prohibited from disputing the court's jurisdiction, however there is no specific regulation on that and such a dispute can be effected in the course of the general proceedings of an appeal. There is a separate block of regulation on recusal of judges in each of the civil courts' jurisdictions.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

It is provided by law that in all types of civil proceedings a third party can join an ongoing proceeding either as a party that has independent claims on the subject matter or a party without independent claims but whose interests may be affected by the judgment. Correspondingly, a third party with its own claims enters the process by filing a claim against one or both of the parties to the ongoing proceedings, while a third party without claims enters the process by filing a statement of joining or on the basis of a court ruling. In both cases such a joining of procedure is permitted prior to the definitive resolution of the case. A third party with its own claims possesses all of the rights and obligations of a claimant and a third party without claims has limited procedural status.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

In all civil proceedings it is possible to consolidate two or more separate cases into one proceeding if they have the same claimant or the same defendant and if all claims are integrally connected.

However, even if two or more separate claims are connected, they cannot be consolidated into one proceeding if they must be considered within different types of proceedings (for example, commercial and administrative).

5.3 Do you have split trials/bifurcation of proceedings?

Administrative and general Civil courts are empowered to bifurcate the proceedings into separate trials in the case joint consideration of the claims is unnecessarily complicated or may slow down the proceedings. Commercial courts do not have the authority to split trials.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Ukraine? How are cases allocated?

In each court cases are allocated automatically by a special software system. The purpose of automated allocation is to provide for the impartial consideration of disputes and to resist corruption, as well as using it as a workload management tool.

6.2 Do the courts in Ukraine have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Ukrainian courts have wide authorities as to the management of the cases they consider. In particular, courts may adjourn hearings in some cases, determine the procedure of a hearing, terminate the proceeding, hold a hearing outside of the court premises, join or split proceedings, etc. However courts may act in strict compliance with process laws only and they cannot use their own discretion in procedural matters unless such actions are directly provided by the law.

The parties may file various interim applications, for example: motions for engagement of third parties; preliminary injunctions or orders; requests for evidence; requests for expert opinions; and summoning and questioning witnesses (the latter is permitted in general Civil and Administrative cases), etc.

Usually a party filing an interim application covers the costs that arise as a result. For example, the party requesting an expert opinion shall make advance payment for the services of the expert or expert institution. These costs are finally allocated by the judge when rendering the judgment.

6.3 What sanctions are the courts in Ukraine empowered to impose on a party that disobeys the court's orders or directions?

The courts may impose procedural sanctions (such as a warning and a ban from attending a hearing) and monetary fines. In addition, judges may notify advocates' chambers if they think that a licensed advocate breaches the applicable rules. There is also a criminal responsibility for purposeful non-compliance with court judgments.

6.4 Do the courts in Ukraine have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Courts have the authority to dismiss a statement of claim entirely but they cannot strike out part of a claim. If there are grounds to conclude that part of a claim does not correspond to the applicable procedural requirements, a court would dismiss the entire claim. Courts exercise this authority in cases when there are deviations from regulations that govern the filing of claims, i.e. on procedural grounds as a rule.

6.5 Can the civil courts in Ukraine enter summary judgment?

There is no concept of summary judgment in Ukrainian process law or analogous. At the same time the law provides for some specific procedures in the exhaustive list of cases where simplified or shortened procedures may apply unless an interested party initiates a full-scale litigation.

6.6 Do the courts in Ukraine have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Ukrainian courts have powers to discontinue and stay the proceedings. The lists of grounds based on which a proceeding may be discontinued or stayed are specifically set forth by the respective process Codes. A court stays a proceeding when circumstances arise that hinder further consideration of the case if such circumstances are of temporary nature and after their lapse the proceeding may be continued. A court discontinues a proceedings when there are no longer grounds for dispute or there is no party that can act as a claimant or a defendant.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Ukraine? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There is no concept fully analogous to disclosure in Ukrainian civil process, however there is a procedure of provision of evidence where courts issue mandatory ruling to parties of a dispute or third parties. The party to a case may file a motion to the court compelling any person to produce evidence, and must specify the piece of evidence, substantiate why such piece of evidence is relevant and indicate who possesses such piece of evidence. Provision of evidence pre-action is also possible in some cases, which may be done via motion to the court as well, and there are short terms after granting the provision of evidence during which an initiating party is obliged to file a statement of claim otherwise provision of evidence loses its legal status in the respective procedure.

7.2 What are the rules on privilege in civil proceedings in Ukraine?

Some pieces of information are treated by Ukrainian law as

information with restricted access or privileged. The best examples are client-advocate privilege, military information with restricted access and personal medical information. In cases when it is necessary to obtain and consider such information in a court proceeding, a court would issue a special ruling sanctioning necessary actions including conduct of closed court hearings.

7.3 What are the rules in Ukraine with respect to disclosure by third parties?

Courts may compel any person, notwithstanding whether they are a participant to the case or not, to produce necessary evidence. It is also required that a party that initiates provision of evidence substantiates the impossibility to obtain such evidence without the involvement of the court.

7.4 What is the court's role in disclosure in civil proceedings in Ukraine?

Courts are authorised to decide whether evidence is admissible and relevant to the proceeding or not and they can decide whether to sanction mandatory provision of evidence or not.

In administrative proceeding courts may also request evidence at their own initiative. Courts may either order the parties or third parties to submit evidence directly to the court or through one of the parties to the proceeding.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Ukraine?

General regulations of law apply to the use of documents obtained during court proceedings. In general, any person who obtained a document or has been acquainted with information with restricted access or under privilege is obliged to treat it as provided by the respective laws irrelevant of whether this was received during a court proceeding or otherwise. At the same time there are specific provisions in procedural Codes requesting courts and other entities to return originals of documents to the owner if keeping of copies thereof is sufficient for the statutory purposes.

8 Evidence

8.1 What are the basic rules of evidence in Ukraine?

According to the Ukrainian process laws, any proved facts and circumstances on which courts may ground their resolutions may work as evidence and a party that refers to evidence must prove its validity. The two main requirements regarding evidence are: it should be relevant; and admissible. Courts may dismiss evidence if a presenting party cannot prove the relevance and admissibility of the evidence. While relevance of evidence mostly relates to material aspects of disputes, admissibility is mostly connected with procedural aspects thereof.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In Commercial, Civil and Administrative proceedings the courts accept documentary and material evidence, including written

explanations regarding the merits of the case, submitted by the parties and other persons, expert evidence and witness testimonies (except Commercial proceedings, where witness testimonies are not a source of evidence).

Expert evidence is allowed as written reports submitted by the experts appointed by the court. The report should answer the questions determined by the court. The parties are allowed to submit suggestions to the court regarding the experts to be appointed and the questions to be addressed to the experts.

Though witness evidence as such is not allowed in Commercial proceedings, individuals may appear before the court to provide explanations regarding the facts of the case.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A witness is obliged to testify and can refuse to do so only if such a testimony is related to his or her person and interests, as well as to that of his or her relatives. The procedural rules permit interrogation and cross-examination of witnesses in court sessions. The parties are allowed to interrogate the witness under the supervision of the court, which may dismiss some of the questions if they are not permissible or relevant. The court may also interrogate the witness. Refusal of a person to testify at the court's request without a permitted reason or purposeful giving of untrue testimonies may establish a criminal offence. It is only courts that can take witness testimonies within court proceedings thus there is no concept of deposition given to any other official body.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are specific regulations on involvement and activity of expert witnesses set forth by the process Codes as well as, more specifically, by the Ministry of Justice, which mostly supervises the activity of experts. Experts are liable for refusal to give a report without a permitted reason and for giving an incorrect report – in some cases such wrongdoings may establish a criminal offence.

An expert report is to be made in writing but an expert may be called to testify in court if additional explanations or clarifications with regard to the expert report are required. The expert owes his/her duties directly to the court. There are state and private expert institutions and there are areas of expertise and types of proceedings where only state institutions may provide expert reports.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Ukraine?

The general rule is that civil proceedings in Ukraine are competitive, i.e. parties are supposed to substantiate their positions. At the same time, courts in Ukraine have authority to assist parties of proceedings in the provision of evidence by issuing mandatory orders requesting any person to provide evidence. In addition to that, in Administrative proceedings courts are authorised to request evidence on their own initiative. Courts exercise wide discretion in deciding whether to order the provision of evidence or not and also decide on admissibility and the relevance of evidence presented by the parties.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Ukraine empowered to issue and in what circumstances?

Courts issue: a) definitive resolutions that settle disputes or confirm facts that have legal consequences; and b) procedural orders, rulings, etc., that are instruments of proceeding management. Ukrainian names for resolutions and orders depend on the kind of proceeding, court jurisdiction (general Civil, Commercial or Administrative), composition of the court (one judge or a panel) and instance of proceeding (First, Appeal or Cassation). Apart from that, some courts are authorised to issue "separate rulings" that may be addressed to any person regarding which a court identified an illegal activity and requesting such a person to terminate the violations of laws.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

A court may grant damages in the amount of actual loss or lost profit, provided that those are confirmed by proper evidence. Ukrainian jurisprudence has very strict standards of proof in relation to damages. In particular, the court will grant damages only if the amount is reasonable and there is evidence of the direct causation link between those damages and the defendant's violation of law. The winning party may usually recover its court expenses, including the court duty, at the expense of the losing party. However compensation of expenses that exceed the minimum level possible is rarely granted by the courts. All issues concerning the claim, including the compensation of court expenses, must be resolved in the judgment on the merits. The courts may not award post-judgment compensation.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforced by the State Enforcement Service and there are specific regulations that govern enforcement proceedings. As a rule, a holder of a court award has to apply to the State Enforcement Service with a statement of enforcement and, if such application is done in accordance with the applicable regulation, the State Enforcement Service will commence an enforcement proceeding. In the course of the enforcement proceeding, parties to it (claimant and defendant), and in some cases third parties, may apply to the courts or vertically up to the State Enforcement Service with appeals and statements regarding the protection of their interests.

Foreign judgments are subject to enforcement proceedings in the same manner as domestic judgments, but after their recognition as set forth by the law, including international treaties that govern such recognition or on the reciprocity basis which is assumed to exist unless the contrary is duly proved.

Provisions of the Civil Process Code apply to foreign judgments at all times when there is no international treaty on the matter at hand. The Civil Process Code of Ukraine provides that enforcement of a foreign court resolution can be rejected if specifically listed circumstances exist.

9.4 What are the rules of appeal against a judgment of a civil court of Ukraine?

Definitive resolutions of Administrative, Commercial or general Civil courts of first instance may be appealed to a competent court of appeals within 10 days of issuing; procedural resolutions (if separate appeal thereof is permitted) may be appealed within five days of issuing. The grounds for appeal usually include: (1) a substantial violation of procedural law by the court when resolving the dispute; (2) incomplete findings regarding the facts of the case; and (3) incorrect application of the law.

Should any of the parties be dissatisfied with the decision of the court of appeals, such decision (if necessary, together with the first instance court decision) may be further challenged by filing a cassation complaint to a competent High Specialised Court within 20 days from the announcement of the court of appeals resolution.

A party that is not satisfied with the outcome of the case after it has been considered by a High Specialised Court may file a complaint on one of the listed grounds with the Supreme Court of Ukraine. The grounds for such complaint are very limited; the most common ground being a different application of the substantive law by the courts in analogous cases leading to rendering different judgments in similar legal relationships. In all civil proceedings a complaint to the Supreme Court of Ukraine may be filed in the terms starting from 10 days and up to 12 months from the day when a ground for complaint arose, depending on the type of case.

In the case an appellant receives a court resolution after the day of its issue, on a good reason, then the above terms start from the day of receipt of the resolution. Mentioned terms may be renewed by the court at the request of the appellant if a failure to meet the above terms was attributable to a good reason.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Ukraine? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In addition to courts, Ukrainian law officially recognises two dispute resolution methods: (1) domestic arbitration; and (2) institutional or *ad hoc* international commercial arbitration.

Generally, commercial disputes with few exceptions may be referred to either domestic or international commercial arbitration (in case of cross-border disputes). Mediation and Expert Determination as concepts are not set forth by the law but disputing parties may agree on any procedure thereof unless it contradicts the applicable laws in general.

Foreign arbitral awards can be enforced in Ukraine pursuant to international treaties, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the European Convention on International Commercial Arbitration (Geneva, 1961), as well as under the reciprocity principle. In the latter case, it shall be presumed that reciprocity exists unless it is proven otherwise. As regards international arbitral awards rendered in Ukraine, their enforcement is covered by the Act of Ukraine “On International Commercial Arbitration” and the Civil Process Code of Ukraine,

while awards of domestic arbitration courts are enforced pursuant to the Act of Ukraine “On Arbitral Tribunals” and respective provisions of the Civil Process Code or Commercial Process Code of Ukraine, depending on the status of parties involved in the disputes (i.e. legal entities or individuals). Ukrainian law does not provide for any rules for mediation as a dispute resolution method. Ukrainian law provides for an Ombudsman as one of the officials engaged in the protection of the constitutional rights of citizens. However, an Ombudsman in Ukraine is not engaged directly in dispute resolution and may not issue binding decisions. During the last several months of 2014 the establishment of a business Ombudsman office has been discussed in legislative and governmental bodies as well as among the business community, thus it is quite possible that in the near future such an office will be introduced. Civil disputes falling under the jurisdiction of the Administrative or Criminal courts may not be resolved under ADR procedures.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The main rules governing domestic and international arbitration with the seat of the tribunal in Ukraine are the Act of Ukraine “On International Commercial Arbitration” (drafted on the basis of OECD sample) and the Act of Ukraine “On Arbitral Tribunals”. Some rules concerning international and domestic arbitration are also found in the Civil Process Code, the Commercial Process Code, the Act of Ukraine “On Enforcement Proceedings” and the Act of Ukraine “On Private International Law”. The acting arbitration courts operate according to their bylaws.

1.3 Are there any areas of law in Ukraine that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

There is a category of disputes that cannot be resolved outside of the state courts, which includes, as a rule, relationships where state involvement is deemed indispensable, such as: disputes on the invalidation of acts or decisions of state bodies; disputes arising out of public procurement contracts; disputes related to state secrets; family disputes, except marriage contract disputes; insolvency cases; disputes involving a state body or a local government or state enterprises, etc.; disputes concerning real estate; disputes regarding the establishment of legal facts; corporate, labour, consumer rights’ protection and other disputes falling within exclusive jurisdiction of Ukrainian state courts; and disputes falling under the jurisdiction of the Constitutional Court of Ukraine.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Ukraine in this context?

Under the general rules, a national court may not intervene in arbitral proceedings except for very few exceptions provided by the law. If any of the parties so requests, a state court shall stay its proceedings

and refer parties to arbitration in disputes that are covered by an arbitration agreement, unless it finds that the latter is null and void. A party may also request a competent court to decide the issue of arbitral tribunal jurisdiction.

As regards measures in the protection of international arbitration, the Act of Ukraine “On International Commercial Arbitration” provides that “it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, a court to order interim measures of protection and for a court to take a decision granting such measures”. However, since no specific procedural rules for granting interim measures in support of arbitration proceeding exist and no state court is specifically assigned for such matters, it is not common for a state court to grant interim arbitration measures.

At the same time, it is possible to obtain the interim measures at the stage of recognition and enforcement of an arbitral award in Ukraine.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Ukraine in this context?

According to Ukrainian law, arbitration awards are binding upon the parties and enforceable through the state courts and State Enforcement Service. For enforcement of an arbitration award, a claimant needs to apply to the general Civil court for getting an enforcement order within three years from the date of the arbitration award. An arbitral award may be set aside by a local court if reasons for that, specifically listed by law, exist. The application for setting aside the award should be made by the complainant within three months from the date of the award and reasons for setting aside an award include those which undermine competence of the arbitration tribunal or the correctness of the arbitration process. There are no sanctions provided by law for refusing to mediate. In the case disputing parties reach a settlement agreement in the course of mediation or expert determination, it would not need to be sanctioned by the court, however if such an agreement is reached simultaneously with consideration of the same dispute in the court then the agreement would be subject to the court’s approval.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Ukraine?

There are two main international commercial arbitration institutions in Ukraine: the International Commercial Arbitration Court; and the Maritime Arbitration Commission of the Ukrainian Chamber of Commerce and Industry. Both institutions consider international disputes only.

There are a number of arbitration institutions at various industrial organisations and professional associations. Overall, as of the end of 2014, there are more than 400 arbitration institutions registered in Ukraine; a large majority of which do not function actively.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Litigation remains the prevailing method of dispute resolution in Ukraine, though arbitration is also frequently used. Mediation is emerging, but is rarely used. While negotiations are generally recognised as a helpful means of dispute resolution, Ukrainian businesses are mostly reluctant to involve a third person (a mediator) in the negotiations process as there are no mediation institutions or individual experts who enjoy the necessary level of reputation. When concluding commercial contracts, domestic businesses mostly rely on litigation as a dispute resolution method in the case of a conflict with their contractors. As an exception from this general trend, banks rather frequently insist on referring disputes with borrowers to the competence of arbitration tribunals but this is due to the fact that these tribunals operate on the basis of banking associations. As for international trade, it also happens that, notwithstanding the inclusion of an arbitration clause in the contract, foreign businesses end up involved in domestic litigation mostly because their Ukrainian counterparts tend to question the validity of arbitration awards when the awards do not meet their expectations.

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Zavadetskyi Advocates advise and act in Dispute Resolution and Criminal law matters, as well as a broad range of business and regulatory matters, and embrace many aspects of local and international legal issues.

Our key lawyers are licensed and practising advocates and contribute their remarkable previous experience to the practice, such as being a judge of the Supreme Court, a high-ranking police officer or a partner in a leading investment bank.

Our dispute resolution practice intersects the domains of Civil, Commercial, Administrative and Criminal law. The core of our clientele are large local and international companies such as ING Bank, Piraeus Bank, OTP Bank, Citigroup, AXA Insurance, ZTE Corporation, British American Tobacco, Reader's Digest, etc. We also assist individuals, first of all in the sphere of advocacy, and we have clients, along with Ukrainians, from the USA, Canada, the UK, China, Saudi Arabia, Russia and Israel.

United Arab Emirates

International Advocate Legal Services

Diana Hamadé Al Ghurair



I. LITIGATION

1 Preliminaries

1.1 What type of legal system has the United Arab Emirates got? Are there any rules that govern civil procedure in the United Arab Emirates?

The United Arab Emirates (the UAE) is a federation of seven emirates comprising Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain, and was formed in 1971. The UAE legal system is founded upon civil law principles (most heavily influenced by Egyptian law) and Islamic Shari'a law, the latter constituting the guiding principle and source of law (Public Order).

UAE legislation is formulated into a number of major codes providing for general principles of law with a significant amount of subsidiary legislation. The UAE has, over the last 30 years, expanded its legislation to include a comprehensive body of federal legislation being established in the form of federal codes of law.

There are federal codes of law which apply in the emirates dealing with the most important and fundamental principles of law. The emirates respectively have laws enacted by their relevant rulers which relate to matters which are more administrative in nature, such as the establishment and operation of government-affiliated entities.

Courts in the UAE render decisions through judges rather than juries. Though the system does not operate based upon judicial precedent, a court's past decisions can be persuasive, particularly where the Supreme Court espouses principles to serve as guidelines for other courts. Additionally, decisions are often based upon established usage and custom as well as the Shari'a, which can also serve as guidelines for a court in the absence of Supreme Court pronouncements.

Civil procedure of the courts is governed by the Civil Procedures Federal Law No. 11 of 1992.

1.2 How is the civil court system in the United Arab Emirates structured? What are the various levels of appeal and are there any specialist courts?

Although the UAE federal constitution permits each emirate to have its own judicial authority, all emirates other than Dubai and Ras Al Khaimah have brought their judicial systems into the UAE Federal Judicial Authority. While Dubai and Ras Al Khaimah are subject to the federal laws of the UAE, they do not come under the federal justice system as they retain the right to administer their own courts. Abu Dhabi has also recently set up its own courts and now has two sets of courts, federal and local.

The Dubai International Financial Centre (DIFC) Courts were also set up in Dubai in 2006 and follow the English legal system.

Every emirate in the UAE has its own courts. All UAE courts comprise a Court of First Instance, a Court of Appeal and the Supreme Federal Court based in Abu Dhabi, except for the Dubai Courts, which has its own Court of Cassation. Each of these courts has a civil division, a commercial division, a criminal division and a Shari'a division.

There are one or three judges in the Court of First Instance, three judges in the Court of Appeal and five judges in the Court of Cassation. The UAE courts conduct themselves in the Arabic language and so legal representation not only requires advocates who are properly licensed to appear before the courts, but also requires that they are conversant in Arabic. All documents submitted to the courts must also be translated into Arabic to be admissible.

The only specialist courts are the Rent Disputes Courts. The DIFC Courts can also be called specialist courts since the type of disputes referred to them are civil and commercial only, they must be within the DIFC Courts' jurisdiction and they are the only courts which conduct themselves in English and so the legal representation is conducted in English.

1.3 What are the main stages in civil proceedings in the United Arab Emirates? What is their underlying timeframe?

Before filing a case, the litigant should make sure that the court in which the case is to be filed has the jurisdiction to hear the case according to the provisions of the UAE law. Jurisdictional matters can be quite tricky.

The first step to file a case in a federal court, whether it is a civil, labour or personal status lawsuit, is to submit a complaint to the Reconciliation and Settlement Committee or the Family Guidance Section, which will try to reach an amicable settlement between the parties involved in the dispute. If an amicable settlement was impossible, the litigating party can apply for a no objection letter from the relevant reconciliation committee.

The competent court may not look into the action unless the matter has been presented to the reconciliation committee or a no objection letter has been issued by the committee. The proceedings in Dubai in relation to civil and commercial matters commence at the dispute resolution court, where the parties will be referred to an expert for an expert opinion on the matter which will be submitted to the court to register the case. As to the personal status court in Dubai, it follows the system adopted by the federal courts.

The average length of time of civil proceedings before the Court of First Instance when the claim is contested ranges from 6 to 12 months. Given that most cases are subject to two appeals, a final judgment will normally not be made earlier than two years after the initial filing of the claim.

1.4 What is the United Arab Emirates' local judiciary's approach to exclusive jurisdiction clauses?

The UAE courts have jurisdiction to hear actions filed against both a UAE national and foreign persons having a domicile or a place of residence in the UAE.

Under the Civil Procedure Code, in certain circumstances the UAE courts also have jurisdiction over actions against foreign persons who have no domicile or place of residence in the UAE. If the UAE courts have jurisdiction, they ignore a choice of jurisdiction clause.

The courts also ignore a choice of jurisdiction clause in certain types of commercial matters, including commercial agencies or distributorship, real property, employment and government contracts.

1.5 What are the costs of civil court proceedings in the United Arab Emirates? Who bears these costs? Are there any rules on costs budgeting?

The court fee depends on the value of the claim, and has a maximum cap. Generally, the maximum court fee is 7.5% of the claim value, subject to a maximum of AED30,000 in Dubai.

If provisional orders are sought, a further fee of 50% of the initial filing fee is payable, subject to a maximum of AED15,000, 4% of the claim for the first AED100,000 and 5% of the amount over AED100,000 (up to a maximum of AED30,000) in the federal courts.

This fee is payable either on an application for provisional relief, or on filing the substantive suit.

The Abu Dhabi local courts, introduced recently, have set their fees at 3% without a maximum cap.

1.6 Are there any particular rules about funding litigation in the United Arab Emirates? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no rules for funding litigation in the UAE. Fees are not fixed by law.

Lawyers usually charge a fee which is calculated as a percentage of the amount of the claim. Additional fees are usually charged for acting in the Court of Appeal and the Court of Cassation. Additional fees are usually charged for acting in relation to a counterclaim.

Lawyers sometimes agree to bill based on hourly rates.

The law does not permit contingency fee arrangements. Article 24 of the UAE Federal Law No. (9) of 1980 in relation to regulating the legal profession states that a lawyer is not entitled to ask for contingency fees. Contingency fees on a "no win, no fee" basis are, strictly speaking, illegal in the UAE.

There is no provision requiring a party to provide security for costs and the courts do not make orders for security for costs. In any event, when giving judgment in a matter, the court generally awards nominal amounts in legal fees, therefore the successful party cannot recover any costs aside from the court fees.

1.7 Are there any constraints to assigning a claim or cause of action in the United Arab Emirates? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no provisions pertaining to finance litigation proceedings and insurance of litigation costs is not available in the UAE. Assigning a claim or a cause of action is not possible in the UAE courts and does not exist.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The claimant must be present in person or through a Power of Attorney to a legal representative. The claim must meet procedural requirements, and include the names and addresses of the parties to the action and details of the claim.

Documents in support of the claim are usually annexed to the claim and must be translated into Arabic.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Law No. 5 of 1985 regarding civil transactions (Civil Code) contains general rules relating to limitation. In general, a claim is time-barred after 15 years, unless a specific provision states otherwise. However, there are many exceptions to the general rule. Several statutes contain limitation periods, depending on the type of dispute. In addition, there are several specific provisions dealing with time bars under Law No. 18 of 1993 regarding commercial procedure (Commercial Code).

Subject to the exceptions, the limitation period is generally 15 years for contract disputes, three years for disputes relating to cheques, three years for insurance disputes and three years for causing harm (tort), 10 years for building contracts (defects), one year for carriage of goods by sea and one year for employment-related disputes. Time limits are treated as procedural law issues.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in the United Arab Emirates? What various means of service are there? What is the deemed date of service? How is service effected outside the United Arab Emirates? Is there a preferred method of service of foreign proceedings in the United Arab Emirates?

Until recently, the court issued a summons with a hearing date endorsed on it for service on the defendant, with a copy of the claim to be served according to the procedures included in the Civil Procedures Law No. 11/1992.

Notice to the defendant used to be delivered by a court officer who served the summons, which included the claim and the date of the first hearing. However the said law which governs such process has been amended recently by Law No. 10/2014, which was passed and signed on 20/11/2014 to become effective after three months from the date of publishing it in the official gazette. The new law has replaced 39 provisions and deleted two thereof.

The new law will be applicable on all cases of both full and restricted jurisdiction; it aims to switch from the traditional method of dealing with cases to an interactive system by reducing the number of procedures and the comprehensiveness of their submission, and also reducing the periods of time that must be met.

The previous system, according to the previous provisions, required a delay in the setting of the first hearing date for a period of one month from the date of registration, for another month to investigate the defendant's address data and for a third month for the date announcement. But now, through a case management department rather than having to wait for approximately three months for the defendant's verification of notice, the period has been reduced to an immediate action. This will be achieved by entering the required information at the registration desk, after which the defendant will receive an e-mail notification, an SMS and a phone call requesting them to collect a copy of the summons and its annexes in order to be able to respond to the claim.

If the proceedings are to be served on a defendant abroad, the summons is served through consular channels. This procedure can be long. The UAE court requires proof of service. Service by registered mail is now permissible at the family courts in the UAE.

Foreign proceedings are served as per the requirements of service according to the foreign country's law, but usually the better way is to serve the foreign proceedings by an attorney to the defendant in person.

3.2 Are any pre-action interim remedies available in the United Arab Emirates? How do you apply for them? What are the main criteria for obtaining these?

Injunctive relief and interim remedies are not generally available in the UAE, but interim attachment orders are granted before a full trial to preserve assets pending judgment or a final order when the court is satisfied that there is both a *prima facie* case against the defendant and a risk that if the order is not granted the claimant may not be able to enforce any judgment subsequently obtained. The courts can make provisional orders, including provisional attachment of assets to secure a claimant's claim (attachment orders).

The Precautionary Attachment Orders are awarded at the judge's discretion and evidence must be provided establishing that there is an imminent danger of assets being removed in a way that would negate the effect of any judgment subsequently obtained.

If an attachment order is granted, a substantive claim must be started within eight days of the order. If the attachment order secures claims made in proceedings abroad, the substantive claim usually seeks only an order validating the attachment and does not seek a judgment on merits.

Another form of interim remedy available in the UAE is the urgent application for the appointment of an expert to examine evidence that might be lost. This is just like the interim attachment order, made *ex parte* and is usually determined on the day of the application or the next working day.

3.3 What are the main elements of the claimant's pleadings?

1. Material facts;
2. the cause of action;
3. names, sums and numbers expressed in figures;
4. a list of witnesses and supporting documents;
5. law and court precedents;

6. the signature of the party or his lawyer; and
7. the lawyer's Power of Attorney.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The CPL allows the plaintiff to submit an interlocutory application, containing a rectification of the original application or an amendment to the subject matter thereof to deal with circumstances supervening or coming to light after the bringing of the action; being supplementary to the original application or consequent upon it or inseparably related to it; containing an addition or amendment to the cause of action, leaving the subject matter of the application unaltered; seeking an order for a preservative procedure; and as the court may permit to be submitted, being related to the original application.

As far as the time frame set by law for such amendments, it is quite wide as amendments to pleadings are allowed throughout the proceedings right until the close of pleadings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

1. Material facts;
2. names, sums and numbers expressed in figures;
3. a list of witnesses and supporting documents;
4. arguments raised against the claim on the grounds of law and court precedents;
5. the lawyer's Power of Attorney; and
6. the signature of the party or his lawyer.

The defendant may submit an interlocutory application applying for a judicial set-off and applying for judgment in his favour for compensation for loss sustained by him by reason of the original action or any procedure in it.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit which the statement of defence has to be served is within and during the time frame/interval set by the court for the submission of the defence, usually two weeks. The statement of defence will be submitted to the court upon the court's order for the said submission to be lodged.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

When a defendant wishes to pass or share liability in relation to a claim filed before the UAE courts, a certain mechanism is available for that purpose. Please refer to section 5.

4.4 What happens if the defendant does not defend the claim?

Procedural fairness is a very crucial aspect of litigation proceedings in the UAE. The courts are keen on allowing the parties to have

a smooth and efficient trial without deliberate obstructions from a non-participating party. As a result, if the defendant fails to respond the judgment will be issued regardless.

4.5 Can the defendant dispute the court's jurisdiction?

Article 20 of Chapter 1 of the CPL thereof provides that, with the exception of actions *in rem* relating to real property abroad, the courts shall have jurisdiction to hear actions brought against nationals and claims brought against foreigners having a domicile or place of residence in the State. The remaining articles in relation to jurisdiction provide for the instances where the courts have jurisdiction and lack it.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Article 94 of the Civil Procedures Law provides that a party may join in the action any person who could have been joined in it at the time it was brought and the defendant may also claim against a person who is not a party to the proceedings and apply that that person be joined as a party to the action. He may also be joined at a hearing if the party to be joined attends and agrees before the court to that procedure.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Class actions are not allowed under UAE law but consolidation of two sets of proceedings is allowed unless each case is related to a dispute arising from a separate contract. Court-ordered consolidation is a way for the courts in the UAE to resolve associated disputes in a more economic, efficient and expedient way, while at the same time preventing the risk of inconsistent or contradictory awards. Although no provisions allowing consolidation of proceedings or prohibiting it are found in UAE Civil Procedures Law, the courts in the UAE have been exercising this under Articles 97 to 99 of the law.

The DIFC Courts' case management system allows consolidation according to the (Rules of The DIFC Courts) 4.2, in particular RDC 4.2(7), which allows the Court to, *inter alia*, consolidate proceedings in circumstances in which it considers appropriate.

5.3 Do you have split trials/bifurcation of proceedings?

The UAE Civil Procedures Law does not provide for split trials/bifurcation of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in the United Arab Emirates? How are cases allocated?

The allocation of cases before the courts in the UAE is based on the value of the claim. Cases that do not exceed AED100,000 in worth,

and counter cases, irrespective of their value, as well as common allocation cases, will be registered as petty (partial) cases. Cases that exceed AED100,000 in worth, and un-estimated valued cases, as well as real estate cases in-kind, whatsoever its value may be, are registered as major cases.

6.2 Do the courts in the United Arab Emirates have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Although the procedure and timetable of court hearings are fixed by the CPL, the parties may influence the timetable in some ways, with the consent of the court, as any party may request an adjournment to respond to any submission at any hearing, and the court usually grants such adjournments. The plaintiff may also apply to the court to suspend the hearing of the case for up to six months.

The court is in charge of case management, starting from registering the case, managing the service of summons, accepting and modifying the pleadings, controlling the sessions, inspecting the evidence, examining the witnesses, scheduling the hearings, joining third parties to the proceedings, issuing interim and provisional orders, deciding on matters of law and facts and issuing judgments.

The Dubai Courts has recently introduced a new case management system which aims to switch from the traditional method of dealing with cases to an interactive system by reducing the number of procedures. The DIFC Courts also has active case management powers as provided in the Rules of the DIFC Courts (RDC).

6.3 What sanctions are the courts in the United Arab Emirates empowered to impose on a party that disobeys the court's orders or directions?

Article 70 of the CPL provides that the court may impose sanctions on the party who submits at that session a document which should have been submitted within the time limit laid down in Article 45 thereof. The court must, of its own motion or on the application of the opposing parties, pass judgment against the party for a fine of not less than AED2,000 and not more than AED5,000.

Article 71 also provides that the court may impose a fine of not less than AED500 and not more than AED3,000 upon any of its employees or litigants who fail to lodge documents or carry out any procedure in the litigation within the time limit laid down by the court. If a party does not submit to a court order, the court will impose a fine, and in the event of a contempt of court charge, the party may be imprisoned for 24 hours.

6.4 Do the courts in the United Arab Emirates have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts have no powers to strike out part of a statement of case or dismiss a case entirely.

6.5 Can the civil courts in the United Arab Emirates enter summary judgment?

In the UAE summary judgments are sought through summary court lawsuits and orders on petition. The CPL provides for a summary judgment procedure under Article 28, where the Court of First Instance judge shall be deputed to make provisional rulings in expedited matters where it is feared [that a right will be lost]

by the passing of time. Article 29 also provides that judges have jurisdiction to make orders imposing judicial custody over moveable property or real estate or a combination of both in respect of which a dispute has arisen or if the right therein has not been established, if a person having an interest in the property has reasonable cause to fear an imminent danger if the property remains in the hands of the person in possession of it.

The trial court shall have jurisdiction to hear those matters if they are raised before it as consequential issues.

Orders on Petitions are regulated by Articles 140, 141 and 142 where the law provides that in circumstances where a party has grounds to seek an order, he shall submit a petition with an application to the competent judge who shall make an order in writing on one of the copies of the petition no later than one day following the submission thereof. A grievance can be submitted with reasons in respect of the passed order on petition.

The defendant has 15 days to apply to have it set aside, setting out the relevant grounds. Once the application to set aside is made, there is what amounts to a full trial on the matter. All arguments are pleaded and the Court of First Instance adjudicates on all defences, including preliminary defences such as jurisdiction, time-bar and so on, in its final judgment.

The parties may also make interim applications to the court for granting temporary injunctions to restrain acts of damaging, destruction or wasting of property such until the time the case is judged, such as property attachment orders, appointment of a receiver, or seizure of a passport or a travel ban.

Except where the conditions set out above apply, there is no other provision for summary judgment. Injunctive relief and interim remedies are not generally available.

6.6 Do the courts in the United Arab Emirates have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court can order the cessation of the action if it considers that judgment on its merits is dependent on a decision in another matter upon which the judgment depends. Upon disappearance of the cause for barring, any of the parties may expedite the action.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in the United Arab Emirates? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There is no process of discovery and inspection of documents. Each party files the documents that it wishes to rely on for its case and there is no obligation on a party to file a document which is damaging to its case. In practical terms, there is extremely limited discovery available.

7.2 What are the rules on privilege in civil proceedings in the United Arab Emirates?

Communications between lawyer and client are privileged. Lawyers must not disclose information provided by the client without the client's permission.

The concept of "without prejudice" correspondence is not recognised. Any correspondence marked "without prejudice" and brought into existence expressly for the purpose of furthering genuine settlement negotiations can be filed in court and relied on. Any admissions or offers made in this correspondence may be prejudicial to the party making the admissions or offers. Therefore, settlement negotiations are not usually documented.

7.3 What are the rules in the United Arab Emirates with respect to disclosure by third parties?

This is irrelevant to the UAE litigation system.

7.4 What is the court's role in disclosure in civil proceedings in the United Arab Emirates?

This is irrelevant to the UAE litigation system.

7.5 Are there any restrictions on the use of documents obtained by disclosure in the United Arab Emirates?

This is irrelevant to the UAE litigation system.

8 Evidence

8.1 What are the basic rules of evidence in the United Arab Emirates?

There is no process of discovery and inspection of documents. Each party files the documents that it wishes to rely on for its case and there is no obligation on a party to file a document which is damaging to its case. In practical terms, there is extremely limited discovery available. There is no pre-trial exchange of evidence. All arguments and supporting documents, together with Arabic translations, are submitted to the court in writing. Hearing witnesses in court is not a normal procedure in the UAE. Only on the request of a party or if the court considers it appropriate may witnesses be called and heard before the court or may a hearing date be scheduled to hear the arguments from a party before the court makes its final decision. Witnesses are more likely to be heard if the case is referred to other forms of evidence (an investigator or expert).

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Documentary evidence, witness evidence and expert evidence are all admissible before UAE courts.

Law No. 8 of 1974 concerning Expert Evidence before the Courts and the Law of Evidence govern the appointment of experts. The court can appoint an expert at any stage to investigate any matters in which the court considers it requires assistance. The court usually appoints an expert for findings of facts in a variety of issues including financial, accounting or other technical matters.

The expert is selected from a list of experts maintained by the court. If the parties fail to agree, the court generally orders that an expert be appointed from the court's list and the parties do not typically have control over who is appointed.

Once the expert has prepared and filed his report in court, a date is fixed for the parties to comment on the report. The expert's report does not bind the judge. However, the court usually adopts the expert's findings.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

All proceedings in civil matters are based on written submissions supported by documentary evidence. The court does not usually hear oral argument from the parties' lawyers. The case is determined on the basis of the written submissions and documentary evidence.

If a party wishes to call a witness, an application must be made to the court. When an application is granted, the witness can be cross-examined. However, the judge closely supervises the testimony of the witness, questions the witness and controls both examination and cross-examination.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

The expert must comply with certain procedures set out in the federal laws. These include holding meetings with the parties and their lawyers and keeping minutes of these meetings.

The expert provides independent advice to the court and does not represent the interests of any party.

As there are no oral hearings, the expert is not questioned by either party or the court. However, once the expert has filed the report, the parties are given an opportunity to comment on the report. This is done by written submissions. If the court considers that the matter requires further investigation, it can refer the matter back to the expert. The court can also order that another expert be appointed to prepare a report if this is deemed necessary.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in the United Arab Emirates?

All documentary evidence has to be submitted to the court in original copies and has to be translated into Arabic by a licensed translator.

When making the order for the appointment of an expert, the court also orders one of the parties to pay an amount into court for the expert's fees. The claimant is usually ordered to make the payment. The court can order further payments. The final judgment of the court contains a determination as to which party must pay the expert's fees.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in the United Arab Emirates empowered to issue and in what circumstances?

Civil and commercial judgments, summary judgments and orders on petitions. Please refer to question 6.5.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts have full powers to make rulings on damages, interests and costs according to provisions 133, 134, 135 and 136 of the CPL.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Article 235 of the CPL provides that an order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE, provided that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction there over in accordance with the rules governing international judicial jurisdiction laid down in their law, and that it does not conflict with a judgment or order already made by a court in the UAE, and contains nothing that conflicts with morals or public order in the UAE.

9.4 What are the rules of appeal against a judgment of a civil court of the United Arab Emirates?

An unsuccessful party has the right to appeal from the Court of First Instance to the Court of Appeal. It is possible to appeal in relation to findings of both fact and law. The Court of Appeal hears the whole matter again and the parties can file further submissions and evidence.

The appeal must be filed within 30 days of the date on which the Court of First Instance delivers its judgment. Further appeal is available in Dubai to the Court of Cassation on a point of law, subject to certain monetary limits (among other things). The time limit for filing the appeal is 60 days from the date judgment was delivered by the Court of Appeal.

The Court of Cassation can either give final judgment in the matter or remit the matter back to the Court of Appeal for further findings. Court of Appeal judgments passed in the other emirates are further appealed before the UAE Federal Supreme Court in Abu Dhabi.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in the United Arab Emirates? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

There is no statutory framework for enforcing decisions of boards set up for the purpose of conciliation, mediation or expert evaluation in the UAE. In practice arbitration is the only method of ADR that is available in the UAE. Other ADR procedures, such as mediation, are not frequently used. Arbitration has become a genuine alternative to court proceedings in the UAE, especially in the context of transactions conducted by the large number of resident expatriate individuals and businesses.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The only law in the UAE which regulates ADR are 12 provisions found in the UAE Civil Procedures Law No. 11 of 1992 related to arbitration.

1.3 Are there any areas of law in the United Arab Emirates that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitrations in the UAE are governed by the provisions found in Chapter 3 of the Civil Procedures Law (Federal Law No. 11 of 1992). These provisions do not apply in the Dubai International Financial Centre, which has its own arbitration law.

Pursuant to Article 203 of the Civil Procedures Law, for an arbitral tribunal to have jurisdiction there must exist a written agreement signed by all of the parties that the dispute be arbitrated. Moreover, even if there exists a contract containing the arbitration clause between each of the parties and duly signed by them, it should still be considered whether the subject matter of the dispute and the claims as formulated are arbitrable.

As to what is arbitrable, Article 725 provides that the compromise or settlement of any dispute (an accord) must relate to permissible subject matters for contracts and not contradict mandatory law or UAE public policy. Further, Article 203(4) provides that arbitration is not permissible in matters in which conciliation is not allowed, and the Court of Cassation has on many occasions determined that as a matter of UAE law no conciliation is permitted for matters relating to public policy.

The DIFC's Arbitration Law (No. 1 of 2008 as amended) contemplates fewer restrictions than UAE law on the types of disputes and claims which may be arbitrated in the DIFC. However, DIFC law still requires much the same analysis to be undertaken to determine whether a dispute is suitable for arbitration or instead whether arbitral proceedings might be invalid or an award vulnerable to be set aside on grounds of conflict with UAE public policy.

The Federal Law of Civil Transactions No. 5 of 1985 (the Civil Code) is the platform for all civil and commercial laws in the UAE and governs all contracts. It also addresses public policy. Article 3 of the Civil Code states that "Public policy shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based, in such a manner as to not conflict with the definitive provisions and fundamental principles of Islamic Shari'a."

Meanwhile, Article 733 of the Civil Code states that the following potentially usurious transactions are unequivocally not permitted to be the subject matter of an accord or compromise and are thus not arbitrable. The transactions are the cancellation of a debt by another debt, the sale of food by way of commutative contract prior to delivery, the deferred exchange of gold against silver and *vice versa*, *Riba al nasia* (usurious interest in consideration of the deferment of the payment of a debt), reducing part of a deferred debt owed by a debtor in consideration of accelerating the date of payment, reducing the amount of a guarantee on a deferred debt owed by a debtor in consideration of accelerated payment with an increase and an advance involving a benefit.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to the United Arab Emirates in this context?

No, they cannot.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to the United Arab Emirates in this context?

There is nothing particular to the UAE in this context except for the fact that arbitral awards will be appealed while being enforced by the local courts. There are no sanctions in place for refusing to mediate.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in the United Arab Emirates?

- Dubai International Arbitration Centre (DIAC).
- DIFC Arbitration Centre.
- Abu Dhabi Arbitration Centre (Abu Dhabi Chamber of Commerce).
- Sharjah Arbitration Centre.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Despite the fact that the UAE is a party to the Washington Convention and is also party to other multilateral treaties providing for the protection of foreign investments, the UAE government's reluctance to embrace arbitration as an ADR method is quite evident from the number of drafts of the UAE federal arbitration law that have been circulated since 2008, combined with much discussion within the arbitration community in the UAE surrounding a new federal arbitration law to supplant the provisions of the CPL, without a clear indication of when the UAE plans to pass any of the said drafts as a federal arbitration law.



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Diana Hamadé is the founder of IALS, with right of audience before all UAE courts, and concentrates her practice in commercial, corporate, real estate and family law matters. She is also actively engaged in arbitrations as counsel and arbitrator.

Diana's admission to the lawyers' register of the Ministry of Justice in the UAE was affected in 2008. Since then, she has been appearing before the courts in all emirates. Since 2013 she has had right of audience before the Court of Cassation and the UAE Federal Supreme Court.

Diana contributed to the "The National" on UAE Legal Affairs and to the "Brief", a Thomson Reuters ILB Publication, where she wrote on local legal issues. She also joined as a trainer of Dubai Government staff on Corporate Governance and is invited to speak at conferences and forums on many legal matters concerning family law. In addition, she is the author of numerous publications.

Diana received her LL.M. degree in Commercial Law from Kings College, Aberdeen University, United Kingdom and an LL.B. from the UAE University in Shari'a & Law.

Selected professional achievements:

- Finalist for the Most Influential Female Lawyer by the "Brief" for 2012.
- Best Local Writing Talent on Legal Affairs in the UAE by "The National".



The International Advocate Legal Services (IALS) is a boutique law firm focusing on high-end cross-border litigation in corporate, civil and family law matters for a variety of national and international clients.

IALS draws on the experience of its founder, Diana Hamadé Al Ghurair. In addition, the firm comprises five lawyers specialised in diversified areas of the law who are capable of providing advice on their specific areas of expertise.

Litigation practice:

The firm represents and acts for clients in corporate, commercial and labour matters before UAE courts. It has also experience in litigating before the Rent Disputes Courts.

Arbitration practice:

IALS is already engaged in arbitration cases and matters related to arbitration in Dubai as counsel and party nominated arbitrator.

Advisory services:

The firm regularly advises clients with respect to general corporate issues, and routinely handles employment and real estate matters.

Family law practice:

IALS is the leading law firm in family law in the UAE. It is one of the few law firms that specialises in Shari'a and expatriate family law matters.

Diana is the only lawyer registered as a fellow of the International Academy Of Matrimonial Lawyers in the Middle East.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has California got? Are there any rules that govern civil procedure in California?

California is the most populous state in the United States, with 38 million people, and has the eighth largest economy in the world measured in dollar terms. San Francisco, Silicon Valley and the greater Los Angeles area abound in companies in the computer technology, energy, aerospace, financial services, and entertainment sectors. California also has a large agricultural base and a world-renowned wine growing and producing industry. California annually exports more than \$150 billion in products to more than 200 foreign economies. California's top export markets are Mexico, Canada, China, Japan and South Korea.

California has two parallel court systems, state and federal, that are governed by different rules. While California is a common law system with case law developed by appellate court decisions, the U.S. Constitution, California Constitution, numerous state and federal statutes, and federal, state and municipal regulations also govern. The California Code of Civil Procedure is the primary source of rules for civil procedure in California courts. California Rules of Court, adopted by the Judicial Council of California, and each Superior Court's local rules also govern civil procedure in California courts. The federal courts are governed by the Federal Rules of Civil Procedure, and each U.S. District Court has its own local rules.

1.2 How is the civil court system in California structured? What are the various levels of appeal and are there any specialist courts?

Each of California's 58 counties has its own Superior Court that handles all civil matters. Each Superior Court is often subdivided so that general civil matters are handled separately from family law, probate, juvenile, small claims, and criminal matters. Superior Court decisions are appealed to one of the six California Courts of Appeal, and ultimately the Supreme Court of California. Decisions of the Courts of Appeal and Supreme Court are binding on all Superior Courts, and the decisions of the California Supreme Court govern all other California courts.

The federal system in California consists of U.S. District Courts for the Northern, Eastern, Central and Southern Districts, with appeals to the Ninth Circuit Court of Appeals, and ultimately the U.S. Supreme Court.

In both state and federal courts, factual disputes are presented to and resolved by a jury applying the law to the facts deduced from the evidence. Juries are selected in a random process from the public at large. The parties may waive their right to a jury in preference for a "bench trial" in which the judge decides all matters.

1.3 What are the main stages in civil proceedings in California? What is their underlying timeframe?

Civil proceedings in state and federal courts in California include the following, in order:

- **Pleading.** Generally, a plaintiff commences an action by filing and serving on the defendants a written complaint. The defendants respond by filing and serving either a legal challenge to the sufficiency of the complaint or an answer, setting forth defenses and, potentially, counterclaims against the plaintiff or cross-claims against a third party. Depending on the complexity of the matters, the strength of legal challenges to the complaint, and whether the court permits multiple amendments to the complaint in response to legal challenges, the pleading stage can take from approximately one month to up to one year.
- **Discovery.** Both state and federal courts in California have party-initiated discovery, in which parties request documents and information from the other parties. The other parties must provide the requested documents and information so long as they are relevant and not privileged or otherwise protected from disclosure by established doctrines. Federal courts also have an obligatory disclosure process that requires each party to identify documents and witnesses it intends to rely on for its claims and/or defenses. Depositions of party witnesses are the norm, and attorneys are empowered to issue subpoenas to take depositions of third party witnesses. The discovery process can be time-consuming and expensive in complex cases due to the proliferation and volume of electronically stored information (ESI).
- **Dispositive motions.** Both state and federal courts have similar procedures for resolving claims and defenses by a written motion for summary judgment. Fed. R. Civ. P. 56; Cal. Code Civ. P. 437c(a). To resolve an issue by written motion *in lieu* of a trial, the moving party must show there are no disputes of material fact and that only legal issues are in dispute. California state courts require such motions to be filed and served no later than 105 days before the first day or trial. Cal. Code Civ. P. 437c(a).

- **Trial.** Due to the cost and uncertainty of trial, approximately 95% of civil cases are resolved by dispositive motion or settlement before trial. If a case proceeds to trial, factual disputes are resolved by a jury unless the parties waive their right to a jury. To prove their cases, the parties introduce oral and documentary evidence through live witness testimony. The parties' attorneys question the witnesses. For a jury trial, the parties or the Court develop written jury instructions that explain to the jury how to apply the law to the facts. The jury then provides a verdict. In a non-jury "bench trial," the judge issues a decision in writing.
- **Judgment.** The jury's verdict or the Court's decision is set forth in a formal written judgment that is entered into the court records as the final resolution of the case. If the judgment is a monetary judgment for the plaintiff, the plaintiff can commence enforcing the judgment immediately upon entry, unless enforcement is stayed pending an appeal.
- **Appeal.** After entry of judgment, parties have a short time in which to file a notice of appeal to contest the result. If an appeal is taken, a record of the trial court proceedings is prepared to provide all necessary information to the appellate court. The parties submit written briefs to the appellate court, but no further evidence or testimony is taken. Both federal and state courts have their own specific rules of appellate procedure.

State and federal courts both establish deadlines for various stages of proceedings but the pace and scope of litigation is principally driven by the parties. Standard 2.2 of the California Rules of Court encourages Superior Courts to dispose of 75% of civil cases within 12 months of filing and all civil cases within 24 months of filing. Due to the economic downturn in recent years, however, which has resulted in budget cuts and staff layoffs in the state courts, California courts have seen cases suffer from greater delay.

1.4 What is California's local judiciary's approach to exclusive jurisdiction clauses?

State and federal courts in California generally enforce contractual exclusive jurisdiction clauses, known as "forum selection clauses." In California, mandatory forum selection clauses, which restrict litigation to a specific forum, are examined for "reasonableness," while permissive forum selection clauses, which confer jurisdiction on a specific forum without prohibiting the plaintiff from choosing another forum, are examined under a traditional *forum non conveniens* analysis. *Berg v. MTC Electronics Techs. Co.*, 61 Cal. App. 4th 349, 358-59 (1998). California courts sometimes reject forum selection clauses in contracts between parties of unequal bargaining power if they are burdensome or unfair to the weaker party.

Federal courts will enforce a valid forum selection clause unless "extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Atl. Marine Constr. Co. v. United States Dist. Court*, 134 S. Ct. 568, 575 (2013). To enforce a forum selection clause in federal court, a party brings a motion to transfer under 28 U.S.C. §1404(a). *Id.* Parties cannot invoke the subject matter jurisdiction of a federal court by agreement. If the federal court does not have federal question or diversity jurisdiction over the matter (see § 3.1), the parties' agreement on the jurisdiction of the federal court will not be enforceable.

1.5 What are the costs of civil court proceedings in California? Who bears these costs? Are there any rules on costs budgeting?

The length and complexity of each case drives the overall cost of

civil litigation in California, creating a large degree of variance. The initial cost to file a civil case is 435 USD in California Superior Court and 400 USD in U.S. District Court. Other costs, such as attorneys' fees and discovery costs, typically dwarf administrative costs.

United States and California state courts follow the "American Rule" under which each party bears its own attorneys' fees. Parties can vary the American Rule by including prevailing party provisions in their contracts that shift attorneys' fees and costs to the losing party, and courts generally enforce such contract provisions. Additionally, there are a number of federal and state statutes that provide for recovery of attorneys' fees and/or costs by the prevailing party. Attorneys' fees often figure prominently in a party's analysis of whether to settle a case or go to trial.

1.6 Are there any particular rules about funding litigation in California? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

An attorney may advance litigation costs to their client, and repayment may be contingent on the outcome of the litigation. Cal. R. Prof. Cond. 4-210. Such costs must be limited to reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

Contingency and conditional fee arrangements are frequently utilised and generally permitted, unless unconscionable, in civil cases in California. Attorney and client may contract for reverse contingency fees, in which the attorney can earn a percentage of predicted damages that were avoided. Under a written fee agreement, an attorney may take a security interest in any judgment or settlement obtained in connection with the client's cause of action to ensure payment of fees and costs advanced. An attorney may also take a security interest in the client's real or personal property.

1.7 Are there any constraints to assigning a claim or cause of action in California? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims are generally assignable in California, and once assigned, the assignee need not join the assignor in the litigation. Certain claims, such as legal malpractice and personal injury claims, are not assignable.

Third party litigation funding is a relatively new phenomenon in California and the United States, although several well-funded commercial litigation investment funds have been formed in recent years. The common-law prohibitions of champerty, the funding of litigation by a non-party in exchange for a portion of the recovery, and maintenance, intermeddling to encourage a lawsuit, do not prohibit third party litigation funding in California, as the courts have held that the doctrine was never officially adopted as California law. *Martin v. Freeman*, 216 Cal. App. 2d 639 (1963). However, there are ethical concerns associated with third party litigation funding, such as privilege concerns, and the attorney's duties of confidentiality, loyalty, and independence in all decision-making. Attorneys also must ensure not to agree to an arrangement where they are splitting fees with non-lawyers, since this violates California Rules of Professional Conduct Rule 1-320. Early indications suggest that California is relatively permissive with respect to third party financing, but little precedent exists in this area.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

With a few exceptions, there are no specific formalities a plaintiff must comply with before filing a lawsuit. Exceptions include requirements to exhaust administrative remedies, such as when litigating against the government. Before filing a lawsuit asserting a claim against a government entity, a plaintiff is required to submit its claim to the government entity. State and federal employment discrimination statutes require employees to attempt to resolve their claims administratively through, respectively, California's Department of Fair Employment and Housing or the U.S. Equal Employment Opportunity Commission.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Statutes of limitations determine the deadline to file a lawsuit as to each particular claim asserted. The statute of limitations varies depending on the claim. For common law causes of action, both state and federal courts apply California law. The California Code of Civil Procedure identifies the statutes of limitation. For example, claims for breach of written contract must be filed within 4 years of the date of breach, and within 2 years of breach for oral contracts. Cal. Code Civ. P. §§ 337, 339. Personal injury claims must be brought within 2 years of the injury. Cal. Civ. Proc. § 335.1. Statutory causes of action typically include a statute of limitation action.

Courts strictly adhere to statutes of limitation except in circumstances where an equitable basis exists to "toll" the time period. For example, due to delayed discovery of an injury, the "discovery rule" may delay the deadline. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103 (1988).

Courts located in California may apply the statute of limitations of another jurisdiction if the cause of action arose in that jurisdiction or the dispute is governed by a contract with a choice of law provision requiring disputes to be decided under another jurisdiction's law. Cal. Code Civ. P. § 361. For example, if the parties have a contract governed by Delaware law, and the plaintiff asserts a claim for breach of written contract not pertaining to a sale of goods, Delaware's three-year statute of limitations for such claims would apply *in lieu* of California's more favorable four-year statute of limitations. Del. Code Ann. tit. 10, § 8106. Each of the 50 states in the United States has its own statutes of limitations for common law claims like breach of contract, breach of fiduciary duty, and negligence, and the deadlines often vary by state.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in California? What various means of service are there? What is the deemed date of service? How is service effected outside California? Is there a preferred method of service of foreign proceedings in California?

Civil actions generally begin by a plaintiff filing a complaint with either the Superior Court or the federal District Court. If there is no federal jurisdiction, a plaintiff must file its complaint in the Superior Court in the county where one of the defendants resides

or does business or where the injury occurred or the contract was entered. See Cal. Code Civ. P. §§ 392-403.

Federal courts have subject matter jurisdiction only when a claim arises under federal law or the parties are "diverse," meaning plaintiffs and defendants reside in different states within the United States. 28 U.S.C. § 1332. Diversity is also found for purposes of federal subject matter jurisdiction when one party is a citizen of a U.S. state and the other party is a foreign state or a citizen of a foreign state. *Id.* In order to invoke diversity jurisdiction, the claim must be valued at \$75,000 or more. *Id.*

The federal district court must also have personal jurisdiction over the parties and be the proper venue, or forum, for the dispute. Generally, the proper venue in a federal proceeding is the judicial district located where the defendant resides or where a substantial part of the events giving rise to the claim occurred or where a substantial part of the property that is the subject of the action is located. 28 U.S.C. 1391(b).

When a complaint is filed, the court issues a summons notifying the defendants that a lawsuit has been filed against them. The plaintiff is responsible for ensuring proper service of the summons and complaint on each defendant within the specified time limit. A plaintiff must serve the summons and complaint within 60 days if filed in California Superior Court and within 120 days if in federal court. Cal. Rules of Court 3.110(b); Fed. R. Civ. Proc. 4(m).

Detailed California and federal rules govern service of summons and complaint. Generally, service may be made in one of four ways:

1. Personal service, effective upon delivery. Cal. Code Civ. P. § 415.10. Fed. R. Civ. Proc. 4(e)(2)(A).
2. If personal service cannot be made due to difficulty in locating the defendant, in some circumstances, substitute service may be made to a competent individual at the defendant's residence or place of business, or by mailing to the defendant's address. Substitute service must be coupled with mailing the summons and complaint to the place where the copies were left. Service is considered complete on the 10th day after the mailing. Cal. Code Civ. P. § 415.20; Fed. R. Civ. Proc. 4(e)(2)(B), 4(e)(1).
3. The plaintiff may ask the defendant to agree to accept service by mail by signing a written "notice and acknowledgment of receipt." The plaintiff's request gives the defendant additional time to respond to the complaint, but if the defendant refuses the plaintiff's request, then the defendant assumes liability for the plaintiff's cost to serve using alternative means. Cal. Code Civ. P. § 415.30; Fed. R. Civ. Proc. 4(d).
4. Service by publication may be allowed only by court order upon a strong showing of inability to serve the defendant, and is effective on the 28th day after publication. Cal. Code Civ. P. § 415.50; Fed. R. Civ. Proc. 4(e)(1).

Out-of-state defendants and foreign defendants (subject to any limitation under international treaty) may be served by any of the four methods listed above or by certified mail. Cal. Code Civ. P. § 415.10. The United States is a signatory to the Hague Convention, and therefore litigants in California federal and state courts are generally required to comply with the provisions of the Hague Convention when serving a defendant outside of the United States.

3.2 Are any pre-action interim remedies available in California? How do you apply for them? What are the main criteria for obtaining these?

California state and federal courts do not allow interim remedies before a complaint is filed. After filing a complaint but before

effecting service, however, a plaintiff may request the court to grant a temporary restraining order (“TRO”) and/or a preliminary injunction (“PI”) to preserve the *status quo* pending trial. Requests for a TRO and PI may be made simultaneous with the filing of the complaint upon giving the defendants 24 hours’ notice. In some circumstances, the plaintiff may be able to convince the court to issue a TRO without serving prior notice on the defendant. To obtain these extraordinary remedies, the plaintiff must show it is likely to succeed on the merits of its claim and that it will suffer considerable harm without a TRO or PI.

3.3 What are the main elements of the claimant’s pleadings?

In federal court, the plaintiff need only include a “short and plain statement of the claim showing that the pleader is entitled to relief,” and the claim must be “plausible” as pled. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); Fed. R. Civ. P. 8(a)(2). California courts require “(1) [a] statement of the facts constituting the cause of action, in ordinary and concise language”, and “(2) a demand for judgment for the relief to which the pleader claims to be entitled”. Cal. Code Civ. P. § 425.10(a). Claims are generally regarded as being comprised of multiple “elements.” For example, a breach of contract claim requires that there be a contract, a breach, and damage caused by the breach. The plaintiff must plead facts showing it satisfies each element of each of its claims. State and federal rules require certain claims, such as fraud, to be pled with greater factual detail. If exhaustion of administrative remedies is required, or there are other pre-filing requirements, the plaintiff must state it complied with those requirements.

3.4 Can the pleadings be amended? If so, are there any restrictions?

California rules permit any pleading to be amended once, without court permission, at any time before the defendant files a responsive pleading or, if the defendant challenges the legal sufficiency of the complaint, before the hearing on that challenge. Cal. Code Civ. P. § 472. A party may seek court permission to amend its complaint, answer, or cross-complaint at any other time. The court has discretion to allow amendments “in the furtherance of justice”. Cal. Code Civ. P. § 473(a)(1); Cal. Code Civ. P. § 576. California courts liberally grant requests to amend. *Atkinson v. Elk Corp.*, 109 Cal. App. 4th 739 (2003).

The federal rules allow a party to amend any pleading once, without permission, within 21 days of serving it, or within 21 days of the opponent’s service of a responsive pleading or motion under rule 12 (b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). Otherwise, the parties must receive the court’s permission or the opposing party’s written consent to amend, and federal courts are to freely permit amendments “when justice so requires.” Fed. R. Civ. P. 15(a)(2).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

After service of a summons and complaint, the defendant may respond by either filing an answer, answer and cross-complaint (called a “counterclaim” in federal court), or a legal challenge

to the sufficiency of one or more of the plaintiff’s claims. This legal challenge is called a “demurrer” in California courts and a “motion to dismiss” in federal courts. A motion to dismiss may also challenge the federal court’s jurisdiction over the claims or the defendant.

In California courts, the answer must contain the defendant’s general or specific denials of the material allegations of the complaint and assert all affirmative defenses. Cal. Code Civ. P. § 431.30(b); Fed. R. Civ. P. 8(b). A general denial denies the entire complaint in one brief statement. In contrast, a specific denial denies specific allegations in the complaint, and any allegation not specifically denied is deemed admitted. Cal. Code Civ. P. § 431.20; Fed. R. Civ. P. 8(b)(3).

Affirmative defenses and counterclaims for set-off are permitted. Generally, the defendant in both California state and federal courts is required to assert any claims it may have against the plaintiff relating to the subject matter of the complaint at the same time it answers the complaint. Cal. Code Civ. P. § 426.30; Fed. R. Civ. P. 13. Under the federal rules this is referred to as a compulsory counterclaim, and the defendant must raise these claims when responding to the opposing party in a pleading, unless doing so would cause jurisdictional problems. Fed. R. Civ. P. 13(a)(1)(A)-(B). Failure to raise compulsory counterclaims results in such claims being barred in subsequent actions. In contrast, a permissive counterclaim, one that does not arise out of the same transaction or occurrence as the present action, may be raised in the present action or a subsequent action. Fed. R. Civ. P. 13(b).

4.2 What is the time limit within which the statement of defence has to be served?

Generally, the defendant must file and serve its response to the complaint within 30 days after service of the complaint. Cal. Code Civ. P. §§ 412(a)(3), 430.40(a). A defendant in federal court has 21 days to respond unless it waived service of process, in which case it has 60 days to respond. Fed. R. Civ. P. 12(a)(1)(A). However, the defendant can file a rule 12 motion, such as a motion to dismiss, and then it will have 14 days after a denial of that motion to file the answer. Fed. R. Civ. P. 12(a)(4)(A). If the defendant files a cross-complaint (in California court) or counterclaims (in federal court), the plaintiff must respond to those pleadings much as the defendant responds to the complaint – i.e., either by answering or challenging the legal sufficiency of the claims.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may file a cross-complaint in California courts against third parties. Cal. Code Civ. P. § 428.10(b). Such claims must either “arise out of the same transaction, occurrence, or series of transactions or occurrences” as the plaintiff’s claims against the defendant, or assert “a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.” Additionally, third parties may be joined under the federal rules if they are either necessary or indispensable, with different procedures and requirements for each type. Fed. R. Civ. P. 19. Under the federal rules the defendant can bring in a third party that they believe is liable for the claims being asserted against them by bringing an impleader action. Fed. R. Civ. P. 14. Alternatively, a defendant may initiate a separate action against a potentially liable third party after the present action has concluded.

4.4 What happens if the defendant does not defend the claim?

Both California and federal courts have a procedure for obtaining a default judgment against a defendant who fails to respond to the complaint. Cal. Code Civ. P. § 585; Fed. R. Civ. P. 55. Generally, a plaintiff must request the court to enter a default judgment. When seeking monetary damages, courts generally require the plaintiff to provide proof of its damages at a “prove-up hearing.” Cal. Code Civ. P. § 585(b); Fed. R. Civ. P. 55(b)(1)-(2). The defendant may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action in the proper court if it can show good cause for not responding to the complaint, such as service was not proper, the neglect was excusable, or the court lacks personal jurisdiction over the defendant. The notice of motion must be served and filed within 60 days after the defendant first receives notice of any procedure for enforcing the default judgment. Cal. Code Civ. P. § 585.5(b); Fed. R. Civ. P. 60(b).

4.5 Can the defendant dispute the court’s jurisdiction?

In both California and federal courts, a defendant may challenge the court’s jurisdiction over the defendant (personal jurisdiction) or the claims (subject matter jurisdiction), although the latter challenge is more common in federal courts because of their more limited jurisdiction. In California courts, a plaintiff may challenge personal jurisdiction by filing a timely motion to quash service of the summons. Cal. Code Civ. P. § 418.10. In federal courts, the defendant challenges subject matter and personal jurisdiction by filing a motion to dismiss. Fed. R. Civ. P. 12(b)(1), (2). Challenges to personal jurisdiction can be waived by not raising them in the initial response to the complaint. In contrast, a party never waives challenges to a court’s subject matter jurisdiction. In fact, the court may *sua sponte* address its lack of subject matter jurisdiction.

In both state and federal courts, a court may lack personal jurisdiction over a defendant who has not engaged in sufficient activities in California to satisfy due process. Superior Courts in California have broad subject matter jurisdiction. Exceptions are few, such as bankruptcy matters, which are handled exclusively in the federal courts, and family law and probate matters which are handled in the state courts designated for such matters. A federal court lacks subject matter jurisdiction when the plaintiff asserts no federal law claims and the parties are not “diverse,” i.e., from different states.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In response to a motion for joinder, the court may order the joinder of third parties. Depending on the circumstances, their joinder may be either compulsory or permissive. Cal. Code Civ. P. § 389, 378, 379; Fed. R. Civ. P. 19, 20. A third party must be joined (compulsory joinder) when the court determines that an adequate disposition of the case cannot be made without that party. Cal. Code Civ. P. § 389(a); Fed. R. Civ. P. 19(a)(1). A court may permit a third party to join (permissive joinder) as either a plaintiff or a defendant even when that party is not essential to resolving the action, such as when the third party has an interest in the subject matter of the dispute. Cal. Code Civ. P. § 378; Fed. R. Civ. P. 20.

A third party may request court permission to “intervene” in an ongoing litigation (without the consent of the parties and without necessarily joining either the plaintiff or defendant) to protect its interest in the property or transaction that is the subject of the action. Cal. Code Civ. P. § 387; Fed. R. Civ. P. 24.

Additionally, a party may commence an “interpleader” action when it holds property in which it does not claim an interest but in which others claim an interest. The interpleader action permits the interpleading plaintiff to deposit the contested property with the court to allow the other parties to litigate their disputed claims in it. Cal. Code Civ. P. § 386; Fed. R. Civ. P. 20. For example, an insurance company may deposit in court via an interpleader action life insurance proceeds if potential beneficiaries dispute their respective entitlement to the proceeds.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Consolidation of multiple proceedings is permitted when they involve common issues of fact or law. Cal. Code Civ. P. § 1048; Fed. R. Civ. P. 42(a). At the court’s discretion, actions may be consolidated for purposes of discovery, a joint hearing or trial, if doing so helps avoid unnecessary cost or delay.

California and federal courts also have a “class action” procedure whereby a plaintiff can represent a group of plaintiffs not before the court who have the same claim against the defendant. To bring a class action, the representative plaintiff must show that the number of plaintiffs is too numerous for each to be joined in the action, the plaintiff’s claims must be typical of each class member’s claims, the plaintiff must be capable of representing the absentee class members, and there must be common issues of fact and law for the claims asserted. Cal. Code Civ. P. 382; Fed. R. Civ. P. 23. Class actions are governed by complex procedures. They are most commonly brought by consumers, shareholders of public corporations, and employees.

5.3 Do you have split trials/bifurcation of proceedings?

Both California and federal courts may exercise their discretion to separate one trial into two or more proceedings if doing so would prevent prejudice and promote convenience or judicial efficiency and economy. Cal. Code Civ. P. § 1048(b); Fed. R. Civ. P. 42(b). For instance, a court may bifurcate proceedings when there are both equitable and legal issues to be decided because equitable issues are decided by the judge and legal issues that involve disputed material facts are decided by a jury. A court may also bifurcate proceedings to resolve a preliminary issue that may eliminate the need to try other issues, such as when a defendant asserts a *res judicata* defense preventing a party from re-litigating an issue that has already been resolved in another court action or in arbitration.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in California? How are cases allocated?

California Superior Courts are courts of general jurisdiction and have the power to hear any matter that is not specifically designated for another tribunal, such as bankruptcy matters. Assignment of cases varies by county, with some using a “direct

calendar” system, under which one judge is assigned at random to oversee the case from complaint to judgment. Other counties have a “master calendar” system that assigns cases for trial to a trial court, while all pre-trial matters are handled in other departments, as applicable, such as law and motion or writs and receivers.

Federal courts in California consist of District Courts and Bankruptcy Courts. The federal court system also has a few specialty courts, including a Tax Court that handles federal taxation matters and a Court of Federal Claims that handles claims for money damages asserted against the federal government. Additionally, patent law issues are handled within the federal system, and the Patent Trial and Appeal Board decides certain issues of patentability in an administrative trial and appeal process. Unless a civil matter must be resolved by one of the specialty courts, the District Courts take all civil cases within their subject matter jurisdiction.

6.2 Do the courts in California have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Judges in both federal and California courts are given broad case management powers to promote efficiency and economical use of resources. While parties and their counsel may propose schedules and deadlines to the court, California courts must comply with the Trial Court Delay Reduction Act (“TCDRA”) (Cal. Gov’t Code § 68600), which requires California courts to dispose of cases as promptly as possible, compelling judges to actively manage their caseloads.

Active case management may include: designation of cases as “complex,” subject to different procedures; setting firm trial dates; requiring parties to engage in mediation and settlement discussions; and holding all parties to a schedule established early by the court.

Parties can apply to the court for interim relief as needed. Most common such applications pertain to discovery disputes. Motions to compel compliance with or further responses to discovery requests may be assigned for hearing in federal court to a magistrate judge or, in California court, to a discovery referee.

Parties bringing motions in California courts must pay a fee to the court. For example, the moving party must pay a fee of \$60 to bring certain motions, such as a motion to compel. Cal. Gov. Code § 70617(a). Motions for summary judgment require a fee of \$500. Cal. Gov. Code § 70617(a). Parties opposing a motion are not required to pay a fee.

6.3 What sanctions are the courts in California empowered to impose on a party that disobeys the court’s orders or directions?

Both state and federal courts in California have authority to impose sanctions on parties or their attorneys for a variety of misconduct. By statute, California judges may impose sanctions on parties and/or their attorneys for filing papers that (1) are solely intended to harass, (2) are not warranted by existing law or submitted in a frivolous effort to change existing law, (3) lack evidentiary support, or (4) contain denials that are not justified by the evidence or based on reasonable belief. Cal. Code Civ. P. § 128.7(b). Federal courts also require a party’s attorney to certify that each filed paper is not for an improper purpose. Fed. R. Civ. P. 11. Sanctions imposed by the court are limited to “what is sufficient to deter” further conduct of the same manner in the future. Cal. Code Civ. P. § 128.7(d); Fed. R. Civ. P. (11)(c)(4). Such sanctions may include payment of a monetary penalty to the court or payment of the opposing party’s legal fees incurred to bring the motion. Fed. R. Civ. P. 11(c)(2).

Sanctions also may be imposed in both California and federal courts for other improper behavior, such as violations of discovery orders. Courts are empowered to use increasing levels of sanctions to compel compliance with discovery; monetary sanctions are imposed first, but parties who do not comply may face adverse jury instructions or, in unusual cases, terminating sanctions (dismissal or default). *Doppes v. Bentley Motors, Inc.*, 174 Cal. App. 4th 967 (2009); Fed. R. Civ. P. 37.

6.4 Do the courts in California have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

A California court may - either on its own motion or the motion of a party - strike all or part of a complaint that is (1) irrelevant, false, or improper, or (2) not written or filed according to the rules of the court. Cal. Code Civ. P. § 436. Such motions are not commonly granted. In determining whether a document contains improper material the court may consider only the “face of the pleading” and matters subject to judicial notice. Extrinsic evidence is not permitted. *Garcia v. Sterling*, 176 Cal. App. 3d 17 (1985).

6.5 Can the civil courts in California enter summary judgment?

Both state and federal courts in California permit disposition of claims or defenses, or an entire complaint, by written submission to the Court. Cal. Code Civ. P. § 437c; Fed. R. Civ. P. 56. In California, such a motion is called a “motion for summary judgment” (if challenging the entire complaint) or a “motion for summary adjudication” (if only portions of a complaint or defenses are challenged). In federal courts, parties bring either motions for summary judgment or motions for partial summary judgment. A court may grant such a motion if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law on the issue in question.

6.6 Do the courts in California have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Both California and federal courts may stay proceedings under certain circumstances on the motion of a party or the court’s determination. California courts must consider whether a stay will “promote the ends of justice” and take into account the effect a stay would have on any related proceedings. Cal. R. Ct. 3.515(f). Some stays are mandatory, such as when a defendant files a bankruptcy petition. Sometimes parties may request a stay to permit other litigation or arbitration to resolve issues whose resolution will impact the outcome of the case.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in California? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

California courts do not have a system of voluntary disclosure of documents and information like in the federal courts. See section I.1.3 above. Instead, all documents and information are exchanged through the party-initiated discovery process described in section

1.1.3 above. Mechanisms for discovery in both state and federal courts include requests for documents, interrogatories, depositions, third party subpoenas for depositions and/or documents, and requests for admissions. Parties often also engage in independent investigations.

7.2 What are the rules on privilege in civil proceedings in California?

California and federal courts permit a party to withhold certain information if it is protected by a valid privilege or immunity. Privileges in California courts are limited to those set forth in the California Evidence Code: (1) attorney-client communication (including protection of the attorney's work-product); (2) spousal communication; (3) physician-patient communication; (4) psychotherapist-patient and educational psychologist-patient communication; (5) clergy-penitent communication; (6) sexual assault victim-counsellor communication; (7) domestic violence victim-counsellor communication; (8) trade secrets; (9) secrecy of political ballot; and (10) official records. Cal. Evid. Code §§ 930-1063. The California Constitution also guarantees a right to privacy, which may only be abridged if a compelling interest so dictates. Cal. Const. Art. 1 § 1. Common privileges recognized in federal courts are the privilege for attorney-client communications, attorney work product protection, and the Fifth Amendment right not to incriminate oneself. Failure to assert a privilege may result in waiver.

7.3 What are the rules in California with respect to disclosure by third parties?

Both state and federal courts permit attorneys to issue subpoenas to a third party to compel that person to testify or produce documents. Cal. Code Civ. P. § 2020.010 *et seq.*; Fed. R. Civ. P. 45. Companies may also be compelled to produce documents and provide a witness to testify as to designated relevant issues.

7.4 What is the court's role in disclosure in civil proceedings in California?

Discovery is conducted by the parties in both state and federal courts. If a party does not comply with its discovery obligations, the other party may seek court intervention to compel compliance at the risk of sanctions. Sometimes, a party may request the court to issue a protective order to avoid production of certain categories of information, such as documents protected by a privilege or confidential and proprietary business records containing carefully guarded trade secrets. Sometimes a party may seek to limit the scope of discovery on the grounds the burden and expense of gathering the information far outweighs the potential benefit such information will provide to the other party. Cal. Code Civ. P. § 2017.020(a).

7.5 Are there any restrictions on the use of documents obtained by disclosure in California?

In both state and federal courts, a party may seek a protective order to restrict the other party's ability to obtain or use certain kinds of information from them. Cal. Code Civ. P. § 2033.080(b). Fed. R. Civ. P. 26(c)(1). The court may grant such a motion "for good cause," such as, in state court, to avoid undue embarrassment, expense, or disclosure of highly confidential information, and in federal court, to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. Among other things, a protective order may

provide that trade secrets or other confidential research, development, or commercial information not be admitted or be admitted only in certain ways. Additionally, parties may agree to a "stipulated protective order" (which is then entered as an order of the court) that governs the treatment of confidential information in the lawsuit.

8 Evidence

8.1 What are the basic rules of evidence in California?

California courts follow the rules of evidence contained in the California Evidence Code. Federal courts follow the Federal Rules of Evidence. There are many similarities between the two sets of rules, but they are not identical.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In both California and federal courts, evidence (whether testimonial or documentary) is admissible if it is relevant to an issue in dispute, competent, a proper foundation for its admission has been made, and it is not barred by any exclusion. Evidence is relevant if it is likely to prove or disprove any fact that is at issue in the proceeding. Evidence is competent if it satisfies certain traditional requirements of reliability that are established by statute and case law. For example, hearsay evidence (i.e., out of court statements used to prove the truth of the matter asserted) is often excluded because it is not considered to be reliable. There are, however, numerous established exceptions to the prohibition against hearsay evidence due to the existence of satisfactory indicia of reliability (such as a party's admission against its own interest, or a record made and kept in the ordinary course of business).

California Evidence Code § 352 and Federal Rule of Evidence 403 allow a court to exclude evidence if it determines that the probative value of admitting that evidence is substantially outweighed by the probability that it will result in (a) an undue consumption of time, (b) unfair prejudice, (c) confusion of the issues, or (d) misleading the jury. Federal courts may also exclude unnecessary cumulative evidence. Fed. R. Evid. 403.

California Evidence Code §§ 800-802 govern the admission of expert witness testimony in California courts, which must be: (1) delivered by a qualified expert; (2) on a subject that is sufficiently beyond common experience; (3) reasonably calculated to assist the trier of fact; (4) based on the expert's personal knowledge; and (5) based on matters that experts reasonably rely upon in forming such opinions. Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal court. It requires "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Before witness testimony may be admitted, the party presenting the witness must establish a sufficient foundation showing the witness is competent (e.g., not mentally impaired), understands his duty to tell the truth, can communicate (foreign language and sign language

translators are permitted), and has personal knowledge of the facts. Cal. Evid. Code §§ 701-702; Fed. R. Evid. 601-603. In depositions, witness are generally required to answer all questions, unless they seek information protected by a recognizable privilege.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

In California and federal courts, expert opinion testimony is permitted according to specific rules. For example, expert testimony may be permitted if it concerns a subject beyond an average person's knowledge and the Court deems it helpful. Cal. Evid. Code 801; Fed. R. Evid. 702. The expert's testimony is considered "opinion testimony" and must be based on sufficient data using reliable principles and methods. Expert qualifications and the admissibility of expert opinion testimony are often heavily litigated. Although experts are subject to the same obligation as fact witnesses to provide truthful testimony, they are hired by the respective parties and are sometimes criticized for being no better than a paid witness. Reputable experts therefore work hard to maintain their independence and objectivity.

Experts typically prepare a written report, often with the assistance of counsel, that is provided to the other parties. The expert witness is then deposed by opposing counsel about his qualifications and opinions. The opposing party often seeks to discredit the expert's opinions by, for example, establishing an inadequate methodology or factual basis for the opinions, or by showing the expert lacks the requisite skill and knowledge to opine on the subject matter.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in California?

While the court supervises the parties' presentation of evidence, generally a party may present its evidence as it chooses, subject only to objections from the opposing party and time limits imposed by the court. When a party objects to the admissibility of specific evidence, the court rules on the objection to ensure inadmissible evidence is not presented to the jury. Courts tend to be more lenient in a bench trial because the chief concern for inadmissible evidence – that juries will be improperly influenced – is absent. Before a jury trial begins, parties may, and often do, move *in limine* (i.e., "at the threshold" of trial) to exclude evidence, and the court will make a preliminary ruling on the admissibility of such evidence. Notably, *in limine* rulings are provisional, and during trial parties can attempt, with the permission of the court, to introduce evidence that the court excluded *in limine*.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in California empowered to issue and in what circumstances?

In California, state and federal courts may issue a variety of orders and judgments in civil proceedings. For example, the courts have authority to issue scheduling orders, orders compelling discovery, protective orders, and sanctions for litigation misconduct.

After trial, courts may enter judgment ordering a party to pay an award of money damages to remedy harm caused to the plaintiff. A court may also award "specific performance" requiring the

defendant to take a specific action such as transfer land or other property or reinstate a terminated employee. A court may also issue a declaratory judgment resolving a legal dispute regarding the parties' rights and duties, such as when the parties dispute the meaning of a contract or an insurer's obligations under an insurance policy.

At the conclusion of a case, the court will enter a final judgment, which officially concludes the case at the trial court level and triggers the deadline for the losing party to file a notice of appeal.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

State and federal courts both have the ability to award money damages, which vary depending on the types of claims and circumstances of the case. For example, compensatory damages are intended to remedy harm caused to the plaintiff (or to the defendant on its cross-complaint or counterclaim) and return the party to its pre-injury position. Some cases permit a party to recover lost profits. California courts are authorized by statute to award punitive damages with respect to certain types of claims where a party has shown the other party intentionally acted with malice, oppression or fraud. Cal. Code Civ. P. § 3294. Federal courts may also award punitive damages. The Supreme Court has held that the due process clause limits punitive damages to a range generally less than a multiple of ten times the amount of compensatory damages awarded. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Punitive damages aim to punish a party and deter similar behavior in the future.

Courts may also award pre-judgment interest on the amount of the award, depending on whether the amount of damages was fixed and known at a point in time before the award issued. Cal. Civ. Code § 3287(a). Courts may also award post-judgment interest at the rate of 10% *per annum* or, if against a government entity, at 7% *per annum*. Federal courts are likewise empowered to award pre- and post-judgment interest at a rate that varies with market rates.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Money judgments are not self-executing. If the party against whom the judgment is entered does not voluntarily pay it, the plaintiff must locate assets of the defendant against which it can "execute" the judgment by further court order. California's Enforcement of Judgments law governs the manner in which the judgment is enforced in California. Cal. Code Civ. P. § 680.010 *et seq.* It provides detailed procedures for enforcing a judgment against real property, bank accounts, and other intangible assets, and it provides for post-judgment discovery regarding the identity and location of the judgment debtor's assets.

The U.S. Constitution ensures that a final judgment from any state within the United States is entitled to the same "full faith and credit" in every other state as in the state where the judgment originated. Thus, a judgment from another state can be enforced in California to the extent that it could be enforced in the state where it was issued, regardless of whether California has conflicting law or public policy on the subject, pursuant to the Sister State Money Judgment Act. Cal. Code Civ. P. § 1710.10 *et seq.* Likewise, a California judgment can be enforced in the other 49 states within the United States according to the rules of the state in which enforcement is sought.

Judgments of foreign countries are not treated with the same deference. Instead, California courts evaluate whether to enforce a foreign judgment based on principles of comity. In doing so, the court may refuse to enforce judgments that contravene California law or public policy.

9.4 What are the rules of appeal against a judgment of a civil court of California?

In California state courts, a judgment in an unlimited civil case (in which more than 25,000 USD is at issue) may be appealed to the California Court of Appeal of the district in which the Superior Court that issued the judgment is located. A party must file a Notice of Appeal generally within 60 days of the Notice of Entry of Judgment and pay a fee of \$775. Cal. R. Ct. 8.100, 8.104. Rules governing appellate procedures are set forth in Title 8 of the California Rules of Court.

A judgment from one of the U.S. District Courts in California may be appealed to the Ninth Circuit Court of Appeals. A Notice of Appeal must be filed generally within 30 days of entry of judgment. The Federal Rules of Appellate Procedure govern procedures before the U.S. Circuit Courts of Appeals. Additionally, the Ninth Circuit Court of Appeals has its own set of local rules.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in California? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Contractual arbitration is very common in California, especially in the context of business, employment, labor, and consumer disputes. Courts routinely enforce pre-dispute arbitration agreements. Another common method of alternative dispute resolution (“ADR”) is consensual mediation by a former judge or person with extensive knowledge of the relevant industry. California courts also may order parties to non-binding arbitration as well as mandatory settlement conferences mediated by a judge.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Federal Arbitration Act and California Arbitration Act govern contractual arbitration in California. 9 U.S.C. § 1 *et seq.*; Cal. Code Civ. P. § 1280 *et seq.* The Federal Arbitration Act governs arbitration concerning contracts that deal with interstate, foreign, or maritime commerce. The California Arbitration Act governs arbitration in California that falls outside the federal subject matter jurisdiction. The California Arbitration Act generally governs arbitration not within the jurisdiction of the Federal Arbitration Act, although the precise dividing line between state and federal law is unsettled (*see* section II.3.2 below).

The United States is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Under the New York Convention, foreign arbitral awards may be confirmed in a U.S. District Court by a summary motion for confirmation. Unless one of the grounds for *vacatur* listed in the New York Convention exists, the court must

enter judgment on the award. That judgment can then be enforced against the California assets of the losing party the same as any court judgment. *See* section I.9.3 above.

It is not uncommon for contracts containing arbitration clauses also to require the parties to mediate before commencing arbitration. As a voluntary and non-binding ADR method, mediation as such is not governed by a statutory scheme. Mediations are confidential, and both state and federal courts prohibit the introduction of evidence in court of statements made during mediation. Cal. Evid. Code § 1119; Fed. R. Evid. 408.

1.3 Are there any areas of law in California that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration and mediation are available for use in most civil proceedings in California and are highly encouraged. Certain matters are outside the scope of arbitration, most notably violations of civil rights by government officials, which rights are protected by the California Constitution or the United States Constitution. Additionally, arbitration is not available in California criminal proceedings.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to California in this context?

State and federal courts in California have the authority to stay court proceedings in favor of arbitration, and they frequently do so where the parties have an enforceable contract requiring arbitration. If a party resists arbitration, the other party may bring a motion in court to compel that party to arbitrate, which the courts will grant so long as the parties have an enforceable contract requiring arbitration. If a party refuses to arbitrate even after being compelled to do so, then a default award can be taken against that party, although usually only after evidence of liability is presented.

There is increasing pressure from courts for litigants to use ADR options before (or, instead of) traditional litigation. To this end, the California Judicial Council has developed several rules regarding the role of ADR in civil cases filed in California Superior Courts. These include requiring the plaintiff to serve copies of documents describing ADR processes to the defendant along with the summons and complaint. Additionally, courts require the parties to “meet and confer” at least 30 days before trial in an effort to resolve their dispute. There are also several statutes in California mandating that certain types of civil cases (for example, state administrative proceedings) be submitted to ADR before a lawsuit may be filed. If a party files a lawsuit that is subject to mandatory arbitration, the court may stay the case and enter an order compelling arbitration at the request of the other party.

Both federal and state courts in California have authority to order parties to engage in settlement discussions. Settlement conferences often take place before a judge other than the judge overseeing the case. While the courts cannot force the parties to settle, they can and increasingly do require the parties to negotiate in good faith.

In a few cases, the court has issued monetary sanctions against parties for not attending the mandatory settlement conference or not negotiating in good faith by refusing to engage in reasonable discussions about the merits of the case.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to California in this context?

After the issuance of an arbitration award, a party may file a motion in court to confirm the award. If no basis for *vacatur* exists, the court is required to enter judgment on the award. That judgment is then enforceable like a court judgment. See section I.9.3 above. As such, arbitration awards are “binding.” Arbitration awards may not be “appealed” in the same way that a court judgment may be judicially reviewed. Under both the Federal Arbitration Act and the California Arbitration Act, a party may file a motion in court requesting it to vacate an arbitration award. The bases on which to vacate an arbitration award are, however, few and statutorily prescribed. See Cal. Code Civ. P. §§ 1286.2; 9 U.S.C. § 10. So long as there is no basis to vacate an arbitration award, the court must enter judgment on an arbitration award.

While at common law, courts could set aside arbitration awards if they posed an obvious “substantial injustice”, it is now clear that the statutory grounds for overturning an award are exclusive and do not include a provision for avoiding miscarriages of justice. See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008); *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).

While an agreement to arbitrate a dispute is binding, the question of whether the parties have agreed to arbitrate is determined by the court rather than the arbitrator. Determinations of whether a party can be bound by an arbitration agreement under principles of agency, alter ego or third party beneficiary status are likewise resolved by a court. The law governing the contract determines the validity of the original agreement.

Mediation may result in resolution of a dispute that is memorialized in a settlement agreement executed by the parties. If the parties execute a settlement agreement resolving their dispute, that agreement is enforceable like any other contract. If a settlement agreement is reached within the context of ongoing litigation, the court may enter judgment on the settlement. The court may also retain jurisdiction to enforce the settlement terms to avoid the parties having to bring new litigation if a party fails to comply with the terms of the settlement agreement if the parties provide for such in their settlement agreement. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); Cal. Code Civ. P. 664.6.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in California?

The American Arbitration Association (AAA) and JAMS are the most prominent and frequently used ADR institutions in California. The AAA is widely considered the premier arbitration institution in the United States and California. It has offices in Los Angeles, San Francisco, San Diego, and Fresno, California. The AAA has well-

developed Commercial Rules of Arbitration, and its International Centre for Commercial Dispute Resolution has rules aimed at, and experience with, international arbitration matters. The AAA also provides mediation services.

JAMS is widely considered the premier institution for mediation services in California, making available a long roster of former judges, experienced trial attorneys, and other experienced business people to engage parties in consensual mediation as well as arbitration. There are other, smaller ADR institutions in California, as well as many well-regarded independent arbitrators and mediators unaffiliated with an institution.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The use of arbitration and mediation to resolve business disputes, *in lieu* of court litigation, has steadily risen in popularity in California over the past 20 or so years. The selling points of arbitration have been that it is faster and cheaper than court litigation, there is less discovery (and thus less cost and intrusiveness) than in court litigation, the parties can select the arbitrators, and the proceedings can be confidential. However, many parties remain loyal to court litigation, worrying about the absence of the right of appeal in arbitration, and sometimes preferring the more robust discovery process of litigation.

Mediation has evolved into a significant service industry in its own right. U.S. mediators, with California on the leading edge, have been pioneers in evaluative mediation, where retired judges or senior litigators, make informed assessments of the merits and weaknesses of the disputing parties’ claims and defenses. The mediators then use their evaluations to facilitate settlement short of trial.

Current issues or proceedings affecting the use of those alternative dispute resolution methods in California:

ADR in California is constantly developing. One heavily debated topic is whether attorneys licensed in states other than California should be permitted to represent parties in California ADR proceedings. In the United States, attorneys who wish to practise in a given state must become licensed there by passing that state’s Bar exam. Currently, attorneys who are not licensed to practise in California may nevertheless represent an individual in an ADR proceeding taking place in California (provided that they meet certain basic requirements). However, some groups wish to limit ADR representation to attorneys licensed by the state.

Finally, there is disagreement between the U.S. Supreme Court and the California Supreme Court regarding the extent to which the California Arbitration Act is preempted by the Federal Arbitration Act (pursuant to the U.S. Constitution’s Supremacy Clause). In 2011, the U.S. Supreme Court held that the Federal Arbitration Act preempted a California law deeming unenforceable class-action waivers in an arbitration agreement. See *AT&T Mobility v. Conception*, 131 S. Ct. 1740 (2011). That decision did not resolve the preemption question for all purposes, however. In 2013, the California Supreme Court held that the Federal Arbitration Act, as interpreted by *Conception*, does not preempt state contract principles governing unconscionable contracts so long as they do not interfere with the fundamental attributes of arbitration. See *Sonic-Calabasas A, Inc. v. Moreno*, 54 Cal.4th 1109 (2013). The U.S. Supreme Court declined to review that decision. See *Sonic-Calabasas A, Inc. v. Moreno*, 134 S. Ct. 2724 (2014).

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Connecticut got? Are there any rules that govern civil procedure in Connecticut?

Connecticut adheres to the doctrine of *stare decisis*; once an issue has been adjudicated by the Connecticut Supreme Court – the highest state court – the decision controls precedent on all lower courts. Decisions rendered by the Connecticut Appellate Court are likewise binding on Connecticut Superior Courts (which are the state’s trial level courts) until reversed by the Appellate Court or the Supreme Court.

At the trial court level, Connecticut civil procedure is governed by the Rules for the Superior Court, which includes general rules applicable to all trial courts, as well as rules pertaining specifically to civil matters, juvenile matters, family matters and criminal matters. At the Appellate and Supreme Court level, Connecticut civil procedure is governed by the Rules of Appellate Procedure. The probate courts are governed by the Probate Rules for Practice and Procedure. Collectively, those rules are known as the Connecticut Practice Book.

1.2 How is the civil court system in Connecticut structured? What are the various levels of appeal and are there any specialist courts?

The Superior Courts constitute the trial courts in civil and criminal matters. There are 15 judicial districts throughout the state, with one Superior Court in each judicial district.

Adverse decisions rendered by the Superior Courts are generally appealed to the Appellate Court. A party adversely affected by a decision rendered by the Appellate Court may petition for *certiorari* to the Connecticut Supreme Court. The Supreme Court is not obligated to hear any case; rather, the granting of *certiorari* is discretionary.

In certain situations, a party may appeal a trial court decision directly to the Connecticut Supreme Court. See Conn. Gen. Stat. § 51-199(b). The Connecticut Supreme Court may also transfer to itself cases from the Appellate Court. Conn. Gen. Stat. § 51-199(c).

Specialised courts handle matters pertaining to: housing; small claims (if damages are not expected to exceed \$5,000); juvenile matters; family matters; and probate.

1.3 What are the main stages in civil proceedings in Connecticut? What is their underlying timeframe?

To commence a civil action, a plaintiff must first serve a summons and complaint upon all defendants. See question 3.1. Once service is complete, the plaintiff must file the summons and complaint with the clerk of the applicable trial court.

Typically, the plaintiff must include a “return date” on both the summons and complaint. The return date, which generally must be a Tuesday, is a date with no independent significance, but rather is a date by which other deadlines are keyed. Within two days after the return date, each defendant must file an appearance.

Generally, 30 days following the return date, each defendant must file a pleading responsive to the complaint. A defendant may respond by filing any of the following: motion to dismiss; request to revise; or motion to strike, or answer. However, pleadings may only be filed in the aforementioned order; by filing a subsequent pleading, a party waives its right to file one of the preceding pleadings.

Following the filing of the defendant’s response to the complaint, the plaintiff may file its objection or other response thereto within 30 days. Thereafter, pleadings typically advance one step every 30 days.

The trial court hears argument on motions (such as a motion to dismiss or motion to strike) on the short calendar (see question 6.1). Short calendar hearings typically take place every Monday, and a judge adjudicating the motion may rule from the bench or issue a written order within 120 days of the argument. Practice Book § 11-19.

Throughout the pendency of the litigation, parties may engage in discovery. At any time, either or both parties may move for summary judgment.

If the case has not been disposed of through interlocutory motions, within 10 days after the pleadings are closed, either party must file a certificate of closed pleadings, which notifies the court that the matter is ready for trial. A case may be scheduled for trial at any time by order of the court.

1.4 What is Connecticut’s local judiciary’s approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses, commonly referred to as forum selection clauses, are generally enforceable in Connecticut, absent a showing of “fraud or overreaching”. *U.S. Trust Co. v. Bohart*, 197 Conn. 34, 42 (1985). In addition, an exclusive jurisdiction clause may not be enforced if it will make litigation “so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent”. *Id.*

Matters involving title to real property generally must be adjudicated by a court in the state where the real property lies, rendering void forum selection clauses providing otherwise.

1.5 What are the costs of civil court proceedings in Connecticut? Who bears these costs? Are there any rules on costs budgeting?

The cost of civil litigation varies widely depending on the nature of the case and counsel selected. In general, the cost of filing a complaint with the court ranges from \$90 to \$350. Additional fees may be assessed throughout the litigation.

Connecticut follows the “American Rule” that each party bears its own attorneys’ fees and costs of litigation. Generally, the prevailing party is not entitled to recover such costs and fees absent a statutory or contractual exception, or where one party has acted in bad faith.

Connecticut does not have rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in Connecticut? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingent fee agreements are permitted except in criminal matters and domestic relations matters. CTR RPC Rule 1.5. Any contingent fee arrangements must be in writing signed by the client and must state how the fee is to be determined. CTR RPC Rule 1.5.

In certain limited cases, such as where a prevailing defendant would be entitled to receive costs or where a plaintiff seeks a prejudgment remedy, the court may order that plaintiff provide a bond. See, e.g., Conn. Gen. Stat. §§ 52-186, 52-278d. A party appealing a decision may also be required to provide a bond. See, e.g., Practice Book 63-5 (appellee may move for security for costs); Conn. Gen. Stat. §§ 52-542.

1.7 Are there any constraints to assigning a claim or cause of action in Connecticut? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Connecticut courts have continued to evolve their position with respect to the assignability of particular claims. It is clear that contract claims are freely assignable (*Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259 (2000)), while tort claims based on personal injury are not assignable. *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257 (2005).

Beyond those two pronouncements, the law becomes less clear. Tort claims based on damage to property are generally assignable, although courts have noted that public policy considerations in a specific case may weigh against assignment.

The assignability of claims that may be asserted either under contract or tort law are generally determined on public policy grounds. *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257 (2005) (legal malpractice claim not assignable); see also *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 9, 11 (2008) (Connecticut Unfair Trade Practices Act claim not assignable).

Typically, a client is responsible for its own attorneys’ fees. However, a lawyer may be paid from a source other than the client if the client provides informed consent and the payment arrangement does not interfere with the attorneys’ duties to the client.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Generally, there are no formalities with which a plaintiff must comply prior to the commencement of litigation. However, there may be notice or demand requirements for particular statutory claims.

In addition, parties should review any governing contract to determine whether the contract provides for any pre-litigation notice or demand requirements. Such provisions will generally be enforced by the courts.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

There are a wide range of limitations periods that apply to various statutory and/or common law claims. Set forth below are the limitations periods for the most common claims, however this does not constitute an exhaustive list.

- A claim for a breach of a written contract must be commenced within six years from the date the claim accrues. Conn. Gen. Stat. § 52-576. Generally, a claim accrues when the breach occurs or the injury is inflicted.
- There are two statutes in Connecticut that apply to oral contracts: Conn. Gen. Stat. § 52-581, which provides for a three-year limitations period (and which applies only to executory contracts); and § 52-576, which provides for a six-year limitations period.
- Most tort claims must be commenced within three years from the date of the act or omission complained of. Conn. Gen. Stat. § 52-577.
- Negligence claims must be asserted within two years from the date the injury is sustained or discovered, or with reasonable diligence should have been discovered. Conn. Gen. Stat. § 52-584.
- A claim for negligence or malpractice by a medical professional must be asserted within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, except that no action may be brought more than three years from the date of the act or omission complained. Conn. Gen. Stat. § 52-584.
- Product liability claims must be commenced within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered, but in no event later than 10 years. Conn. Gen. Stat. § 52-577a.
- A claim for unpaid wages must be commenced within two years. Conn. Gen. Stat. § 52-596.
- A claim for libel or slander must be commenced within two years from the act complained of. Conn. Gen. Stat. § 52-596.

Certain tolling periods may also apply to the aforementioned limitations periods.

Ordinarily, statutes of limitations are considered procedural. However, if a claim did not exist at common law, and is merely a creature of statute, the time within which to bring a claim is considered a substantive element of the claim. *Baxter v. Sturm, Ruger & Co., Inc.*, 230 Conn. 335, 340 (1994).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Connecticut? What various means of service are there? What is the deemed date of service? How is service effected outside Connecticut? Is there a preferred method of service of foreign proceedings in Connecticut?

Most civil proceedings are commenced by serving a copy of the summons and complaint on each individual defendant or an agent of each defendant. Service must be made by a marshal, constable or disinterested person. In the case of an individual defendant, service may be made in hand (by literally handing the summons and complaint to the individual) or by leaving the summons and complaint at the individual's primary residence (abode service). In the case of a domestic corporate or municipal defendant, service may be made on the defendant's registered agent for service, or in accordance with the statute applicable to the specific corporate or municipal form of the defendant. Process is deemed served on the date the marshal provides the copy of the summons and complaint to the individual or agent.

Service on a foreign individual, foreign partnership or foreign voluntary association may be made by serving the Secretary of the State with a copy of the summons and complaint at least 12 days before the return date, and by sending a copy of the summons and complaint to the defendant at the defendant's last-known address, by registered or certified mail and with a return receipt requested. Conn. Gen. Stat. § 52-59b.

To lawfully conduct business in Connecticut, foreign corporations must appoint a registered agent for service of process; therefore, service should be made on the registered agent, if any. If the foreign corporation: (1) has no registered agent or its registered agent cannot, with reasonable diligence, be served; (2) has withdrawn from transacting business in this state; or (3) has had its certificate of authority revoked, then the foreign corporation may be served by registered or certified mail with a return receipt requested, and addressed to the secretary of the foreign corporation at its principal office shown in its application for a certificate of authority or in its most recent annual report. Conn. Gen. Stat. § 33-929.

After the summons and complaint are served on all defendants, the individual who made service must attest to the manner in which such service was performed in a document called the return of service. The return of service, summons and complaint are then filed with the court.

The United States is party to both the Hague Service Convention and the Inter-American Service Convention. As a state within the United States, Connecticut is also bound by these conventions.

3.2 Are any pre-action interim remedies available in Connecticut? How do you apply for them? What are the main criteria for obtaining these?

A party may apply for a pre-judgment remedy ("PJR") in Connecticut before commencement of the plenary action, by attaching a proposed unsigned summons and complaint to (1) an application for a PJR, (2) an affidavit showing that "there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any known defences, counterclaims or set-offs, will be rendered in the matter in favour of the plaintiff", (3) a form of order that a hearing be held, and (4) a form of summons. Conn. Gen. Stat. 52-278c. A party also may seek a PJR at the same time

it files a complaint, or any time during the pendency of the action. A PJR is any remedy that enables a plaintiff by way of attachment, foreign attachment, garnishment or replevin to secure assets of the defendant(s) sufficient to satisfy a prospective judgment in favour of the plaintiff. Conn. Gen. Stat. § 52-278a(d). Upon receipt of the application for PJR, the court will typically schedule the matter for an evidentiary hearing, although if certain statutorily enumerated exigent circumstances are present, a PJR may be granted without a hearing or notice to the defendant. The evidentiary standard at the hearing is "probable cause"; a plaintiff satisfying that low threshold is entitled to a PJR. Conn. Gen. Stat. § 52-278d.

A party may also apply for interim injunctive relief, in the form of a temporary injunction and/or temporary restraining order ("TRO") (which typically restrains the defendant for a brief period pending notice and hearing on an application for a temporary injunction). Conn. Gen. Stat. § 52-471. No temporary injunction may be granted without notice to the adverse party unless it clearly appears from the specific facts shown by affidavit or by verified complaint that irreparable loss or damage will result to the plaintiff before the matter can be heard on notice. Conn. Gen. Stat. §52-473. To be eligible for temporary injunctive relief, the party must demonstrate that he or she has no adequate remedy at law, and that he or she will suffer a substantial and irreparable injury if no injunction is granted.

3.3 What are the main elements of the claimant's pleadings?

The complaint is the plaintiff's initial pleading. In the complaint, the plaintiff must set forth the facts underlying the action and particular legal theories on which the plaintiff relies. The complaint "shall contain a plain and concise statement of the material facts", "but not of the evidence by which they are to be proved". Conn. Practice Book § 10-1.

The allegations in the complaint should be set forth in numbered paragraphs and each distinct legal theory should be distinguished as a separate claim. On the final page of the complaint, the plaintiff must include a demand for relief, in which the plaintiff articulates the remedy or remedies sought. The demand for relief should be on a page separate from the allegations in the claims. Where money damages are sought, a plaintiff must include, on a separate page, a statement of amount in demand. Conn. Gen. Stat. § 52-91.

The complaint must be accompanied by a summons which is appended to the front of the complaint. A summons is a court form, completed by the plaintiff, that provides basic information about the lawsuit, including the names of all the parties, the return date, the address of the court house and the number of counts (claims) asserted against the defendant(s).

3.4 Can the pleadings be amended? If so, are there any restrictions?

The plaintiff may amend its complaint once as of right within the first 30 days after the return date. At any time thereafter, either party may amend its pleading by either: (1) consent of the opposing party; (2) order of the judicial authority; or (3) filing a request to file an amendment, with the proposed amended pleading attached. However, if option (3) is utilised, the opposing party may object within 15 days of filing the request, and the court will determine whether the amendment will be allowed.

Amendments are liberally permitted, and may even be permitted after trial to conform to the proffered evidence. However, the court has discretion to prohibit proposed amendments that may unduly delay trial or prejudice the adverse party.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defendant's statement of defence, known in Connecticut as the answer to the complaint, may be filed as an initial response to the complaint, or may be filed after other pre-answer motions have been exhausted.

In the answer, the defendant must respond to each allegation in the complaint, by admitting, denying, or denying information sufficient to form a belief as to the truth or falsity of the allegation. Legal conclusions do not require a response.

In the answer, the defendant must state any special defences, counterclaims and/or cross-claims that it intends to assert. A special defence is a defence that does not dispute the allegations of the complaint, but asserts that, even if the plaintiff's allegations are true, the plaintiff is not entitled to the full measure of relief requested.

Counterclaims (claims asserted against the plaintiff) and cross-claims (claims asserted against another defendant) must "arise[] out of the transaction or one of the transactions which is the subject of the plaintiff's complaint". Practice Book § 10-10.

4.2 What is the time limit within which the statement of defence has to be served?

In most civil actions, the first pleading on behalf of the defendant must be filed within 30 days after the return date. Practice Book 10-8. Please note that a motion to dismiss – which may be the initial response filed by a defendant – is due 30 days after filing an appearance (Practice Book 10-30) and an appearance is generally filed two days after the return date (Practice Book 3-2).

Motions for extension of time are generally granted, especially if the plaintiff consents to the requested extension.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes. A defendant in any civil action may seek to implead a third party defendant by moving for permission to serve a summons and complaint upon a third party who is or may be liable to the original defendant for all or part of the plaintiff's claim against him or her. Practice Book § 10-11; Conn. Gen. Stat. § 52-110.

A motion to implead a third party may be filed at any time before trial. The court will grant the motion to implead the third party if the court, in its discretion, determines that the granting of the motion will not unduly delay the trial or work an injustice upon the plaintiff or the party sought to be impleaded.

4.4 What happens if the defendant does not defend the claim?

If a defendant does not defend against an action, the court may default the defendant, and thereafter grant a default judgment in favour of the plaintiff. A defendant is typically defaulted for either failing to file an appearance or failing to plead.

If a party has been defaulted for failing to appear or failing to plead, and judgment enters based on said default, the judgmented party may move to open the judgment any time within four months

after the notice of judgment was sent. In the motion to open the judgment, the moving party must show: (1) a good defence existed at the time judgment entered; and (2) the party was prevented by mistake, accident or other reasonable cause from pleading or appearing. Practice Book § 17-43. If the court grants said motion, the case is reinstated on the docket.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may dispute the court's subject matter jurisdiction over the matter, that is, the court's authority to hear the case, and/or personal jurisdiction over the defendant.

A court may exercise personal jurisdiction over a foreign defendant only if the state's long-arm statute authorises assertion of jurisdiction over the defendant and the exercise of jurisdiction comports with constitutional principles of due process. A court will also lack jurisdiction over a foreign (or domestic) defendant if the defendant was not validly served with process.

Unlike subject matter jurisdiction, lack of personal jurisdiction may be waived. A motion to dismiss for lack of subject matter jurisdiction may be raised at any time.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There are multiple mechanisms for adding a party to a pending action, depending on the purpose for adding said party. First, a defendant may seek to implead a third party who is or may be liable to the defendant.

Additionally, any party to the action – or person who is not yet a party – may also file a motion to cite in additional party if the party to be added: (1) has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff; or (2) is necessary for a complete determination or settlement of any question involved therein. Conn. Gen. Stat. 52-102. If a complete determination cannot be had without the presence of other parties, the Court may direct that party to be joined. Conn. Gen. Stat. § 52-107. The Court has discretion to add a party to the case when it "deems the interests of justice require". Conn. Gen. Stat. § 52-108; Practice Book § 9-19.

A non-party itself may seek leave to intervene in an action and be made a party. If the court determines that the prospective party has an interest which a prospective judgment will affect, the court will order that person or entity to be made a party. Practice Book § 9-18; Conn. Gen. Stat. § 52-107.

New parties may be added at any time during the action. Practice Book 9-19; Conn. Gen. Stat. § 52-108. However, because the addition of parties is at the discretion of the Court, a Court may decline to permit the addition of a party where doing so would prejudice another party or unduly delay trial.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes. Pursuant to Practice Book § 9-5, two or more separate actions may be tried together where doing so would expedite adjudication

without causing injustice to any party. While the court has discretion to determine whether consolidation is appropriate, the primary considerations are whether the actions arise out of the same transaction or involve identical parties.

5.3 Do you have split trials/bifurcation of proceedings?

Yes. Pursuant to Conn. Gen. Stat. § 52-205 and Practice Book § 15-1, the court, in its discretion, may bifurcate the issues for trial, in either jury cases or court cases, where doing so would serve the interests of convenience, negation of prejudice and judicial efficiency.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Connecticut? How are cases allocated?

Historically, most civil cases in Connecticut have not been assigned to a particular judge until trial. Throughout the pendency of the case, when a motion, request or application is scheduled to be argued, or adjudicated without argument, the matter is decided by a particular judge assigned to short calendar that day. Practice Book § 11-13. It is only when the case is exposed for trial, and all pre-trial hearings have been concluded, that the court assigns a trial judge to hear the matter.

The Connecticut judicial branch has recently implemented an Individual Calendaring Program, applicable to most civil matters, in three judicial districts in Connecticut (Waterbury, New Britain and Stamford). Newly-commenced cases in these judicial districts are assigned to a particular judge for the life of the case. Administrative appeals, foreclosure and property matters are not part of the Individual Calendaring Program.

Certain civil cases with issues of complexity may be referred to the Complex Litigation Docket (“CLD”), where they are assigned to a particular judge throughout the life of the case. A party must apply for referral to the CLD, and the court has discretion to grant or deny the request.

6.2 Do the courts in Connecticut have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court has the authority to oversee the progression of the case. Under the traditional system, the court will not take an active role until the matter is ready for trial. Often, the court’s managerial role is limited to a trial management conference. At the trial management conference, counsel for all parties provide to the court a trial management report containing information regarding the dispute, stipulated facts, and evidence and testimony that may be proffered. The court may also try to mediate the dispute between the parties in an effort to settle the matter before trial.

In some cases, and in all matters in the Individual Calendaring Program or on the Complex Litigation Docket, the court may require the parties to propose a scheduling order at the commencement of the case. The scheduling order, which when approved is entered as an order by the court, sets forth the timeframe for the case, and includes, for example, the deadlines for completing written discovery, depositions and disclosures of expert witnesses.

On the Complex Litigation Docket, the court will also require the parties to appear periodically for case management conferences.

6.3 What sanctions are the courts in Connecticut empowered to impose on a party that disobeys the court’s orders or directions?

The trial court has the inherent power to impose reasonable sanctions to compel the observance of its rules. *Millbrook Owners Ass’n, Inc. v. Hamilton Standard*, 257 Conn. 1, 9 (2001). For example, if a party has acted in bad faith in the commencement or course of litigation, the court has inherent authority to award the adverse party its attorneys’ fees. In addition to its inherent authority, numerous statutes and court rules permit the imposition of sanctions for specific conduct. For example, Practice Book § 13-14 provides that if a party fails to comply with certain discovery obligations, the court “may, on motion, make such order as the ends of justice require”, including entry of an order establishing as a fact the matters in question, prohibiting the entry into evidence of designated matters, entry of a default, nonsuit or dismissal, and an award of costs and attorneys’ fees. Additionally, Practice Book § 13-4 provides that if a party fails to disclose its intended expert witness, the court may preclude the proffered testimony. Sanctions must be proportional to the violation.

6.4 Do the courts in Connecticut have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Yes. Practice Book § 10-39 provides that a party may seek to strike part of an adversary’s pleading if: (1) the allegations fail to state a claim upon which relief can be granted; (2) any prayer for relief in any such complaint, counterclaim or cross-complaint is legally insufficient; (3) any count of the pleading is legally insufficient due to the absence of any necessary party or the failure to join or give notice to any interested person; or (4) two or more causes of action are improperly joined.

In addition, Practice Book § 10-30 provides that a party may move to dismiss a complaint for: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; or (4) insufficiency of service of process.

6.5 Can the civil courts in Connecticut enter summary judgment?

Yes. The court may grant summary judgment “if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law”. Practice Book § 17-49. To successfully oppose summary judgment, a party must specify facts that create a genuine issue of material fact.

6.6 Do the courts in Connecticut have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes. A court may dismiss or stay an action in a number of circumstances. For example, court may dismiss a case as a sanction for egregious conduct. Additionally, a court may stay or dismiss a case where there is prior action pending of the same character between the same parties. A court also has discretion to stay the proceedings or postpone civil discovery where there is a parallel pending criminal prosecution, where the interests of justice so require. A court must stay litigation when a party files a petition for bankruptcy. Likewise, a court will stay litigation when the parties are required to arbitrate the disputed matter. Conn. Gen. Stat. § 52-409.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Connecticut? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Parties to a civil action are entitled to obtain a variety of discovery. A party must request such information in the form of interrogatories (questions seeking factual answers), requests for the production of documents and/or requests for admission. A party may also depose another party, party representative or third party. The information sought through these discovery tools does not have to be admissible, but merely has to be reasonably calculated to lead to the discovery of admissible evidence.

The party responding to a discovery request does not have to provide information that is privileged, falls within the scope of the attorney work product doctrine, is not currently within its possession or may be obtained as easily by the requesting party. Practice Book § 13-2. Materials prepared in anticipation of litigation must only be provided if a court determines that the requesting party “has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means”. Practice Book § 13-3.

A party may object to certain interrogatories, requests for the production of documents and/or requests for admission. The requesting party and the responding party must engage in a good faith dialogue regarding the objections, and, if agreement is not reached, the requesting party may seek judicial assistance in resolving the dispute.

Note that once litigation is anticipated, a party has an obligation to preserve all potentially relevant documents, including hard copy materials and electronic information.

Connecticut permits a party to file a bill of discovery, which is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. *Berger v. Cuomo*, 230 Conn. 1, 5-8, 644 A.2d 333, 337-38 (1994). To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defence of, another action already brought or about to be brought. *Id.* at 6. A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. *Id.* at 7. In addition, the plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. *Id.*

7.2 What are the rules on privilege in civil proceedings in Connecticut?

Connecticut courts recognise a variety of categories of privileged communications. The most common is the attorney-client privilege, which is invoked when confidential communication between client and attorney is inextricably linked to giving of legal advice. The attorney-client privilege may be waived by voluntary disclosure of otherwise confidential communications, the presence of a third party during the communication or if a party places the communications “at issue” in the case. The “at issue”, or implied waiver, exception applies when a party specifically pleads reliance on an attorney’s advice as an element of a claim or defence, or otherwise only when the contents of the legal advice is integral to the outcome of the legal claims of the action.

For public policy reasons, statements made by a client to his attorney with respect to the client’s commission of a crime or civil fraud to be committed in the future are not privileged.

Connecticut also recognises a psychologist-patient communication privilege (Conn. Gen. Stat. § 52-146c); a psychiatrist-patient communication privilege (Conn. Gen. Stat. § 52-146d); a physician-patient communication privilege (Conn. Gen. Stat. § 52-146o); a clergy-penitent communication privilege (Conn. Gen. Stat. § 52-146b); a communications privilege for a sexual assault counsellor and a victim (Conn. Gen. Stat. § 52-146k); and a parent-child privilege, pursuant to which a parent may decline to testify for or against an accused child in juvenile proceedings (Conn. Gen. Stat. § 46b-138a).

There are two privileges that apply to married couples: a spousal testimony privilege (permitting the husband or wife of a criminal defendant to refuse to testify against his or her spouse in a criminal proceeding, provided that the couple is married at the time of trial); and the marital communications privilege (permitting an individual to refuse to testify as to any confidential communication made by the individual to the spouse during their marriage).

7.3 What are the rules in Connecticut with respect to disclosure by third parties?

A party may direct discovery requests to a third party. Serving a subpoena on a third party is a commonly used process for procuring testimony and the production of documents relevant to the matter in dispute. Practice Book 13-28; *Three S. Dev. Co. v. Santore*, 193 Conn. 174, 179 (1984). The court, however, may, upon motion, quash or modify the subpoena if it is unreasonable and oppressive or if it otherwise seeks materials not subject to production.

7.4 What is the court’s role in disclosure in civil proceedings in Connecticut?

Discovery is primarily conducted by the parties to the litigation. Generally, the court will only become involved when the parties cannot reach an agreement regarding the scope of, or procedure for, permissible discovery. For example, the court will adjudicate objections to discovery requests, motions to quash subpoenas and motions for a protective order. Courts are empowered to impose sanctions on parties who fail to abide by discovery rules or orders.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Connecticut?

If a party wishes to keep a particular document or testimony from public disclosure, the party may move for an order that materials to be filed in connection with a court proceeding be sealed or their disclosure limited. Practice Book § 11-20A. The party wishing to seal the material bears the burden of demonstrating that sealing is necessary to preserve an interest which overrides the public’s interest in viewing such materials.

Additionally, parties often enter into a confidentiality agreement pursuant to which they mutually agree to limit the use of materials obtained during discovery to the present litigation. Such an agreement may simply take the form of a bilateral agreement, or the parties may ask the court to enter it as an order.

8 Evidence

8.1 What are the basic rules of evidence in Connecticut?

The rules of evidence are set forth in the Connecticut Code of Evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All evidence that is relevant is presumed to be admissible (CT R REV § 4-2), although the court may restrict evidence to be used for a particular purpose. CT R REV § 1-4. Evidence is relevant if it has “any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence”. CT R REV § 4-1. Evidence may be excluded if its “probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence”. CT R REV § 4-3.

Expert evidence, typically in the form of testimony, is admissible in the form of an opinion if “(1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues”. *Sullivan v. Metro-N. Commuter R. Co.*, 292 Conn. 150, 158 (2009); CT R REV § 7-2. However, an expert may not testify regarding the “ultimate” issue in a case, unless the trier of fact needs expert assistance in deciding the issue. CT R REV § 7-3.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

All witnesses are presumed competent to testify and must declare that s/he will testify truthfully. CT R REV §§ 6-1, 6-2. Fact witnesses must testify on first-hand knowledge; although exceptions apply, generally hearsay is not permissible testimony.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Connecticut courts require disclosure of the “factual basis” underlying an expert witnesses’ opinion before the expert witness may render opinion. Connecticut courts have not addressed whether an expert’s duties lie primarily with the court or the client on whose behalf the expert testifies.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Connecticut?

The court determines what evidence is admissible, although the issue of admissibility is typically raised by a party.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Connecticut empowered to issue and in what circumstances?

Courts are empowered to grant a wide range of legal and equitable relief. Conn. Gen. Stat. § 52-1. Most parties typically seek money damages, which a court may award in the form of compensatory and/or punitive damages. Where there is no adequate remedy at law, equitable remedies are available, which may include, but are not limited to: specific performance of a party’s obligations under a contract; an accounting of certain monies received and/or expended; imposition of a constructive trust; disgorgement of profits; and/or injunctive relief. Finally, Connecticut courts are statutorily authorised to issue a declaratory judgment determining the parties’ rights and legal relations. Conn. Gen. Stat. § 52-29.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Connecticut courts are empowered to make a determination of compensatory and/or punitive damages. The purpose of compensatory damages is to restore an injured party to the position he or she would have been in if the wrong had not been committed. Common law punitive damages are limited to the expense of litigation less taxable costs, and are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights. Certain statutes also permit punitive damages awards at the court’s discretion. Courts are also empowered to award a prevailing party interest.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Connecticut enacted a foreign judgment statute, which applies to “any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state except one obtained by default in appearance or by confession of judgment”. Conn. Gen. Stat. § 52-604. Pursuant to the foreign judgment statute, the judgment creditor must file a certified copy of the foreign judgment along with a certification that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, that the enforcement of such judgment has not been stayed, and the name and address of the judgment debtor. Within 30 days after the filing of the judgment and the certificate, the judgment creditor must mail notice of filing of the foreign judgment by registered or certified mail, return receipt requested, to the judgment debtor. A foreign judgment debtor may stay enforcement by showing to the court that an appeal of the foreign judgment will be taken, or that a stay of execution has been granted.

To enforce a money judgment, a prevailing party may obtain a bank execution from the court, which permits a state marshal to withdraw funds up to the amount of the judgment from the account of the judgmented party. A prevailing party may also file a judgment lien on assets of the judgmented party.

9.4 What are the rules of appeal against a judgment of a civil court of Connecticut?

The Connecticut Rules of Appellate Procedure set forth the rules for appealing a civil court order.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Connecticut? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are the most commonly used methods of alternate dispute resolution in Connecticut. Parties are always free to utilise private mediators, arbitrators and experts.

The Connecticut Judicial Branch also provides litigants with access to a variety of court-annexed alternate dispute resolution programmes. For example, parties to a civil action in which a judgment is expected to be less than \$50,000 may participate in the court-annexed non-binding arbitration programme. Conn. Gen. Stat. § 52-549u, *et seq.*

Parties to a civil action may also participate in a judicial alternative dispute resolution (J-ADR) if settlement is feasible, but would take longer than a half day. Conn. Gen. Stat. § 51-5a.

Certain contract cases involving money damages of less than \$50,000 may be eligible for referral to the court's fact-finding programme. Conn. Gen. Stat. § 52-549n, *et seq.* The court-appointed fact-finder determines the matters in controversy submitted to him, and prepares a finding of fact, which includes an award of damages, if applicable. The parties may object to the findings, and the court is free to accept or reject the fact-finder's determination.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The rules governing the court-annexed alternate dispute resolution programmes are set forth in the aforementioned statutes. Parties utilising private mediators and arbitrators – e.g., the American Arbitration Association or JAMS – must adhere to those servicers' rules.

1.3 Are there any areas of law in Connecticut that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

By statute, agreements to arbitrate issues related to child support, visitation and custody are not enforceable. Conn. Gen. Stat. § 52-408. Additionally, the specific statutes governing the various court-annexed alternate dispute resolution programmes establish which cases may be referred to those programmes.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Connecticut in this context?

If a party to an agreement to arbitrate fails and refuses to participate in arbitration, the party seeking to enforce the arbitration covenant may apply to the Superior Court for an order directing the non-compliant party to proceed with arbitration. Conn. Gen. Stat. § 52-410.

If a party to an arbitration agreement commences litigation, the party seeking to enforce the arbitration covenant may file a motion to stay the litigation proceedings. Conn. Gen. Stat. § 52-409. Pursuant to statute, if any issue involved in the litigation is referable to arbitration under the agreement, the court must stay the litigation until the parties have completed arbitration proceedings.

A party may also seek a PJR or injunction in aid of a pending arbitration. Conn. Gen. Stat. §§ 52-422, 52-278d(c), § 52-409. Pursuant to Conn. Gen. Stat. § 52-422, a court in an arbitration proceeding “may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed”.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Connecticut in this context?

Arbitration awards must be approved, modified or vacated by the court to be enforced. Pursuant to Conn. Gen. Stat. § 52-417, a party has one year after an arbitration award has been rendered to apply to the Superior Court for confirmation of the arbitration award.

A party may also seek to vacate the arbitration award on one or more of the following grounds: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption on the part of any arbitrator; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers or so imperfectly executed them that a final award upon the subject matter submitted was not made. Conn. Gen. Stat. § 52-418.

A party may also seek to modify an arbitration award on one or more of the following grounds: (1) there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted; or (3) the award is imperfect in matter of form not affecting the merits of the controversy. Conn. Gen. Stat. § 52-419.

In most cases, agreements reached through mediation do not need to be approved by the court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Connecticut?

Many contracts containing arbitration or mediation provisions require reference to national ADR institutions such as JAMS or the American Arbitration Association. The ADR Center and Litigation Alternatives are ADR institutions based in Connecticut.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

In general, alternate dispute resolution methods are gaining favour, and Connecticut is continuing to expand the court-annexed alternate dispute resolution programmes. The courts now offer alternate dispute resolution programmes targeted to address specific types of cases including family matters, child protection, landlord-tenant disputes and foreclosures. Other categories of cases may still qualify for participation in the court's Judicial-ADR, voluntary arbitration or fact-finding programmes. In 2014, the Connecticut judicial branch announced a variety of new initiatives that it intended to implement in the near future: expansion of the number of judges who are trained to serve as mediators; appointment of attorneys with particular subject matter expertise as mediators; and the creation of a new pilot mediation docket, which would operate in a less-formal manner and more closely resemble private mediation.

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USA – Illinois

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Illinois got? Are there any rules that govern civil procedure in Illinois?

Illinois is a common law jurisdiction under which case law is developed according to precedent. Proceedings in civil cases are governed by the Illinois Code of Civil Procedure (“Code”), 735 ILCS 5/1-101 *et seq.*, Illinois Supreme Court Rules (“Rules”) 100 *et seq.*, and local rules of the various courts.

1.2 How is the civil court system in Illinois structured? What are the various levels of appeal and are there any specialist courts?

Illinois is divided geographically into 22 judicial circuits. Each circuit court is a court of original jurisdiction. Appeals from the circuit courts are heard in the Appellate Court, which is organised into five geographic districts. The Illinois Supreme Court is the highest court of the State.

The circuit courts are organised into specialised divisions and departments ranging from criminal and family divisions to a specialised commercial calendar in the law division and mortgage foreclosure courts within the chancery division. Not all circuit courts include the same divisions and departments.

1.3 What are the main stages in civil proceedings in Illinois? What is their underlying timeframe?

- Pleading: civil actions are commenced by the filing and subsequent service of a complaint. Defendants generally are required to respond by filing an answer or a motion directed to the complaint, as described below.
- Discovery: Illinois allows broad discovery in civil cases, similar to most U.S. jurisdictions. The discovery phase can last from several months to several years or more in complex cases.
- Motion Practice: during both the pleading and discovery phases, parties may file motions seeking adjudication of issues that can be decided by the court on the basis of facts that are not subject to reasonable dispute. Such motions may or may not rely on evidence obtained through discovery.
- Trial: disputed issues of fact are decided by a trial. Illinois distinguishes between cases at law, which are subject to trial by jury, and cases in equity, which are tried to the court. A

party seeking trial by jury must file a jury demand with its initial pleading (generally, the complaint or answer) or the right to jury trial is waived.

- Judgment: a judgment is the final decision of the court that determines the parties’ rights and obligations.
- Appeal: any party affected by a final judgment of the circuit court may appeal to the Appellate Court.
- Enforcement: enforcement of judgments is discussed below in question 9.3.

1.4 What is Illinois’ local judiciary’s approach to exclusive jurisdiction clauses?

Illinois courts will enforce the parties’ agreement to exclusive jurisdiction in a contractual forum selection clause unless the party opposing enforcement shows that the agreement was the result of fraud, otherwise defective as a matter of contract law, contravenes a strong public policy of the State, or that the choice of forum would impose serious inconvenience that was outside the reasonable contemplation of the parties at the time that they entered into the agreement. Various statutes occasionally place other limitations on forum selection.

1.5 What are the costs of civil court proceedings in Illinois? Who bears these costs? Are there any rules on costs budgeting?

Court costs in civil proceedings vary according to the court and the nature of the action. Generally, litigants should expect to pay several hundred dollars to commence an action and somewhat less to appear as a defendant or to file a jury demand. Other fees also may apply.

Illinois courts follow the American Rule under which each party bears its own costs of litigation, including attorneys’ fees, unless a statute or valid agreement between parties provides otherwise. The courts also have discretion to award costs and attorneys’ fees as a sanction for frivolous pleadings or other misconduct.

There are no rules that require budgeting of costs or attorney fees, though attorneys often can provide budgets if requested.

1.6 Are there any particular rules about funding litigation in Illinois? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Under the Illinois Rules of Professional Conduct, the fees charged by an attorney must be reasonable. The factors considered in

determining reasonableness include the time and labour involved, the complexity of the matter and technical skills required, the results obtained, and the fees customarily charged, among others. Contingent fees (i.e., fees conditioned in whole or in part on the outcome of the matter) are allowed except in domestic relations and criminal matters.

Parties normally are not required to post security for costs, although security may be required by statute in particular actions, such as certain types of shareholder or real estate actions. As a condition to granting any restraining order or preliminary injunction, Illinois courts have discretion to require a bond or other security for costs and/or damages that may be incurred or suffered by any party who is wrongfully enjoined or restrained.

Litigation funding is discussed in response to the next question.

1.7 Are there any constraints to assigning a claim or cause of action in Illinois? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

As a general rule, actions for torts to property and most contract actions are assignable. Actions for personal injuries and some contract actions of a personal nature are not assignable.

Litigation funding, or the advancement of funds to a litigant in exchange for an interest in the outcome of the lawsuit, rapidly is gaining acceptance in the U.S. There is no definitive guidance under Illinois law that establishes the boundaries within which litigation funding is permitted. A recent and well-reasoned decision of the United States District Court for the Northern District of Illinois found that Illinois law provides no defence of champerty or maintenance against a plaintiff that entered into a contract for third-party funding of litigation expenses. *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014). This ruling is consistent with a long history of Illinois cases that narrowly construe the doctrines of champerty and maintenance.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Notice is not required prior to filing an action except in rare situations. In certain cases, such as employment discrimination, plaintiffs are required to exhaust administrative remedies prior to filing a civil action. In medical malpractice cases, plaintiffs must obtain a written determination from an expert in that there is a reasonable and meritorious basis for filing the action.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitations periods are established by statutes, many of which are collected in Article XIII of the Code, as a matter of substantive law. Unless a more specific statute applies, actions on a written contract or other written instrument are required to be commenced within 10 years after the cause of action accrues. Most personal injury actions are required to be commenced within two years after accrual. The limitations period for most actions involving injuries to property and typical business disputes that are not based on a written contract is five years.

A cause of action accrues when the plaintiff suffers an injury caused by the wrongful act of another. The limitations period is tolled under the “discovery rule” if the plaintiff shows that it did not know within the limitations period, and with reasonable diligence could not have known, of the injury and its cause.

Actions in equity are governed by the common law doctrine of *laches*, which bars a claim when the defendant has been prejudiced by the plaintiff’s unreasonable delay in asserting the claim. In determining unreasonable delay, the courts often look to the statutes of limitation that would apply to comparable actions at law.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Illinois? What various means of service are there? What is the deemed date of service? How is service effected outside Illinois? Is there a preferred method of service of foreign proceedings in Illinois?

Unless otherwise provided by statute, every action is commenced by the filing of a complaint. Service on individual defendants may be made personally or at the defendant’s residence if the summons is left with a resident of at least 13 years of age. Service on corporations is made through a registered agent or by personal service on any officer or agent of the corporation found in the State. Partnerships are served by service on any partner or agent found within the State.

Parties outside Illinois may be served by personal service in like manner as if service were made within the State. If the party is subject to jurisdiction in the State (because of being a citizen or resident or having committed an act subjecting itself to jurisdiction), such service has the same force and effect as personal service within the State. Upon an evidentiary showing that personal service is impracticable after reasonable efforts have been made, the court may order service to be made in another manner consistent with due process.

3.2 Are any pre-action interim remedies available in Illinois? How do you apply for them? What are the main criteria for obtaining these?

Parties may obtain emergency injunctive relief in the form of a temporary restraining order or preliminary injunction to prevent a threatened wrong or other imminent irreparable harm until a final determination of the merits. A temporary restraining order preserves the *status quo* until a hearing can be held on an application for preliminary injunction. A verified complaint or supporting affidavits are required. A temporary restraining order may be granted without notice only if the movant clearly shows that immediate and irreparable injury would otherwise result.

To obtain a preliminary injunction, the party seeking relief must demonstrate a clearly ascertainable right that needs protection, an imminent threat of irreparable injury, no adequate remedy at law, and a substantial likelihood of success on the merits. The court also considers public policy and the balance of equities and relative hardships between the parties.

Pre-judgment attachment may be available to creditors asserting a money claim under the conditions set out in Code section 4-101.

3.3 What are the main elements of the claimant’s pleadings?

All pleadings must contain a plain and concise statement of the pleader’s cause of action, counterclaim, defence, or reply. Each

separate cause of action upon which a separate recovery might be had must be stated in a separate count or counterclaim and must contain a specific prayer for relief. Illinois law requires the plaintiff to allege facts, not mere conclusions, sufficient to establish his or her right to relief.

For any claim or defence founded upon a written instrument, a copy thereof must be attached to the pleading as an exhibit. Every pleading must be signed by the party or the party's attorney to certify to the best of the signer's knowledge, information, and belief that the pleading is well grounded in fact and is warranted by existing law or good-faith argument.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Illinois allows liberal amendment of pleadings at any time before final judgment on terms that are "just and reasonable" and do not cause prejudice to another party. New parties can be added by amendment after the expiration of the applicable limitations period only if the party sought to be added knew or should have known within the limitations period that it would have been named but for a mistake of identity. New claims can be added by amendment after the expiration of the applicable limitations period only if they arise from the same transaction or occurrence as a claim filed against the same party within the limitations period.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

If a defendant challenges the jurisdiction of the court or the sufficiency of the complaint to state a cause of action on which relief can be granted, or asserts that the action is barred by an affirmative matter established by undisputed facts, such as the statute of limitations or a prior judgment between the parties, the defendant may respond to the complaint by moving to dismiss the action.

If the defendant does not move to dismiss, or if the motion to dismiss is denied, the defendant is required to file an answer that admits or denies each factual allegation of the complaint and sets forth a short and plain statement of any counterclaim or defences, including the defence of set-off.

4.2 What is the time limit within which the statement of defence has to be served?

Defendants generally are required to file an answer or otherwise respond to the complaint within 30 days after service, excluding the date of service. Extensions of time are granted routinely for good cause, such as when a defendant reasonably requires additional time to retain counsel or to investigate the allegations.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Code section 2-406 permits any defendant to bring a third-party complaint against any person not a party to the action that is or may be liable to the defendant for all or part of the plaintiff's claim. In

addition, the court may require the addition of any parties that are necessary for the complete determination of the matters in controversy.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to answer or otherwise respond within the time required, the court may enter an order of default. The plaintiff may thereafter request the court to enter judgment by default and award damages and/or other relief requested in the complaint. In its discretion, the court may require proof of the allegations showing the plaintiff is entitled to relief.

After entry of an order of default, the defendant may appear and request the court to set aside the default. If no default judgment has been entered, such requests are granted liberally. The defendant may move to set aside a judgment by default, but generally must do so within 30 days after entry thereof.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, a defendant may move to dismiss for lack of subject matter jurisdiction under Code section 2-619 or for lack of personal jurisdiction under Code section 2-301. The latter may be on the ground that the defendant is not amenable to process (i.e., not subject to jurisdiction) in the State or on the grounds of insufficient process or insufficient service. Objections to personal jurisdiction are waived by filing any responsive pleading that does not assert the objection. Lack of subject matter jurisdiction is not waivable and can be raised at any time, including by the court on its own initiative.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

See question 4.3.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Actions pending in the same court may be consolidated to aid convenience whenever it can be done without prejudice to a substantial right. When civil actions involving one or more common questions of law or fact are pending in different judicial circuits, the Supreme Court may transfer all such actions to one circuit for consolidated pre-trial, trial, or post-trial proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

The trial court has discretion to order separate trials of any cause of action, counterclaim or third-party claim to promote convenience or efficiency. Bifurcation of liability and damages for trial is allowed only with the agreement of all parties.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Illinois? How are cases allocated?

Illinois circuit courts are divided into divisions and departments to which cases are assigned on the basis of the subject matter, the relief sought, and the nature of the claims asserted.

6.2 Do the courts in Illinois have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Among other things, Illinois courts are authorised to dismiss or strike defective claims or pleadings, supervise discovery, grant summary judgments, and rule on the evidence admissible at trial. Unless the court finds that the conduct of the opposing party was sanctionable, each party bears its own costs.

6.3 What sanctions are the courts in Illinois empowered to impose on a party that disobeys the court’s orders or directions?

Illinois courts may impose sanctions for frivolous pleadings, failure to respond to valid discovery requests, failure to comply with a court order, or other conduct that is disrespectful toward the authority of the court. The most common sanction is to require the offending party to pay the other party or parties’ reasonable expenses, and/or attorneys’ fees incurred as a result of the sanctionable conduct. When the offending party’s conduct is extreme or has caused prejudice, the courts also may impose a monetary fine, bar the offending party from offering certain evidence, or strike the offending party’s pleadings with respect to the relevant issue.

6.4 Do the courts in Illinois have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Upon motion, Illinois courts will dismiss or strike any claim that is insufficient in law or that is barred by any affirmative matter that appears on the face of the complaint or can be established on undisputed facts. The courts also may strike immaterial matter, dismiss misjoined parties, and may strike all or part of a party’s pleadings as a sanction for failure to comply with discovery or other misconduct.

6.5 Can the civil courts in Illinois enter summary judgment?

Civil courts in Illinois may enter summary judgment upon determination that there is no genuinely disputed issue of material fact as to one or more of the major issues in the case. The court may then order further proceedings on any remaining issues.

6.6 Do the courts in Illinois have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Illinois courts have discretion to stay proceedings for any just cause. Discovery may be stayed in whole or in part pending the determination of a motion to dismiss or other matter that might moot the requested discovery. Stays are commonly granted where some

or all of the issues before the court are the subject of and likely to be determined in an administrative proceeding, another court action, or an arbitration.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Illinois? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

Illinois permits broad discovery into any matter relevant to the subject matter of the action. The basic methods of discovery include written interrogatories, requests for production of documents and electronic records or other tangible things, inspection of real estate, subpoenas to non-parties, and depositions. Discovery may be conducted in any sequence unless otherwise directed by the court. Documents and other evidence are exempt from discovery if they fall within a recognised privilege. Pre-action discovery can be obtained by an action designating one or more persons as respondents in discovery if the plaintiff believes they have information essential to determining who should be named as defendants in the action.

7.2 What are the rules on privilege in civil proceedings in Illinois?

The attorney-client privilege protects from disclosure any communications made in confidence between a client and the client’s attorney for the purpose of obtaining legal advice. The attorney work product doctrine, often called a privilege, protects materials prepared by or for a party or its counsel in preparation for trial to the extent that such materials disclose their theories, mental impressions or litigation plans. Illinois also recognises common law privileges protecting confidential communications between spouses, patient and physician, priest and penitent, and in some instances insured and insurer.

7.3 What are the rules in Illinois with respect to disclosure by third parties?

Third parties may be subpoenaed for production of documents and tangible things, to require their appearance and testimony in a deposition, trial or other evidentiary proceeding, or both. The court may order conditions such as payment of the third party’s reasonable expenses.

7.4 What is the court’s role in disclosure in civil proceedings in Illinois?

Illinois courts have broad discretion to supervise discovery. The court usually establishes a discovery schedule, which may include a sequence of discovery. The court also rules on objections to discovery that cannot be resolved by agreement, and on other discovery motions or disputes.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Illinois?

It is prohibited to seek discovery for any improper purpose such as annoyance, embarrassment, or oppression or to wilfully seek discovery by an improper method or to which the party is not entitled. When discovery involves confidential personal or business

information, the court upon motion normally will enter a protective order restricting the use of such information and the persons to whom it may be disclosed.

8 Evidence

8.1 What are the basic rules of evidence in Illinois?

Proceedings in the courts of Illinois are governed by the Illinois Rules of Evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All relevant evidence is admissible unless otherwise provided. Evidence that is not relevant is not admissible. Evidence is relevant if it tends to make any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

An expert witness qualified by knowledge, skill, experience, training or education may testify if scientific, technical, or other specialised knowledge within his or her expertise will assist the trier of fact to understand the evidence or to determine a fact in issue.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Every witness must testify under oath or affirmation. Fact witnesses are permitted to testify only to matters within their personal knowledge. Witnesses may give written statements in the form of affidavits or declarations, which also must be under oath and based on personal knowledge. Generally, written statements are not admissible at trial if the witness does not appear to testify and be cross-examined.

Depositions may be used at trial for impeachment, as admissions, or *in lieu* of live testimony if the witness is unavailable and the court finds that use of the deposition will further substantial justice.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Prior to trial, parties are required to disclose expert witnesses, the subject matters on which they will testify, their conclusions and opinions, the bases for them, the expert's qualifications, and any report prepared by the expert witness about the case. Reports are required only when directed by the court. To the extent that a party or its attorney gives instructions to an expert that form part of the basis for the expert's conclusions or opinions, those instructions would be subject to disclosure. An expert may testify in court to conclusions or opinions without first testifying to the underlying facts and data, but must disclose the underlying facts and data on cross-examination if requested.

Expert witnesses are engaged by the parties and the terms of retention normally are discoverable. Party-retained experts do not owe duties to the court except the duty of all witnesses to testify truthfully. The Illinois Rules of Evidence do not provide for court-appointed experts.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Illinois?

The court determines preliminary questions concerning the qualification of a person to be a witness, the existence of any privilege, and the admissibility of any evidence to which an objection is made.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Illinois empowered to issue and in what circumstances?

Upon final determination of the rights and obligations of the parties, Illinois courts may enter judgment awarding any lawful relief to which any party is entitled. The most common relief is money damages. Where money damages do not provide a complete remedy or where the law otherwise provides, the courts may order injunctive or other equitable relief. As discussed elsewhere, pre-judgment relief is more limited and normally granted only to preserve the *status quo* or to prevent imminent irreparable harm.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

In jury trials, the amount of damages, if any, is determined by the jury. The courts have some powers to reduce a jury award if it is excessive. In a bench trial, the amount of damages is determined by the court. Judgments for money damages are subject to post-judgment interest at the rate of 9% *per annum* (6% if the judgment debtor is a governmental entity).

Pre-judgment interest is awarded only if authorised by statute or contract. The Illinois Interest Act, 815 ILCS 205/2, provides for pre-judgment interest to be awarded on monies due on a bond, bill, promissory note or other written instrument and permits pre-judgment interest on monies vexatiously withheld and in certain other circumstances. Various other statutes authorise pre-judgment interest for specific actions.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Judgments may be enforced in Illinois by levy against real or personal property of the debtor or by garnishment of wages or other assets of the debtor in the possession of a third party. The dominant procedure is a citation to discover assets, which may be brought against the judgment debtor or any other person reasonably believed to possess or control assets of the debtor. The citation initiates a supplemental proceeding to discover assets or income of the debtor and compel their application toward satisfaction of the judgment. Service of the citation upon any respondent imposes a lien upon any property of the debtor in the respondent's possession.

Judgments validly entered by the courts of another State are given full faith and credit and may be enforced in the same manner as a domestic judgment. With respect to judgments of a foreign country, Illinois follows the Uniform Foreign-Country Money Judgments Recognition Act, 735 ILCS 5/12-661. Such judgments will not be recognised if they were rendered without jurisdiction or in proceedings not compatible with due process, and may not be recognised for a variety of additional reasons set forth in the statute.

9.4 What are the rules of appeal against a judgment of a civil court of Illinois?

Every final judgment of a circuit court in a civil case is appealable as of right to the Illinois Appellate Court. The appeal is initiated by filing a notice of appeal. Certain cases are directly appealable to the Illinois Supreme Court, such as cases in which a statute of the United States or the State is held invalid.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Illinois? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are the most common methods of alternative dispute resolution. In limited circumstances, either arbitration or mediation is available through the court system. More often, the parties engage private mediators or arbitrators. If the parties agree, a subject matter expert can act as an arbitrator or mediator.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation generally is conducted in the circumstances and according to the procedures to which the parties and the mediator agree. Arbitration usually occurs when one of the parties makes a demand for arbitration pursuant to a binding agreement between the parties to arbitrate disputes. Absent unusual circumstances, the arbitration would be conducted in a forum and according to rules and procedures set forth in the underlying agreement to arbitrate.

1.3 Are there any areas of law in Illinois that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

It would be highly unusual for arbitration or mediation to be prohibited in any kind of commercial dispute.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Illinois in this context?

Illinois courts routinely will enforce a valid agreement between the parties to mediate or arbitrate disputes. The courts also regularly stay proceedings pending arbitration or mediation and may grant

other temporary relief in aid of the parties’ ADR efforts. Absent an enforceable agreement, Illinois courts rarely would compel arbitration or mediation of a substantial commercial dispute. Illinois practice with respect to these matters is similar to other states.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Illinois in this context?

Mediation is non-binding and it would be unusual for a party to be sanctioned for refusing to mediate. Settlements reached in mediation do not need to be documented with the court, but often it is advisable, even if certain terms are kept confidential.

Arbitration is binding upon the parties to the agreement to arbitrate. Unless the parties have otherwise agreed, arbitration decisions are subject to judicial review only on very limited grounds such as corruption, fraud, or if the arbitrator exceeds his or her powers under the governing arbitration agreement. This is similar to practices in federal court and other states.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Illinois?

Most of the major national and international ADR organisations provide services in Illinois, such as the American Arbitration Association, JAMS, the International Chamber of Commerce, and the London Court of International Arbitration.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Mediation continues to grow in popularity, in part because it is highly flexible and non-binding. The popularity of arbitration is flattening with the realisation that it is not necessarily more expeditious or cost-effective than formal litigation. Costs can be held down if procedures are curtailed, but parties may then be unable to fully develop their cases and subject to a decision rendered without full information. Similarly, many practitioners believe that the sharply limited grounds for appeal, while promoting finality, can entrust too much discretion to arbitrators and make arbitration outcomes less predictable than litigation. In part as a response to these concerns, a proliferation of new arbitration providers and rule regimes offer greater choice but may further reduce consistency and predictability.



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has New Jersey got? Are there any rules that govern civil procedure in New Jersey?

New Jersey is a common law jurisdiction and case law is developed according to the doctrine of *stare decisis*. The Rules Governing the Courts of the State of New Jersey govern proceedings at all levels of New Jersey's court system.

1.2 How is the civil court system in New Jersey structured? What are the various levels of appeal and are there any specialist courts?

New Jersey Courts are organized under a unified judicial system. The Supreme Court of New Jersey, the highest court, hears certain cases as of right and has discretion to hear other cases. The Supreme Court has original jurisdiction in limited instances. The Superior Court is below the Supreme Court, and it is divided into the Appellate Division (New Jersey's intermediate appellate court) and the trial courts. The Appellate Division hears appeals as of right after the final disposition of a trial court matter or an administrative court, and has discretion to hear interlocutory appeals. At the trial court level, the Superior Court is divided broadly into the Law Division, which includes criminal and civil courts, and the Chancery Division, which includes family courts and general equity courts. New Jersey also has an administrative court system, managed through the Office of Administrative Law.

1.3 What are the main stages in civil proceedings in New Jersey? What is their underlying timeframe?

- Pleadings: a civil action is initiated by filing a complaint. New Jersey is a "notice pleading" state. Responsive pleadings or motions to dismiss must ordinarily be filed within 35 days of service of the complaint, but parties have the right to extend the time for response upon consent up to 60 days. R. 4:6-1.
- Discovery: discovery methods include depositions, written interrogatories, requests for admission, and requests for production of documents, electronically stored information or other tangible items.
- Motion Practice: the Superior Court Law Division and the Chancery Division, General Equity Part publish a list of "motion days" upon which civil motions are to be made

returnable, which ordinarily fall on every other Friday. A motion must be filed and served at least 16 days before the listed return date, except for motions for summary judgment, which must be served and filed at least 28 days before the return date. A party must file any opposition at least eight days before the return date (10 days for summary judgment motions), and the moving party must reply, if at all, at least four days before the return date.

- Trial: a civil jury consists of at least six or as many as 12 persons. A party must demand a trial by jury in writing within 10 days after service of the last pleading or it is waived. R. 4:35.
- Judgment: a judgment is the final decision of the court which determines the parties' rights and obligations. Question 9.3 describes how judgments may be enforced.
- Appeal: a party only has a right to appeal where it is given by statute. The scope of appeals is discussed in question 9.4.

1.4 What is New Jersey's local judiciary's approach to exclusive jurisdiction clauses?

New Jersey courts uphold the enforceability of a contract's forum selection clause so long as the contract is freely negotiated and the provision is not "unreasonable and unjust". *YA Global Investments, L.P. v. Cliff*, 419 N.J. Super. 1, 9-10 (App. Div. 2011). A forum selection clause is presumptively valid and will be enforced unless it is the product of fraud, undue influence or overwhelming bargaining power, is unreasonable, or offends a strong public policy. *Id.*

1.5 What are the costs of civil court proceedings in New Jersey? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil court proceedings vary. The fee for filing a complaint is \$250 and the filing fee for a motion is \$50. New Jersey courts follow the American Rule, under which each party assumes responsibility for its attorneys' fees and costs unless a statute, court rule, or other legal obligation provides otherwise.

1.6 Are there any particular rules about funding litigation in New Jersey? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

The New Jersey Rules of Professional Conduct permit contingent fees. N.J.R.P.C. 1.5(c). The propriety of the fee is evaluated based on factors including the time and labor involved, the complexity

of the work, and the fee customarily charged. N.J.R.P.C. 1.5(a). Contingent fee arrangements are not permitted in domestic relations matters and criminal cases. N.J.R.P.C. 1.5(d). A lawyer is generally not permitted to provide financial assistance to a client in connection with pending or contemplated litigation, or acquire a proprietary interest in the cause of action, but a lawyer may take a contingent fee as described above and may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. N.J.R.P.C. 1.8 (e) and (i).

1.7 Are there any constraints to assigning a claim or cause of action in New Jersey? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

A tort claim that has not been reduced to judgment may not be assigned in New Jersey. *Cherilus v. Federal Express*, 435 N.J. Super. 172, 178 (App. Div. 2014).

A lawyer shall not provide financial assistance to a client in connection with litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. N.J.R.P.C. 1.8(e).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For most claims, no notice is required prior to instituting a civil action. Certain claims, such as employment discrimination, require exhaustion of administrative remedies. All civil complaints filed in the Law Division must be accompanied by a Civil Case Information Statement, a form that helps the court assign the case to a “track” for discovery purposes. The form is available on the New Jersey Judiciary’s website. In any action based on professional liability, the plaintiff must serve and file an affidavit of merit within 60 days after the answer is filed. N.J.S.A. 2A:53A-26 *et seq.*

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

A six-year statute of limitations applies to actions arising in contract (four years for contracts involving the sale of goods under the Uniform Commercial Code). Actions in tort arising from personal injuries generally must be brought within two years, or arising from property claims within six years. Actions for fraud, statutory consumer protection claims, breaches of fiduciary duty causing purely economic loss, unjust enrichment, tortious interference with contract rights, trade secret misappropriation, unfair competition or conversion must be brought within six years. Claims for breach of warranty must be brought within four years. Actions to enforce judgments must be brought within 20 years of the date of the judgment.

The statute of limitations begins to run when the plaintiff is able to maintain the elements of a cause of action. The statute of limitations may be tolled for certain claims by the discovery rule, that is, it begins to run when the plaintiff, by the exercise of reasonable diligence, knew or should have known of the injury and its cause.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in New Jersey? What various means of service are there? What is the deemed date of service? How is service effected outside New Jersey? Is there a preferred method of service of foreign proceedings in New Jersey?

A civil action is commenced by filing a complaint. In a civil case, the complaint is accompanied by either a summons or order to show cause. The plaintiff, plaintiff’s attorney or the clerk of the court may issue the summons. R. 4:4-1. If a summons is not issued within 15 days from the date of the Track Assignment Notice, the action may be dismissed. *Id.* Summonses shall be served together with the complaint by any competent adult not having a direct interest in the litigation. R. 4:4-3. If personal service cannot be effected after a reasonable and good faith attempt, service may be made by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the usual place of abode of the defendant or a person authorised by rule or law to accept service for the defendant, or with postal instruction to deliver to the addressee only, to the defendant’s place of business or employment. The party making service may elect to serve via first class mail simultaneously with the certified or registered mail, and if the addressee refuses to claim or accept delivery of the registered or certified mail, and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service. R. 4:4-3(a).

New Jersey allows service upon out-of-state defendants using the same methods, i.e. personal service, or certified mail if personal service is not possible, but a party cannot obtain personal jurisdiction over a defendant served by certified mail if the defendant does not answer or otherwise appear within 60 days of service, and default cannot be entered in such cases. In those cases, the party seeking service may apply to the court for permission to serve the defendant by other means.

3.2 Are any pre-action interim remedies available in New Jersey? How do you apply for them? What are the main criteria for obtaining these?

A plaintiff may seek a preliminary injunction or a temporary restraining order to preserve the *status quo*, which requires a showing of likelihood of success on the merits, the need for immediate relief, that the balance of the equities favours the applicant, and that there would be irreparable injury in the absence of an injunction.

3.3 What are the main elements of the claimant’s pleadings?

The pleading must contain a caption, a notice to defend, numbered paragraphs each containing one material allegation, a claim for relief, and must be signed by the attorney filing the document or by the party if appearing *pro se*. Complaints may, but are not always required to be, verified by a party or party representative. Claims need not be pleaded with specificity, except for allegations of fraud, misrepresentation, mistake, breach of trust, wilful default or undue influence. R. 4:5-8. A party also must include a certification under Rule 4:5-1 stating whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any such action is contemplated, and if so, must identify such actions and all parties thereto. The party also must identify any non-party who should be or must be joined in

the action. R. 4:5-1. Civil complaints in the Law Division must be accompanied by a Civil Case Information Statement, which is a form available from the New Jersey Judiciary’s website.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A party may amend any pleading as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. R. 4:9-1. Thereafter, a party may amend a pleading only by written consent of the adverse party or by leave of the court, which shall be freely given in the interest of justice. A motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading. R. 4:9-1.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

An answer shall state in short and plain terms the pleader’s defenses to each claim asserted and shall admit or deny the allegations upon which the adversary relies. A pleader who is without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state and, except as otherwise provided by R. 4:64-1(c) (foreclosure actions), this shall have the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs. Wholesale general denials have the effect of an admission. R. 4:5-3 and 4:5-5. A party waives most defenses and objections that are not presented in an answer.

The answer shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defence, such as accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, failure to state a claim upon which relief may be granted, fraud, illegality, injury by fellow servant, *laches*, licence, payment, release, *res judicata*, statute of frauds, statute of limitations, or waiver. R. 4:5-4.

The defendant’s responsive pleading may contain a counterclaim or a cross-claim. New Jersey’s entire controversy doctrine requires that any related claim against another party to the litigation, including claims for indemnity or contribution, must be asserted in the original proceeding, or be precluded from assertion in a later proceeding. Rule 4:30A.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant may file an answer or motion in response to a complaint within 35 days of service of the complaint. R. 4:6-1. The time for service of a responsive pleading may be enlarged by a period not to exceed 60 days by written consent of the parties.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may join as an additional defendant any person who may be solely liable or liable with the joining party. R. 4:5-1, 4:28.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to file a response to a pleading, the plaintiff can file a request for entry of default within six months after the default. R. 1:6-8, 4:43-1. After entry of default, the party may apply to the court for entry of final judgment by default. R. 4:43-2. If the claim is for a sum certain, the clerk may enter judgment on the basis of an affidavit. If not, the party must move before the Superior Court, which may conduct a proof hearing on the issue of damages. *Id.*

4.5 Can the defendant dispute the court’s jurisdiction?

A defendant can challenge the court’s subject matter or personal jurisdiction in its answer or by way of a motion to dismiss the complaint. Subject matter jurisdiction can be raised at any time. Personal jurisdiction must be raised in the initial responsive pleading or the defence is waived.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

If a transaction or occurrence gives rise to more than one cause of action, the plaintiff must join all causes of action and parties. If the claims do not arise out of the same transaction or occurrence, the plaintiff may still bring multiple claims in one action, but it is not required. The defendant’s responsive pleading may contain a counterclaim or a cross-claim. New Jersey’s entire controversy doctrine requires that any counterclaims or cross-claims for indemnity or contribution against other parties to the case be asserted in the original proceeding, or be precluded from assertion in a later proceeding. Rule 4:30A. The entire controversy doctrine “is intended to be applied to prevent a party from voluntarily electing to hold back a related component of the controversy in the first proceeding by precluding it from being raised in a subsequent proceeding thereafter”. *Oltremare v. ESR Custom Rugs*, 330 N.J. Super. 310, 315 (App. Div. 2000).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

When actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party’s or its own motion may order the actions consolidated. If the actions are not triable in the same county or vicinage, the order shall be made by the Assignment Judge of the county in which the venue is laid in the action first instituted on a party’s motion, the judge’s own initiative, or on certification of the matter to the judge by a judge of the Law or Chancery Division.

R. 4:38-1. If actions pending in different venues are consolidated, the order shall specify the venue in which the consolidated action shall proceed and the party having the responsibility to file a copy of the order with the deputy clerk of the Superior Court in each county from which an action is being transferred. The order of consolidation may also include such terms as the court may prescribe to expedite further proceedings. *Id.*

5.3 Do you have split trials/bifurcation of proceedings?

The court has discretion to order trials of separate issues for the convenience of the parties or to avoid prejudice. 4:38-2. The court also has discretion to bifurcate trial of liability and damages (particularly punitive damages).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in New Jersey? How are cases allocated?

The Superior Court has separate trial-level courts that handle small claims, landlord/tenant cases, probate and guardianship cases, family cases, criminal cases, and cases in which the primary relief sought is equitable in nature. Also, civil cases are assigned to one of four tracks at the time the complaint and Case Information Statement are filed, which vary in terms of the length of discovery period permitted, ranging from 150 days (Track 1) to 450 days (Tracks 3 and 4), as well as the type of judicial involvement in the cases. Track 4 cases have active case management by individual judges. New Jersey also has courts that specialise in multi-county litigation involving specific products.

As of January 1, 2015, New Jersey also has a Complex Business Litigation Program to handle complex commercial and construction cases that have the potential for \$200,000 or more in damages.

6.2 Do the courts in New Jersey have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Courts have authority to take actions reasonably necessary for the administration of justice within their jurisdiction. Most civil cases are assigned a pre-trial motion judge to handle discovery and other pre-trial motions when the complaint is filed. Judges sitting in the General Equity Part, which hears cases in which the primary requested relief is equitable in nature, case-manage every case.

Otherwise, the parties may request a case management conference or the court may order the attorneys for the parties to appear for a conference to simplify the issues, enter a scheduling order, obtain admissions of fact, limit the number of expert witnesses, or settle the case. R. 4:5B-2.

6.3 What sanctions are the courts in New Jersey empowered to impose on a party that disobeys the court's orders or directions?

The court may use its contempt power to sanction parties for conduct that brings into disrespect the authority of the court. The court may impose sanctions when a party fails to obey a court order compelling discovery. A party subject to sanctions may be required to pay the moving party's expenses and attorneys' fees. The court may also order a party's pleading stricken or suppressed, with or without prejudice.

6.4 Do the courts in New Jersey have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

On the court's or a party's motion, the court may either: (1) dismiss any pleading that is scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant. The order of dismissal may expressly require, as a condition of the refile of a pleading asserting a claim or defence based on the same transaction, the payment by the pleading party of attorneys' fees and costs incurred by the party who moved for dismissal. R. 4:6-4.

6.5 Can the civil courts in New Jersey enter summary judgment?

Summary judgment may be granted: (1) where there is no genuine issue of any material fact as to a necessary element of the cause of action or defence; and (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defence which in a jury trial would require the issues to be submitted to a jury. R. 4:46.

6.6 Do the courts in New Jersey have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may stay execution on a judgment, order a stay of proceedings, pending an outcome in another venue, such as a bankruptcy court or arbitration, and order a stay pending appeal.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in New Jersey? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. R. 4:10-2. The information must appear reasonably calculated to lead to the discovery of admissible evidence. *Id.* A party's access to documents or materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) depends only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party can discover facts known or opinions held by an expert retained by a party who is not expected to be called as a witness only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subjects by other means. R. 4:10-2(c) and (d).

7.2 What are the rules on privilege in civil proceedings in New Jersey?

A party may not obtain discovery regarding matters which are privileged. Communications subject to the attorney-client and accountant-client privilege are not discoverable. In New Jersey, “the root of the attorney-client privilege is the recognition that sound legal advice or advocacy serves public ends and requires full and frank communication between a client and his counsel”. *Halbach v. Boyman*, 369 N.J. Super. 323, 328 (App. Div. 2004). A party also may not obtain attorney work product, which includes the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes, summaries, research, or theories.

7.3 What are the rules in New Jersey with respect to disclosure by third parties?

A subpoena requires a third party to attend and testify at a deposition, and may also require the person to produce documents. R. 4:14-7. A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties, who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced. If evidence is produced by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and of its specific nature and contents, and shall make it available to all other parties for inspection and copying. R. 4:14-7(c).

7.4 What is the court’s role in disclosure in civil proceedings in New Jersey?

A party may seek to compel discovery responses, or to strike another party’s pleading for failure to produce discovery. Upon motion to quash a subpoena, the court may make an order to protect the party, witness, or other person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

7.5 Are there any restrictions on the use of documents obtained by disclosure in New Jersey?

The court may prohibit a party from disclosing trade secrets, confidential research, or other commercial information. R. 4:10-2(g). The court may also enter a protective order to govern production of and use of confidential information.

8 Evidence

8.1 What are the basic rules of evidence in New Jersey?

The New Jersey Rules of Evidence govern the admissibility of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence is admissible if it is competent and relevant. “Relevant evidence” means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or is cumulative. N.J.R.E. 403. Hearsay is inadmissible unless it is permitted by a legal exception set forth in the New Jersey Rules of Evidence or some other legal grounds. The standard for qualification of an expert is liberal: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise”. N.J.R.E. 702.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A fact witness can only testify to matters as to which he or she has personal knowledge. N.J.R.E. 602. Deposition testimony may be used at trial for many purposes, including impeachment, to preserve a witness’s testimony, or in the event a witness is absent from court. R. 4:16.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

A party may propound interrogatories, asking the other party to identify any expert witness, as well as the subject matter on which the expert is expected to testify. The interrogatories can also demand production of the expert’s report. An expert is permitted to give an opinion on the ultimate issue. However, experts may not testify on questions of law. The purpose of expert testimony is to assist the trier of fact in deciding complex factual issues.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in New Jersey?

The court decides preliminary questions regarding the witness’s qualifications, the existence of a privilege, and admissibility of evidence. N.J.R.E. 104.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in New Jersey empowered to issue and in what circumstances?

A final judgment is the final determination of the rights and obligations of the parties in a case. An interlocutory judgment determines a preliminary issue and does not adjudicate the parties’ ultimate rights. A preliminary injunction is an interlocutory judgment designed to maintain the *status quo* while litigation is pending. The court may enter a final judgment ordering money damages. Courts also have authority to issue declaratory judgments, which determine the rights of the parties with respect to certain legal issues.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

New Jersey courts adhere to the American Rule, which provides that litigants are responsible for their own litigation costs and may not recover them from an adverse party unless there is express statutory authorisation, a clear agreement of the parties, or some other established exception. The exceptions are codified at R. 4:42-9. An award of damages is subject to post-judgment interest from the date on which the judgment is finally entered. The legal rate of interest in New Jersey varies. Prejudgment interest may also be awarded.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Execution of a judgment is commenced by filing a writ of execution with the clerk of any county in which the judgment has been entered. The writ of execution can be enforced by a variety of means including sale of real property, garnishment, execution against contents of a safety deposit box, or sale of securities. In special actions, enforcement of a judgment occurs through an action of ejectment (to obtain possession of real property), an action of replevin (to obtain possession of personal property), and mortgage foreclosures.

The Full Faith and Credit Clause of the United States Constitution requires courts to recognise judgments from other states. New Jersey law contains a Uniform Enforcement of Foreign Judgments Act, which governs enforcement of judgments of other states. See N.J.S.A. 2A:49A-25. Enforcement of money judgments obtained in another country is governed by N.J.S.A. 2A:49A-11.

9.4 What are the rules of appeal against a judgment of a civil court of New Jersey?

The Appellate Division of the Superior Court is the intermediate appellate court in New Jersey. The Rules Governing the Courts of the State of New Jersey provide for appeals of right to the Appellate Division from final orders, collateral orders, and certain interlocutory orders within 45 days of their entry. If an order is not appealable of right, a motion for leave to appeal may be filed, or a determination of finality sought. R. 2:2-3 and 2:2-4.

The New Jersey Supreme Court hears appeals following adjudication in the Appellate Division and directly from the trial court in cases in which the death penalty has been imposed. Appeals may also be taken to the Supreme Court on certification. R. 2:2-1.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in New Jersey? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are commonly used methods of dispute resolution.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Certain claims are subject to statutory arbitration, including collective bargaining agreements and most personal injury cases. R. 4:21A-1. Within 30 days of the arbitrator’s decision, a party may file for a notice of rejection of the arbitrator’s award and a demand for trial *de novo*. New Jersey also has a complementary, and in many cases, compulsory, mediation program, to which parties may be required to attend and participate in good faith. R. 1:40. Mediators also play a large role in certain family law matters.

1.3 Are there any areas of law in New Jersey that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

An agreement to arbitrate a child custody dispute is permissible but may not be enforced where it is not in the best interests of the child. *Johnson v. Johnson*, 204 N.J. 529, 547 (2010).

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to New Jersey in this context?

Where an arbitration clause governs a dispute between parties, a party may file a motion to compel arbitration. Courts address disputes over the scope of the arbitration clause, i.e. what issues may be arbitrated, unless the parties have agreed to submit such disputes to arbitration. A court may order litigation to be stayed pending arbitration. Before an arbitrator is appointed and is authorised and able to act, the court, in such summary action upon application of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action. N.J.S.A. 2A:23B-8(a). A party does not waive a right of arbitration by making an application for provisional remedies. N.J.S.A. 2A:23B-8(c).

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to New Jersey in this context?

Appellate review is available of final arbitration orders, but the review is subject to the Federal Arbitration Act and is narrowly limited only to circumstances of fraud, corruption or similar wrongdoing by the arbitrator, or manifest disregard. *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.*, 135 N.J. 349 (1994). A court may enforce an arbitration award by ordering specific performance.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in New Jersey?

Arbitration agreements often call for disputes to be arbitrated by the American Arbitration Association or by JAMS, both well-known providers of arbitration and mediation services. Under Rule 1:40, the New Jersey judiciary also maintains a large mediation programme.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

Alternative dispute resolution continues to be a popular choice given the rising costs of litigation.



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Pennsylvania got? Are there any rules that govern civil procedure in Pennsylvania?

Pennsylvania is a common law jurisdiction and case law is developed according to the doctrine of *stare decisis*. The Pennsylvania Rules of Civil Procedure govern civil matters at the trial court level. The Pennsylvania Rules of Appellate Procedure govern appeals.

1.2 How is the civil court system in Pennsylvania structured? What are the various levels of appeal and are there any specialist courts?

Courts are organised under a Unified Judicial System. The Supreme Court of Pennsylvania, the highest court, hears certain cases as of right and has discretion to hear other cases. The Supreme Court has original jurisdiction in limited instances. The two state-wide intermediate appellate courts are the Superior Court and the Commonwealth Court. The Superior Court hears appeals from final decisions of the Court of Common Pleas. Direct appeals from certain Commonwealth administrative agencies and cases involving the Commonwealth and the public sector are heard by the Commonwealth Court. The Courts of Common Pleas are the trial courts and are organised into 60 judicial districts. In certain circumstances, the Commonwealth Court has original jurisdiction.

1.3 What are the main stages in civil proceedings in Pennsylvania? What is their underlying timeframe?

- Pleadings: a civil action is initiated by filing either (1) a praecipe for a writ of summons, or (2) a complaint. All pleadings after the complaint must be filed within 20 days of service of the previous pleading. If a pleading does not contain a “notice to plead”, no response is required. Pennsylvania is a “fact pleading” state. Allegations contained in a complaint or answer must be made specifically.
- Discovery: discovery methods include depositions, written interrogatories, and production of documents.
- Motion Practice: a party may file a motion seeking a rule to show cause or other decision from the court.
- Trial: a civil jury consists of at least six or as many as 12 persons. A party must demand a trial by jury within 20 days after service of the last pleading.

- Judgment: a judgment is the final decision of the court which determines the parties’ rights and obligations. Question 9.3 describes how judgments may be enforced.
- Appeal: a party only has a right to appeal where it is given by statute. The scope of appeals is discussed in question 9.4

1.4 What is Pennsylvania’s local judiciary’s approach to exclusive jurisdiction clauses?

A contract’s forum selection clause is enforceable where it is clear and unambiguous. *See Cent. Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965). A forum selection clause in a commercial contract is presumptively valid and will be deemed unenforceable only when: (1) the clause itself was induced by fraud or overreaching; (2) the forum selected is so unfair or inconvenient that a party will be deprived of an opportunity to be heard; or (3) the clause violates public policy. *See Patriot Com. Leasing Co. v. Kremer Rest. Enters., LLC*, 915 A.2d 647 (Pa. Super. 2006).

1.5 What are the costs of civil court proceedings in Pennsylvania? Who bears these costs? Are there any rules on costs budgeting?

The fee for filing a complaint can run upwards of \$300. Pennsylvania courts follow the American Rule under which each party assumes responsibility for its attorneys’ fees and costs unless a statute provides otherwise.

The court may impose costs on a party who seeks a continuance after the preliminary call of the trial list. The opposing party may receive costs incurred which would not have been incurred if the request for a continuance had been made at or prior to the trial call. Pa. R.C.P. 217. The Rules of Appellate Procedure provide for the recovery of costs by a successful party. Pa. R.A.P. 2741, 2742, 2743, 2744.

1.6 Are there any particular rules about funding litigation in Pennsylvania? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

The Pennsylvania Rules of Professional Conduct permit contingent fees. Pa. R.P.C. 1.5(c). The fee is evaluated based on factors including the time and labour involved, the complexity of the work, and the fee customarily charged. Pa. R.P.C. 1.5(a). Contingent fee arrangements are not permitted in domestic relations matters and criminal cases.

Security for costs may be required in certain situations, including in some shareholder suits, *see* 15 Pa. C.S.A. § 1782(c), real property disputes, and actions involving non-resident plaintiffs. A preliminary injunction will only be granted if the plaintiff files a bond. Pa. R.C.P. 1531. The court may order a party seeking an appeal, a stay, or an injunction pending appeal to post a bond as security. Pa. R.A.P. 1731.

1.7 Are there any constraints to assigning a claim or cause of action in Pennsylvania? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The principle of champerty restricts the assignment of claims. “An assignment is champertous when the party involved: (1) has no legitimate interest in the suit, but for the agreement; (2) expends his own money in prosecuting the suit; and (3) is entitled by the bargain to share in the proceeds of the suit”. *Frank v. TeWinkle*, 45 A.3d 434, 438-39 (Pa. Super. Ct. 2012).

A lawyer shall not provide financial assistance to a client, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Pa. R.P.C. 1.8(e).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For most claims, no notice is required prior to instituting a civil action. Certain claims, such as employment discrimination, require exhaustion of administrative remedies. Every pleading containing an averment of fact not appearing in the record or containing a denial of fact shall state that the averment or denial is true upon the signer’s personal knowledge and shall be verified. Pa. R.C.P. 1024.

In any action based on professional liability, the plaintiff must file a certificate of merit within 60 days of filing the complaint. Pa. R.C.P. 1042.3.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

A four-year statute of limitations applies to contract actions. Personal injury actions must be brought within two years. An action involving the possession of real property must be brought within 21 years. A two-year statute of limitation governs actions for waste and trespass. An action based on a construction defect must be filed within 12 years. Other civil actions that are not subject to a specific limitations period must be commenced within six years.

The statute of limitations begins to run when the plaintiff is able to maintain the elements of a cause of action. The statute of limitations may be tolled for certain claims by the discovery rule, that is, it begins to run when the plaintiff, by the exercise of reasonable diligence, knew or should have known of the injury and its cause.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Pennsylvania? What various means of service are there? What is the deemed date of service? How is service effected outside Pennsylvania? Is there a preferred method of service of foreign proceedings in Pennsylvania?

A civil action is commenced by filing either (1) a praecipe for a writ of summons, or (2) a complaint. Pa. R.C.P. 1007. If the plaintiff initiates the action by way of a praecipe for a writ of summons, but does not file a complaint, the prothonotary, upon praecipe by the defendant, will enter a rule upon the plaintiff to file a complaint. If the plaintiff fails to do so within 20 days after service of the rule, upon praecipe by the defendant, the prothonotary will enter a judgment of *non pros*. Pa. R.C.P. 1037(a).

Original process must be served within 30 days of the issuance of a writ of summons or the filing of a complaint. Pa. R.C.P. 401. If service is not made, upon praecipe by the plaintiff, the prothonotary will reissue the writ of summons or reinstate the complaint, providing an additional 30 days for service. Pa. R.C.P. 401. In all counties except Philadelphia, original process – except for limited categories of actions set forth in Pa. R.C.P. 400(b) and (c) – must be served by a sheriff. Pa. R.C.P. 400. In Philadelphia County, service of original process may be made by a sheriff or any competent adult. Pa. R.C.P. 400.1. Service of original process is made by handing a copy: i) to the defendant; ii) to an adult member of the defendant’s family at the residence or to another adult person in charge if no adult family member is found; iii) to the clerk or manager of a property in which the defendant resides; or iv) at any office or usual place of business of the defendant to the person in charge. Pa. R.C.P. 402. Original process may be served outside the Commonwealth by a competent adult, by mail, or in the manner prescribed by the law of the jurisdiction in which service is to be made. Pa. R.C.P. 404.

Outside Pennsylvania, original process must be served within 90 days of the issuance of the writ or filing the complaint by a competent adult, by mail, in any manner provided by the law of the jurisdiction in which the service is made, in the manner provided by treaty, or as directed by a foreign authority in response to a letter rogatory or request. Pa. R.C.P. 404.

3.2 Are any pre-action interim remedies available in Pennsylvania? How do you apply for them? What are the main criteria for obtaining these?

A plaintiff may seek a preliminary injunction or a temporary restraining order, which requires that the plaintiff’s right to relief be clear, the need for relief be immediate, and the injury be irreparable if the injunction is not granted.

3.3 What are the main elements of the claimant’s pleadings?

The pleading must contain a caption, a notice to defend, numbered paragraphs each containing one material allegation, a claim for relief, and must be verified by a party. The claim for relief must be specific. The pleading must be signed by an attorney of record, or the party if not represented.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended at any time by filed consent of the adverse party or by leave of the court. Pa. R.C.P. 1033. A party may file an amended pleading as of course within 20 days after service of preliminary objections. If a party has filed an amended pleading, the preliminary objections to the original pleading are deemed moot. Pa. R.C.P. 1028(c)(1).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

Preliminary objections are limited to certain grounds, including lack of subject matter or personal jurisdiction, legal insufficiency of a pleading, and failure to exhaust a statutory remedy. Pa. R.C.P. 1028. If the defendant files an answer, he must specifically deny the plaintiff’s averments; general denials have the effect of an admission. Pa. R.C.P. 1029.

The defendant’s responsive pleading may contain “new matter”, which include a number of affirmative defences that must be pleaded. Pa. R.C.P. 1030. The defendant may also bring a counterclaim or a cross-claim. Pa. R.C.P. 1031, 1031.1.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant can file an answer or preliminary objections within 20 days of service of the complaint. Pa. R.C.P. 1026.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may join as an additional defendant any person who may be solely liable or liable with the joining party. Pa. R.C.P. 2252. The joining party may file a praecipe for a writ or a complaint when joining the new defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to file a response to a pleading, the plaintiff can file a request for a default judgment. Pa. R.C.P. 1037(a). If the prothonotary cannot assess damages, a trial will be held on the amount. Pa. R.C.P. 1037(b)(1).

4.5 Can the defendant dispute the court’s jurisdiction?

A defendant can challenge the court’s subject matter or personal jurisdiction by way of preliminary objections. Pa. R.C.P. 1028. Subject matter jurisdiction can be raised at any time. Personal jurisdiction must be raised by preliminary objection or the defence is waived.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

If a transaction or occurrence gives rise to more than one cause of action, the plaintiff must join all causes of action. Pa. R.C.P. 1020(d). If the claims do not arise out of the same transaction or occurrence, the plaintiff may still bring multiple claims. Counterclaims are permissive. If the defendant files a counterclaim, the defendant must assert all claims that arise from the same transaction or occurrence.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If two or more actions in the same county involve a common question of law or fact or arise from the same transaction or occurrence, the court may order a joint hearing or trial, or may order the actions to be consolidated. Pa. R.C.P. 213. If two or more actions pending in different counties involve common questions of law or fact or arise from the same transaction or occurrence, a party can request the court to order coordination of the actions. Pa. R.C.P. 213.1.

5.3 Do you have split trials/bifurcation of proceedings?

The court has discretion to order trials of separate issues. Pa. R.C.P. 213(b).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Pennsylvania? How are cases allocated?

The Court of Common Pleas of Philadelphia has a trial division, an orphans’ court division, and a family court division. 42 Pa. C.S.A. § 951(a). It also has a Commerce Program where certain matters are heard, including corporate governance disputes, business disputes, actions related to trade secrets, non-compete agreements, intellectual property, and business torts. There are no separate courts of equity in Pennsylvania.

6.2 Do the courts in Pennsylvania have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court may order the attorneys for the parties to appear for a pre-trial conference to simplify the issues, enter a scheduling order, obtain admissions of fact, limit the number of expert witnesses, and settle the case. Pa. R.C.P. 212.3.

6.3 What sanctions are the courts in Pennsylvania empowered to impose on a party that disobeys the court’s orders or directions?

The court may use its contempt power to sanction parties for conduct

that brings into disrespect the authority of the court or when a party fails to obey a court order compelling discovery. Pa. R.C.P. 4019. A party subject to sanctions may be required to pay the moving party’s expenses and attorneys’ fees.

6.4 Do the courts in Pennsylvania have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

A party can file a preliminary objection based on inclusion of “scandalous or impertinent matter”. Pa. R.C.P. 1028(a)(2). A court may dismiss a case entirely by granting a defendant’s preliminary objections. Pa. R.C.P. 1028. Rule 230.2 permitted a court to terminate a case in which there had been no activity for two years. However, the Supreme Court of Pennsylvania recently suspended this rule. Trial courts retain the ability to terminate a matter that has been inactive for an unreasonable amount of time under Rule of Judicial Administration 1901.

6.5 Can the civil courts in Pennsylvania enter summary judgment?

Summary judgment may be granted: (1) where there is no genuine issue of any material fact as to a necessary element of the cause of action or defence; and (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defence which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. 1035.2.

6.6 Do the courts in Pennsylvania have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may stay execution on a judgment, order a stay of proceedings and compel arbitration, and order a stay pending appeal. A motion for a stay of a judgment pending appeal must establish that the petitioner is likely to prevail on the merits, that the petitioner will suffer irreparable injury, that the issuance of a stay will not substantially harm other interested parties, and that issuance of a stay will not adversely affect the public interest. *Pa. Pub. Util. Comm’n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Pennsylvania? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Pa. R.C.P. 4003.1(a).

A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint. The discovery sought must not cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R. C. P. 4003.8.

7.2 What are the rules on privilege in civil proceedings in Pennsylvania?

A party may not obtain discovery regarding matters which are privileged. Communications subject to the attorney-client and accountant-client privilege are not discoverable. In Pennsylvania, “the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice”. *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011). A party may not obtain attorney work product. Pa. R.C.P. 4003.3.

7.3 What are the rules in Pennsylvania with respect to disclosure by third parties?

A subpoena requires a third party to attend and testify at a deposition, and may also require the person to produce documents. Pa. R.C.P. 234.1(a). A party may also obtain documents from a non-party by giving written notice of the intent to serve a subpoena at least 20 days before service. Pa. R.C.P. 4009.21.

7.4 What is the court’s role in disclosure in civil proceedings in Pennsylvania?

A party may seek to compel discovery responses. Pa. R.C.P. 4019. Upon motion to quash a subpoena, the court may make an order to protect the party, witness, or other person from unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 234.4(b).

7.5 Are there any restrictions on the use of documents obtained by disclosure in Pennsylvania?

The court may prohibit a party from disclosing trade secrets, confidential research, or other commercial information. Pa. R.C.P. 4012.

8 Evidence

8.1 What are the basic rules of evidence in Pennsylvania?

The Pennsylvania Rules of Evidence govern the admissibility of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence is admissible if it is competent and relevant. “Evidence is competent if it is material to the issues to be determined at trial, and relevant if it tends to prove or disprove a material fact in issue”. *McManamon v. Washko*, 906 A.2d 1259, 1274 (Pa. Super. Ct. 2006). Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or cumulative evidence. Pa. R. Evid. 403. The standard for qualification of an expert is liberal and considers “whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation”. *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528

(Pa. 1995). Pennsylvania courts follow the *Frye* test, as set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which admits novel scientific evidence if the underlying methodology has gained general acceptance in the relevant scientific community.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A witness can only testify to matters as to which he or she has personal knowledge. Pa. R. Evid. 601. Deposition testimony may be used at trial, such as for impeachment or if the witness is more than 100 miles from the place of trial or outside the Commonwealth. Pa. R.C.P. 4020.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

A party may propound interrogatories asking the other party to identify any expert witness, as well as the subject matter on which the expert is expected to testify. Pa. R.C.P. 4003.5. An expert is permitted to give an opinion on the ultimate issue. Pa. R. Evid. 704. However, experts may not testify on questions of law. The purpose of expert testimony is to assist the trier of fact in deciding complex factual issues.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Pennsylvania?

The court decides preliminary questions regarding the witness’s qualifications, the existence of a privilege, and admissibility of evidence. Pa. R. Evid. 104.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Pennsylvania empowered to issue and in what circumstances?

A final judgment is the final determination of the rights and obligations of the parties in a case. An interlocutory judgment determines a preliminary issue and does not adjudicate the parties’ ultimate rights. A preliminary injunction is an interlocutory judgment. The court may enter a final judgment ordering money damages. Under the Declaratory Judgments Act, 42 Pa. C.S.A. § 7532, courts have authority to issue declaratory judgments, which determine the rights of the parties with respect to certain legal issues.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Pennsylvania courts adhere to the “American Rule, which states that litigants are responsible for their own litigation costs and may not recover them from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception”. *In re Farnese*, 17 A.3d 357, 370 (Pa. 2011). An award of damages is subject to post-judgment interest from the date on which the judgment is finally entered. The legal rate of interest in Pennsylvania is 6%. Pre-judgment interest is only awarded where it is necessary to prevent injustice.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Execution of a judgment is commenced by filing a writ of execution with the prothonotary of any county in which the judgment has been entered. Pa. R.C.P. 3103(a). The writ of execution can be enforced by a variety of means including sale of real property, garnishment, execution against contents of a safety deposit box, and sale of securities. In special actions, enforcement of a judgment occurs through an action of ejectment (to obtain possession of real property), an action of replevin (to obtain possession of personal property), and mortgage foreclosures.

Full Faith and Credit Clause of the United States Constitution requires courts to recognise judgments from other states. Pennsylvania law contains a Uniform Enforcement of Foreign Judgments Act, which governs enforcement of judgments of other states. *See* 42 Pa. C.S.A. § 4306. The Uniform Foreign Money Judgment Recognition Act provides for enforcement of money judgments obtained in another country. *See* 42 Pa. C.S.A. § 22001 *et seq*; *see also Louis Dreyfus Commodities Suisse SA v. Fin. Software Sys., Inc.*, 99 A.3d 79 (Pa. Super. Ct. 2014) (instructing that judgments of other countries must first be recognised under the Recognition Act).

9.4 What are the rules of appeal against a judgment of a civil court of Pennsylvania?

There are two intermediate appellate courts in Pennsylvania: the Commonwealth Court; and the Superior Court. The Pennsylvania Rules of Appellate Procedure provide for appeals of right from final orders, from collateral orders, and from certain interlocutory orders. If an order is not appealable of right, a petition for permission to appeal may be filed, or a determination of finality sought. Pa. R.A.P. 341(c); Pa. R.A.P. 1311.

Depending on the case and the order, the Pennsylvania Supreme Court hears appeals from the Court of Common Pleas, the Superior Court, and the Commonwealth Court. Some appeals to the Supreme Court are as of right. E.g., 42 Pa. C.S.A. § 9711(h); Pa. R.A.P. 1101. Most appeals are discretionary and are initiated by a petition for allowance of appeal from a final order of the Commonwealth Court or the Superior Court. Pa. R.A.P. 1112(c). The criteria that the Supreme Court uses to grant allowance of appeal are set forth in Pa. R.A.P. 1114. The Supreme Court has extraordinary jurisdiction and King’s Bench powers, which can be sought by application. Pa. R.A.P. 3309. Where post-trial motions are required, the issues must be raised in timely post-trial motions in the trial court before they can be raised on appeal.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Pennsylvania? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

An agreement to arbitrate is presumed to be an agreement for common law arbitration. 42 Pa. C.S.A. § 7302(a). Mediation is another commonly used method of dispute resolution.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Certain claims are subject to statutory arbitration, including collective bargaining agreements and disputes relating to government contracts. Pa. C.S.A. § 7302(b)-(c). The Pennsylvania Uniform Arbitration Act sets forth the rules governing witnesses, discovery, awards, and fees. A common law arbitration award “may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable or unconscionable award”. 42 Pa. C.S.A. § 7341. Civil actions where the amount in controversy does not exceed a certain amount are subject to compulsory arbitration.

1.3 Are there any areas of law in Pennsylvania that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

An agreement to arbitrate a child custody dispute is permissible but may not be enforced where it is not in the best interests of the child. *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. Ct. 1993). Arbitration clauses may be found unenforceable under extraordinary circumstances if they violate public policy. *See In re Fellman*, 604 A.2d 263 (Pa. Super. Ct. 1992).

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Pennsylvania in this context?

Where an arbitration clause governs a dispute between parties, a party may file a motion to compel arbitration. Courts address disputes over the scope of the arbitration clause, i.e. what issues may be arbitrated, unless the parties have agreed to submit such disputes to arbitration. A court may order litigation to be stayed pending arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Pennsylvania in this context?

Appellate review is available of final arbitration orders, but the review is limited, as described in Section II, question 1.2. A court may enforce an arbitration award by ordering specific performance. In court-established custody mediation programmes, sanctions are available against a party who does not comply with the rules. Pa. R.C.P. 1940.8.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Pennsylvania?

Arbitration agreements often call for disputes to be arbitrated by the American Arbitration Association. JAMS, a well-known provider of arbitration and mediation services, has a location in Philadelphia, Pennsylvania. Pennsylvania’s Office of General Counsel offers a mediation programme for disputes involving Commonwealth employees or agencies. The Pennsylvania Council of Mediators provides mediation services in private disputes.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

The Supreme Court of Pennsylvania recently granted a petition for allowance of appeal to address the issue of whether the designation of the National Arbitration Forum (“NAF”) – which can no longer accept arbitration cases – rendered an arbitration clause unenforceable. *See Wert v. ManorCare of Carlisle PA, LLC*, 95 A.3d 268 (Pa. June 24, 2014). The Pennsylvania Supreme Court affirmed the decision of the trial court concluding that the agreement was unenforceable, based on the court’s prior decision in *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (Pa. Super. 2010). The *Stewart* decision involved the same scenario – how to interpret an arbitration agreement when the referenced forum is no longer available. The Pennsylvania Supreme Court will consider whether *Stewart* was incorrectly decided such that an arbitration agreement may still be enforced where there is no evidence that the NAF designation was integral to the agreement.



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Venezuela

Alfredo Almandoz Monterola



Juan Manuel Silva Zapata



Pittier, Almandoz y Eliaz, S.C.

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Venezuela got? Are there any rules that govern civil procedure in Venezuela?

The Venezuelan legal system is based on civil or European continental law, in which objective or written law, in principle, governs our inhabitants' conduct. The primary sources of law are: the Constitution; the International Treaties in force; the Laws, Analogy and the General Principles of Law; and as secondary or supplementary application one finds doctrine, customs and precedents [the latter known as jurisprudence].

Both the Constitution of the Bolivarian Republic of Venezuela (hereinafter "CBRV"), in its article 335, as well as the Master Law of the Supreme Tribunal of Justice, in its article 4, provide that the interpretations made by the Supreme Tribunal of Justice's Constitutional Chamber on the scope and contents of constitutional rules are binding both for the remaining Chambers of the Supreme Tribunal of Justice and for the remaining Courts of the Republic, for which reason, on this point exclusively jurisprudence is a primary source of law.

The rules governing procedure in Venezuela are provided by the Code of Civil Procedure (hereinafter "CCP"), which has gone through amendments since it came into force in 1986; the CCP currently in force being the one published in the Official Gazette of the Republic of Venezuela # 4,209 Extraordinary dated September 18, 1990. The CCP is mostly inspired by the Italian Code of Civil Procedure of 1940.

During the last 15 years special statutes have come into force for certain matters (children, children and adolescents, labour, taxes, and leasing, among others), having created their own rules of procedure.

In October 2014, the Supreme Tribunal of Justice's Civil Chamber submitted to the National Assembly a draft amendment of the CCP adapted to the CBRV's principles, especially oral and fast trials.

1.2 How is the civil court system in Venezuela structured? What are the various levels of appeal and are there any specialist courts?

The civil courts are vertically structured, where we find from lower to higher degree: Municipality Courts; First Instance Courts;

Superior Courts; and the Civil Cassation Chamber of the Supreme Tribunal of Justice, which, although not deemed as an instance for disputes knowledge, may declare null and void judgments that incurred in errors in procedure or infringements of the law with the purpose of unifying the precedents.

The Municipality Courts, the First Instance Courts and the Superior Courts are organised by judicial circuits corresponding to each of the country's states. Municipality Courts hear disputes with an amount not exceeding 3,000 Tax Units (currently USD 7,620), as well as those matters of voluntary or non-contentious jurisdiction (divorce under mutual agreement and affidavits for perpetual memory, among others). First Instance Courts hear disputes exceeding 3,000 Tax Units. Superior Courts hear appeals entered against the decisions of Municipality and First Instance Courts.

Lastly, in order for the Superior Courts' decisions to be subject to cassation before the Civil Cassation Chamber of the Supreme Tribunal of Justice, the dispute amount must exceed 3,000 Tax Units.

It is important to clarify that there are controversies not susceptible to economic valuation, as is the case where there is a debate about the status and capacity of persons, known by First Instance Courts, which decisions are appealable before the Superior Courts. These controversies may also be subject to cassation.

1.3 What are the main stages in civil proceedings in Venezuela? What is their underlying timeframe?

Civil procedure in Venezuela has several stages, depending on the issue being debated. Thus, if issues of damages, contract compliance or termination are being debated, the procedure used is called "Ordinary Procedure", which is essentially written.

The Ordinary Procedure at a first stage of knowledge mainly has three stages:

- **Filing.** At this stage the introduction of the complaint, the summons of the defendant, the opposition of previous issues motions, or exceptions, third party intervention, be it voluntary or forced, and the answer to the complaint take place. The estimated time frame for this stage is six months.
- **Instruction.** At this stage the filing by the parties of their documents bringing the evidences, opposition to means of evidence, admission of means of evidence, and the official production of means of evidence by the judge take place. The estimated time frame for this stage is four months.
- **Decision.** This is the final stage of the procedure, where parties present their conclusions related to the issue debated, present their remarks on the production of means of evidence produced by the judge, decrees for better ruling (this is the

second opportunity that the judge has to *ex officio* produce means of evidence during the trial), and final judgment. The estimated time frame for this stage is five months.

The stages in the event of an appeal of a decision produced under Ordinary Procedure are:

- Reception of the appeal. At this stage the submission of statements or conclusions, adhesions to the appeal, production of certain means of evidence (public instrument, sworn depositions, deciding oath), decrees for better ruling (this is the third opportunity for the judge to officially produce means of evidence during the trial), and remarks to the opposing party's statements take place. The estimated time frame for this stage is three months.
- Decision of appeal. At this stage we find the judgment deciding on the appeal. The estimated time frame for this stage is three months.

1.4 What is Venezuela's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are accepted as a general rule. Pursuant to article 47 of the Law of Private International Law, jurisdiction of Venezuelan courts may not be derogated conventionally in favour of foreign judges when referred to controversies related to real rights on real property situated in the territory of the Republic, or when dealing with matters where there is no room for settlement or when affecting essential principles of Venezuelan public order.

1.5 What are the costs of civil court proceedings in Venezuela? Who bears these costs? Are there any rules on costs budgeting?

The CBRV provides for free administration of justice, save in cases of the movement of judicial officers in order to serve summonses or notices, the publication of notes in the press, and the payment of professional fees of experts and expert witnesses, among others.

Such expenses are assumed by the interested party; however there is the possibility of recovering such expenses in the case of condemnation to pay costs to the losing party (expenses as well as lawyers' professional fees).

There are no rules on cost budgeting.

1.6 Are there any particular rules about funding litigation in Venezuela? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

In Venezuela there is no regulation prohibiting or regulating the financing of litigation. The *quota litis* covenant is expressly prohibited between lawyers and their clients, as so expressly provided by article 1,482 of the Civil Code (hereinafter the "CC").

Lawyers and their clients may freely set the amount of their professional fees, it being possible to enter professional fee agreements without there being maximum limits set by the law. A minimum fee schedule has been set by the Federation of Bar Associations of the Bolivarian Republic of Venezuela, by means of the National Internal Regulation of Minimum Fees, or limitations or the setting of amounts under some laws.

1.7 Are there any constraints to assigning a claim or cause of action in Venezuela? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The rights resulting from a trial may be assigned to a third party. However, the Constitutional Chamber of the Supreme Tribunal of Justice decreed that assignment is not admissible after judgment of the case; that is to say that it must be made prior to the adoption of the decision. There is no prohibition to non-party financing of proceedings, except for what has been formerly said regarding the *quota litis* covenant.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There is no previous formality in order to initiate an ordinary trial, nor is there a previous conciliatory stage that should be exhausted in order to enter the complaint. However, article 16 of the CCP provides that the party deciding to enter a complaint should have interest in it. One of the factors to determine the plaintiff party's interest is the need it has of going to the courts in order to request that its right be satisfied.

In the matter of trials whose subject is a leasing agreement of a real property to be used as a dwelling, article 94 of the Law for the Regularization and Control of Lease on Dwellings provides that, prior to the complaints for eviction, enforcement or termination of a leasing agreement, the landlord wanting to enter the complaint shall initiate before the National Superintendence of Dwellings' Leases the previous administrative procedure described in the Decree with Rank, Value and Force of Law against the Arbitrary Evictions of Dwellings.

In this sense, prior to entering a complaint it is advisable that the plaintiff party performs the extrajudicial actions aimed at requesting satisfaction of its right, and in the event that it may not have success it will always have the possibility of going before the courts.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

As a general rule, the statute of limitation is 10 years for personal actions and 20 years for real actions; however, special terms for statutes of limitations are provided for the collection of bills of exchange or promissory notes, the collection of professional fees or of lease rents, with a three-year duration. There are shorter terms of two years for the collection of lawyers', architects' and physicians' fees, among others.

The statute of limitations term begins on the date after the date of the obligation compliance, and accordingly, the term is counted by days, and not by hours.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Venezuela? What various means of service are there? What is the deemed date of service? How is service effected outside Venezuela? Is there a preferred method of service of foreign proceedings in Venezuela?

The entering of the complaint before the Tribunal initiates the civil procedure. Once the complaint has been entered, the Tribunal has three court office days in order to admit it or not, and under the first case the plaintiff party has the procedural burden of performing all those actions aimed at getting the defendant party's service of summons.

The service of summons is personal and, accordingly, it must be made on the person appearing as the defendant party. In the event that personal notice may not be served, one shall proceed with notice bills to be published in two of the main national circulation newspapers as well as a notice bill to be posted by the Tribunal's Secretariat at the defendant party's domicile. There is the possibility to summon legal entities by means of registered mail. In the event that the defendant party is not found within Venezuelan territory, service may be done by means of publication of bills.

Serving the defendant party with notice may vary between a two and three-month time frame, in accordance with provisions of the CCP, however this seldom occurs due to the delay in the following of trial in Venezuela. Once the defendant's service of notice is verified in the record, it is understood that such party is in abidance with the law for all acts of the process. Regarding the service of summons and notices to be made within the territory of the Republic on the occasion of procedures initiated abroad, it is common to use the figure of the missive or letters rogatory. Venezuela is a signatory of (i) the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and (ii) the Inter-American Convention on Letters Rogatory.

3.2 Are any pre-action interim remedies available in Venezuela? How do you apply for them? What are the main criteria for obtaining these?

In Venezuela, the existence of a trial is the fundamental premise for the decree of injunctions; however there are certain cases in which the judge may order injunctions securing the practical result of a future and eventual trial. As an example, we have the provisions of article 191 of the CC (in the special matter of divorce). In the same manner, and in the matter of copyright, article 112 of the Law on Copyright provides for the judge's power to order injunctions prior to the trial's initiation, with the particularity that such measure drops if the trial does not commence within a term of thirty (30) days as from its application. Lastly, in the matter of arbitration, precedent of the Constitutional Chamber of the Supreme Tribunal of Justice has recognised the possibility of getting pre-arbitration injunctions.

3.3 What are the main elements of the claimant's pleadings?

Article 340 of the CCP provides for the requirements of any complaint writing, to wit:

1. The indication of the court before which the complaint is entered.

2. The name, surname and domicile of the plaintiff and of the defendant and the corresponding capacity.
3. If the plaintiff or the defendant is a legal entity, the complaint must include the denomination or corporate nature and the data related to its creation or incorporation.
4. The contentious object, to be precisely identified. Indicating: its situation and boundaries, if it is a real property; the brands, colours or indications if it is a chattel; the signs, signals and features enabling its identity to be established, if it is personal property; and the necessary data, titles and explanations when dealing with non-corporeal rights or objects.
5. The description of the facts on which the complaint is based, with the pertinent conclusions.
6. The instruments on which the pretension is based, that is, those from which the deduced right immediately derives, which must be produced with the complaint instrument.
7. If indemnity for damages is claimed, their specifications and causes.
8. The principal's name and surname and the production of the power of attorney.
9. The seat or address of the plaintiff party as referred to by article 174.

In requirement number 5, the plaintiff must fit the alleged facts to the invoked right. The instruments on which the contention pretension is based may be public, privately recognised, legally held as recognised and private. Those being public, privately recognised and legally held as recognised may be produced as originals, certified copies or plain copy, while private ones must be produced as original.

3.4 Can the pleadings be amended? If so, are there any restrictions?

It is possible to amend pleadings provided the amendment does not purport to fully modify the original pleading, and that the defendant party has not yet answered the complaint.

In maritime matters, it is possible that the plaintiff party may amend the complaint after the defendant party has answered the complaint. What is more, the defendant party may amend its answer to the complaint.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

When answering the complaint, the defendant may do the following:

- Oppose previous issues motions or exceptions: mainly aimed to deplete the trial.
- Allege the lack of interest.
- Allege the lack of quality or *legitimatio ad causam*.
- Agree with or abide by the plaintiff's contention.
- Allege peremptory exceptions: the obligation's extinctive, impeding or amending facts.
- Allege defences on the substance.

The defendant party may also enter its own complaint or mutual petition (counterclaim) or call a third party to trial.

4.2 What is the time limit within which the statement of defence has to be served?

The general term for serving the statement of defence is 20 court office days, after all formalities to carry out the defendant's service of summons have been exhausted. In brief procedures it is two court office days.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Numbers 4 and 5 of CCP article 370 provide for the possibility that the defendant party may request a third party's intervention when the cause being followed should be common to the third party, and when the third party should have been bound to the defendant party in order to warrant the sold property's ownership or to warrant answering to an eventual claim against the defendant party.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim by not filing the statement of defence, the plaintiff is released from the burden of proof; however, this failure to answer does not prevent the defendant from promoting evidence favouring it in the trial. In the event that the defendant party fails to file the statement of defence, does not produce any evidence favouring it, or that the complaint is not opposed to the law, then the defendant party shall be deemed as confessed and the court shall decide in favour of the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

Dispute of the court's lack of jurisdiction is admitted if presented at the moment of filing the statement of defence when:

- The dispute is to be decided by a foreign judge.
- The matter being debated is reserved to the knowledge of public administration.
- There is an arbitration agreement reserving the knowledge of the controversy to arbitration under the terms provided by the arbitration agreement.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Article 370 of the CCP sets the following third parties that may intervene in the trial:

- 1) When the third party alleges having a preferential right against the plaintiff party, or when concurring with it in the alleged right, based on the same title; or claims property in his favour, seized or sequestered, or to a prohibition of alienating and attaching, is its own, or it is entitled to it.
- 2) When there has been an attachment of property being owned by a third party, this third party should oppose to the same.
- 3) When the third party should have a current legal interest in holding the reason of any of the parties and pretends to help it to win the process.

- 4) When any of the parties should ask for the intervention of the third party in view of the fact that the pending cause is common to it.
- 5) When any of the parties contend having a warranty or guarantee from the third party and request its intervention in the cause.

Third party intervention provided by the above points 1, 2 and 3, can be sought voluntarily by the concerned third party at any stage and degree of the process, through claim, simple writing or entry, as the case may be, with the burden of proving the interest alleged in the trial.

The defendant party must seek third party intervention as provided in points 4 and 5, and, accordingly, it is a forced intervention.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

There are two ways of accruing; one is by reason of connection and the other by "*continencia*". Reasons for connection provided by article 52 of the CCP are:

- 1) When there is a connection between persons and object, even with a different title.
- 2) When there is a connection between persons and title, even though the object may be different.
- 3) When there is a connection between object and title, even though the persons may be different.
- 4) When the complaints result from the same title, even though the persons and object may be different.

Accumulation under "*continencia*" operates when two complaints have been entered, one seeking the compliance of the main obligation, and the other demanding its accessories.

[As per the Spanish Real Academia Dictionary, one of the meanings of "*continencia*" is "*Criterio con el cual se decide la acumulación de dos o más procesos para que no se produzca la división de un mismo objeto procesal*" (rule under which the consolidation of proceedings is decided in order not to split the same procedural object).]

5.3 Do you have split trials/bifurcation of proceedings?

Split trials/bifurcation of proceedings are not admissible in Venezuela.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Venezuela? How are cases allocated?

Complaints filed before the courts of the Republic are distributed at random by means of a digital system called Juris 2000, which is also used for the management, follow-up and organisation of the complaints.

At the time the complaint is filed, the party knows which court has been assigned to handle the trial.

6.2 Do the courts in Venezuela have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Judges direct the dispute subject to its ruling, and as such, they can correct the faults committed by the parties against the loyalty and probity in the process. Likewise, the parties may request that counterparties are punished for inadequate behaviour.

6.3 What sanctions are the courts in Venezuela empowered to impose on a party that disobeys the court's orders or directions?

In accordance with article 110 of the Organic Law of the Judicial Power, and with article 483 of the Penal Code, any party in contempt of a judicial order shall be punished with six months to three years' prison or a fine from 20 Tax Units (USD 339.68) up to 150 Tax Units (currently USD 2,547.62).

6.4 Do the courts in Venezuela have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

The courts have such powers in the event parties or attorneys use offensive or indecent concepts or expressions.

Under the Supreme Tribunal of Justice's Constitutional Chamber (Hans Ebert Gotterried Dreger judgment dated 08-04-2000) the courts can annul judgments where procedural fraud or collusion has been identified.

6.5 Can the civil courts in Venezuela enter summary judgment?

In cases of voluntary jurisdiction, the courts will decide in accordance with the evidence produced by the requesting party.

In payment order procedures ("*proceso de intimación*") and execution trials the judge shall issue the payment orders according to the means of evidence produced by the plaintiff party.

6.6 Do the courts in Venezuela have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Courts in Venezuela do not have such powers.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Venezuela? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure?

There are no regulations in Venezuela regarding the preliminary discovery of documents prior to the procedure. However, when one of the parties fears that evidence or proof to be used in a future trial may disappear, it may request from the court its production by means of a procedure known as prejudicial delay. In this procedure, all the items of evidence may be produced except for those seeking to obtain the other party's confession.

7.2 What are the rules on privilege in civil proceedings in Venezuela?

Only the Republic and the State entities or companies are entitled to privileges. Among these procedural privileges are: that the Republic, in spite of not answering to the complaint, will not be deemed as having admitted the facts; that it should be expressly notified of any decision adopted during the trial; and that it may not be condemned to pay costs.

7.3 What are the rules in Venezuela with respect to disclosure by third parties?

Third parties may be called to produce documents in their possession, or to report to the court relevant facts to the trial if they appear to be in their files.

7.4 What is the court's role in disclosure in civil proceedings in Venezuela?

As disclosure is limited, the court's role in disclosure is not relevant.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Venezuela?

No. There are no restrictions on the use of documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in Venezuela?

In Venezuela there is a mixed system for the production of means of evidence in which it is possible to introduce into the trial the items of evidence provided by the law as well as those not expressly forbidden, also known as free or atypical evidence.

Each party has the burden of proving its respective assertions of fact; accordingly, the proof of absolute negative facts is not admissible and proof of notorious facts is not necessary. As to the evaluation of evidence, there are two methods. On the one hand, regulated evaluation is where the law provides how a means of evidence should be evaluated, and is applicable to the evaluation of public instruments and private ones having been recognised or held as recognised.

On the other hand, there is the evaluation under logical consideration, where the judge, through logic and maxims of experience, appreciates the means of evidence. This is applicable to those means of evidence in which a human being's intervention determines their efficacy, for example, experts' findings, witnesses, judicial inspection.

By virtue of the principle of disposition governing the civil trials, in principle it is to the parties that the possibility of offering means of evidence in trial is attributed. Exceptionally, the judge may produce means of evidence.

When evaluating the evidence, the judge must limit their appreciation only to the facts and evidence that are contained and included in the case. They must not use their internal beliefs nor apply their private knowledge of the circumstance and case. Also, the judge is obliged to appreciate and evaluate all evidence produced, including evidence that may be found irrelevant.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All means of evidence are admissible, except if prohibited by law. An experts' assessment shall be made upon technical issues, either by request of a party or by the initiative of the judge.

Only qualified people who, by virtue of their profession, art or industry, have the practical and theoretical knowledge that are required to review a specific situation, are entitled to act as experts.

Should an expert's assessment be required in a case, both parties shall appoint one (1) expert each, and a third one will be appointed by the court (however, if the parties agree, the expert's assessment could be prepared by one sole expert). These three experts will participate as a team in the evaluation of a determined situation and their responses or expert assessments shall be submitted in writing. The parties may ask for clarifications. Experts' fees must be paid by the party that proposed this type of evidence. Article 1.427 of the CC provides for the possibility of the judge not considering the expert opinion if its conviction opposes to it.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

There are rules referring to those who are not allowed to give testimony, which are: (i) children under 12 years of age; (ii) any person suffering from dementia or mental illnesses; (iii) the attorneys in favour of those they represent; (iv) partners with regard to a common business; (v) any person who has legitimate interest in the result of the case; (vi) an intimate friend; (vii) a known enemy; and (viii) a domestic employee or servant in favour of or against his employer, etc.

Witnesses must be brought to the hearing by the parties. During the process the witnesses may be interrogated only on those facts that they have experienced or that have come to their attention. The judge may propose certain questions to the witness if he considers it appropriate.

Witnesses shall be interrogated separately by the party presenting them, and the other party will have the right to cross-examine.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Technical testimonies that are required to be presented in hearings shall be made by an expert's assessment or by promoting an expert witness ("*Experto testigo*") or a witness expert ("*Testigo experto*").

The expert witness is a qualified person who does not know the facts of the case, but will offer his technical knowledge and expertise, whereas the witness expert is a person who knows the facts discussed in the case, and will offer not only this knowledge but also technical knowledge and expertise as well.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Venezuela?

The court has to admit or deny the means of evidence offered by the parties and set the time to hear them. As it has been said, the court has to evaluate said means of evidence in a regulated manner or under logical consideration. It also participates in the hearing of

some means of evidence, such as judicial inspection and deposition of witnesses.

Once the evidence produced by the parties has been heard, the court may consider the possibility of officially requesting evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Venezuela empowered to issue and in what circumstances?

Courts mainly adopt two kinds of decisions:

Judgments: these may be two kinds: final, resolving the controversy's substance, which are adopted at the end of the trial; and interlocutory, which are those deciding an incidence produced during the trial. Within the interlocutory judgments one may find those having definitive force, which, without referring to the controversy's substance, put an end to the trial.

Decreets: issued to order the follow-up or continuation of the procedure, opening a phase of the procedure, setting the time for the hearing of evidence, deciding on appeals filed or on any motion filed by the parties during the trial.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

In Venezuela, only ascertainable damages can be compensated, including not only the actual damages ("*daño emergente*"), but also loss of profits that can be expected from the original ones ("*lucro cesante*"). Unexpected and indirect damages, as well as punitive damages, are not contemplated under Venezuelan law, therefore are not subject to compensation.

As of the estimation, the plaintiff is obliged to declare his/her estimation of damages, and must provide sufficient evidence that supports his/her claim. At the end of the case, the court in its decision will establish the amount of the compensation, and could order expert evidence in order to determine the actual and exact extent of the damages.

Moral damages are allowed to be claimed in Venezuela, although their claiming is somewhat uncertain. The parties shall only claim for moral damages, and it is up to the judge's decision to both establish them, and quantify them. The parties are not entitled to estimate a fixed amount for moral damages.

Attorneys' fees may be declared by the ruling, following the general rule indicating that the losing party must pay the court costs and attorneys' fees generated during the case.

The CPC establishes a limit to the fees that the losing party must pay to the winning party, in order to cover its legal expenses. This limit has been fixed as up to thirty per cent (30%) of the amount involved in litigation. Notwithstanding, there is no legal provision that impedes any of the parties agreeing with their own lawyers' higher or lower fees to the limit foreseen in the CPC. Should the winning party incur fees and costs beyond that limit, however, it will not be able to recover them from the losing party.

9.3 How can a domestic/foreign judgment be enforced?

According to Venezuelan procedural rules, definitive judgments are only enforceable when they are legally binding, or fully enforceable, that is, when no legal means would be viable to change or challenge the decisions.

For the execution, the competent court will be the first instance court that tried the case. The court, by request of the interested party, shall issue an execution order addressed to the defeated party, in order to ask for the voluntary execution of the judgment, within three (3) to ten (10) days. If the losing party does not comply with the voluntarily execution, the court shall proceed to the forced execution process, in which the court may order a seizure of the losing party's known assets.

Articles 850 and following provide for the procedure in order to enforce in Venezuela a judgment adopted by a foreign court. Such procedure, known as *exequatur*, provides for several stages, from service of the person against whom the judgment applies, a term of 10 court office days in order to answer to the complaint and a period for hearing means of evidence if so deemed by the Civil Cassation Chamber of the Supreme Tribunal of Justice. Articles 53 and following of the Law of Private International Law must be taken into consideration in order to enforce foreign judgments.

9.4 What are the rules of appeal against a judgment of a civil court of Venezuela?

In order to begin the appeal process, the “losing” party must file the appeal in writing before the judge, who will provide for his admission or denial within the following day.

If admitted, the case file must be sent to a Superior Court in order to continue with the second instance stage. This is essentially a revision instance, in which the parties are not allowed to offer new facts, or new evidence, except for public documents, confession and *juramento decisorio*.

Once received in the Superior Court, the parties must file their closing arguments on the twentieth (20th) court day following the reception of the file if the appealed judgment is definitive, and the tenth (10th) court day if it is not definitive.

If the first instance court decides not to admit the appeal motion, the appealing party is entitled to file a special recourse directly before a Superior Court (“*recurso de hecho*”) and ask for the admittance of the appeal. The Superior Court is obliged to decide the recourse within five (5) court office days following the reception of the motion. If the motion is approved, the Superior Court will order the remission of the file and the processing of the appeal before a Superior Court. If denied, the first instance ruling will become definitive and firm.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Venezuela? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The alternate dispute resolution methods that are available in Venezuela are: (i) negotiation; (ii) mediation or conciliation; (iii) communal justice of the peace; and (iv) arbitration, which are part of the justice system in accordance with the provisions of articles 353 and 258 of the Constitution of the Bolivarian Republic of Venezuela.

Negotiation is not ruled by any law, however all Venezuelan citizens and inhabitants are entitled to reach agreements aimed at warranting peaceful coexistence and harmonious relations in all

fields of civil life, provided the same are not contrary to the law, good uses or public order. Conciliation or mediation is not ruled by any law, however its promotion, use and development have been shown in a series of statutes, both of a substantial and procedural character, in which previous stages of mediation or conciliation to be compulsorily exhausted have been included. Examples are the Labor Procedural Law of the year 2002 and the Law for the Defense of Persons in the Access to Goods and Services.

Some arbitration centres, by means of their regulations, have regulated conciliation and mediation.

As to Justice of the Peace, on May 2, 2012, its statute was derogated and the Organic Law of Communal Special Justice of the Peace was passed, which established rules for the organisation and functioning of the special communal justice of the peace, as an area of Popular Power and being part of the justice system in order to achieve or preserve harmony in family relationships, neighbouring and communitarian coexistence.

As to arbitration, since 1998 Venezuela has had a Commercial Arbitration Law, and it has ratified a series of international conventions on the matter, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958), the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Panama Convention of 1975) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention of 1979).

In the city of Caracas, the two (2) main institutions for the administration of arbitral processes or arbitration centres have their seats, and they are: (i) the arbitration centre of the Chamber of Commerce, Industry and Services of Caracas; and (ii) the Business Arbitration and Conciliation Centre (CEDCA), whose regulations have been recently amended and updated with the most modern trends in matters of arbitral process administration.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The alternative methods of dispute resolution are mainly governed by (i) the 1999 Constitution of the Bolivarian Republic of Venezuela, (ii) International Treaties in force in the Matter of Arbitration, (iii) the Organic Law of Communal Special Justice of the Peace Jurisdiction of 2012, (iv) the Law of Commercial Arbitration of 1998, and (v) the provisions of diverse substantive or procedural laws.

1.3 Are there any areas of law in Venezuela that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In Venezuela, the use of alternative methods of dispute resolution, such as negotiation, mediation or conciliation, may be used in order to resolve any kind of dispute, without there being any limitation. In matters of arbitration, only those matters which may be subject to settlement may be submitted to arbitration, with the express exception (in article 3 of the Law of Commercial Arbitration) of matters that: (i) are contrary to public order or related to crimes or misdemeanours, save for the amount of the civil liability, inasmuch as it has not been set by definitely firm judgment; (ii) those directly concerned with the empire of the State functions or of public law persons or entities; (iii) those related to the status civil capacity of persons; (iv) those related to property or rights of incapacitated persons, without previous judicial authorisation; and

(v) those over which there is a definitely firm judgment, save for estate consequences arising from their enforcement as exclusively concerning the parties of the process not having been set by definitely firm judgment.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Venezuela in this context?

In Venezuela, the judge has wide powers to implement the use of alternative methods of dispute resolution if the parties in conflict so request it, be it acting as a mediator, conciliator (before or during the flow of the process) or sending the cause to arbitral tribunals (it being the court's obligation to send the cause to arbitral tribunals if, in the conflict review, one finds an arbitral clause or agreement or in the event that once the trial has begun the parties should decide to enter into the respective arbitration agreement). In accordance with precedent of the Supreme Tribunal of Justice's Constitutional Chamber (ASTIVENCA judgment dated 11-3-2010), the power of the judiciary to order anticipated or pre-arbitral injunctions, and with the adoption of the decree adopting said anticipated injunction, an obligation arises for the petitioner to initiate the arbitral process within a specified term that when not met may extinguish the decreed injunction. In the same manner, precedents of the Supreme Tribunal of Justice's Constitutional Chamber have been peaceful when affirming the existence of a necessary cooperation between the judicial power and the arbitration tribunal in matters such as hearing evidence, enforcement of injunctions or arbitral awards.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Venezuela in this context?

In the matter of labour procedures, the consequence of the defendant's failure to attend the conciliation hearing is that the facts alleged by the plaintiff be deemed as admitted and the judge is bound to sentence. In the same manner, in matters of consumer rights, the consequence of the denounced person's failure to attend

the conciliation hearing is that the sanctioning administrative procedure may begin. As to arbitration matters, there are no appeals like in the ordinary civil process and only recourse of annulment is available, which may only be entered under the mandatory causes set in the Law of Commercial Arbitration. We must mention that the Supreme Tribunal of Justice's precedents have been constant when affirming that the parties may not avail themselves of recourses contemplated for constitutional jurisdiction (see constitutional protection recourse) in order to avoid the arbitral award's effects.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Venezuela?

The two (2) main institutions for the administration of arbitral processes have seats in Caracas, and they are: (i) the arbitration centre of the Chamber of Commerce, Industry and Services of Caracas; and (ii) the Business Arbitration and Conciliation Centre (CEDCA), whose regulations have been recently amended and updated to be in line with the most modern trends in matters of arbitral process administration.

One should point out that in both arbitral regulations, the use of conciliation is compulsory as a step of the arbitral procedure. In the same manner one must mention the existence of the Centre of Municipal Justice of the Municipality of Chacao of the city of Caracas, an institution permanently fostering the use of neighbourhood and communal mediation and conciliation, with a protagonist role in the resolution of neighbourhood conflicts.

3 Trends & Developments

3.1 Are there any trends or current issues in the use of the different alternative dispute resolution methods?

We believe that the use of mediation will keep growing in Venezuela, inasmuch as it favours the resolution of disputes in a more economic and simplistic manner, with the involved parties themselves feeling closer to the solution rather than just abiding by a judgment issued by a third party. Precedents of the Supreme Tribunal of Justice's Constitutional Chamber have given important institutional backing to arbitration and its use has grown, but we believe that further education is needed in the forum of arbitration users. The recent Law on Commercial Leases forbids arbitration as a method of conflict resolution.

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NOTES

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