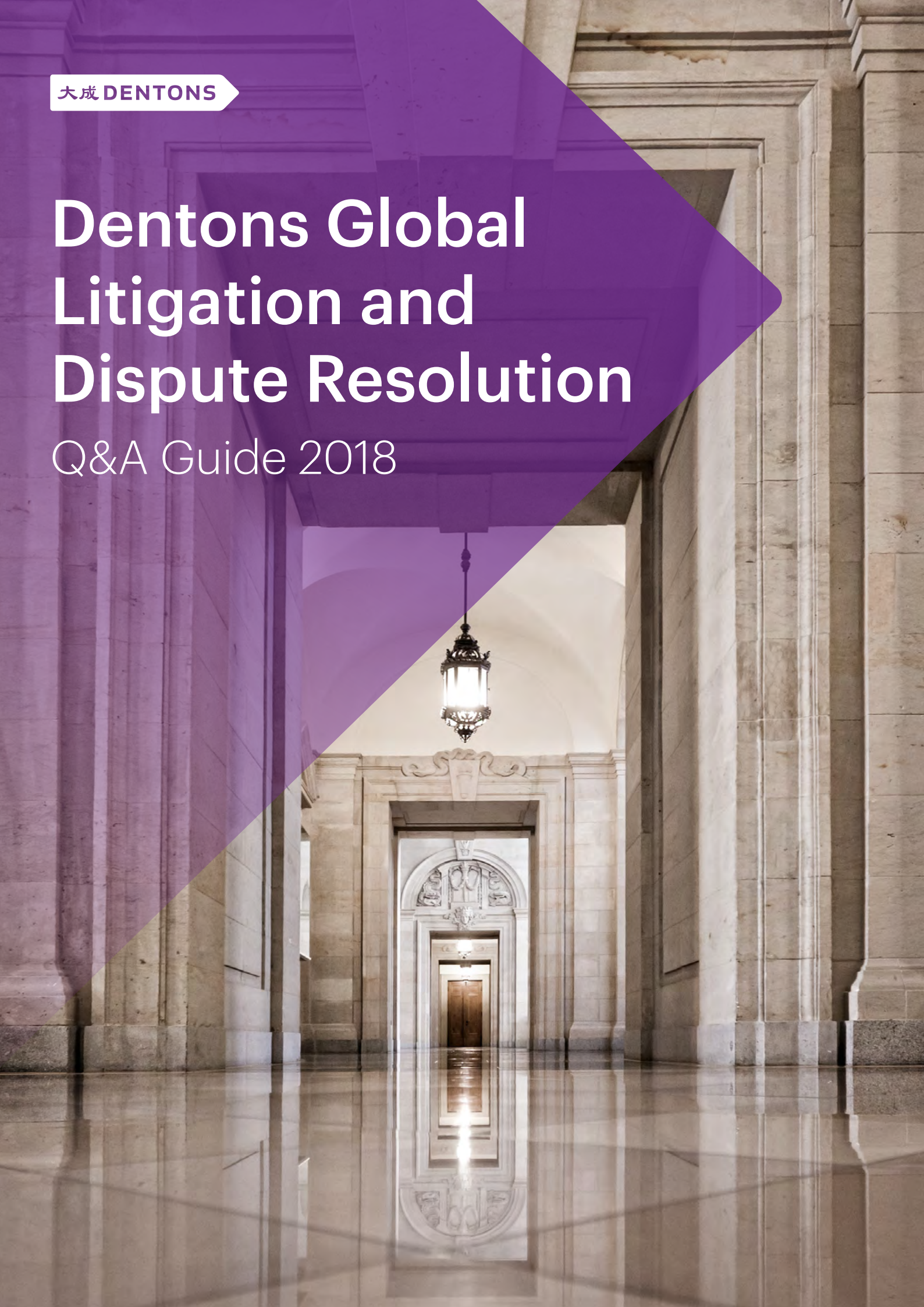
大成 DENTONS

Dentons Global Litigation and Dispute Resolution

Q&A Guide 2018



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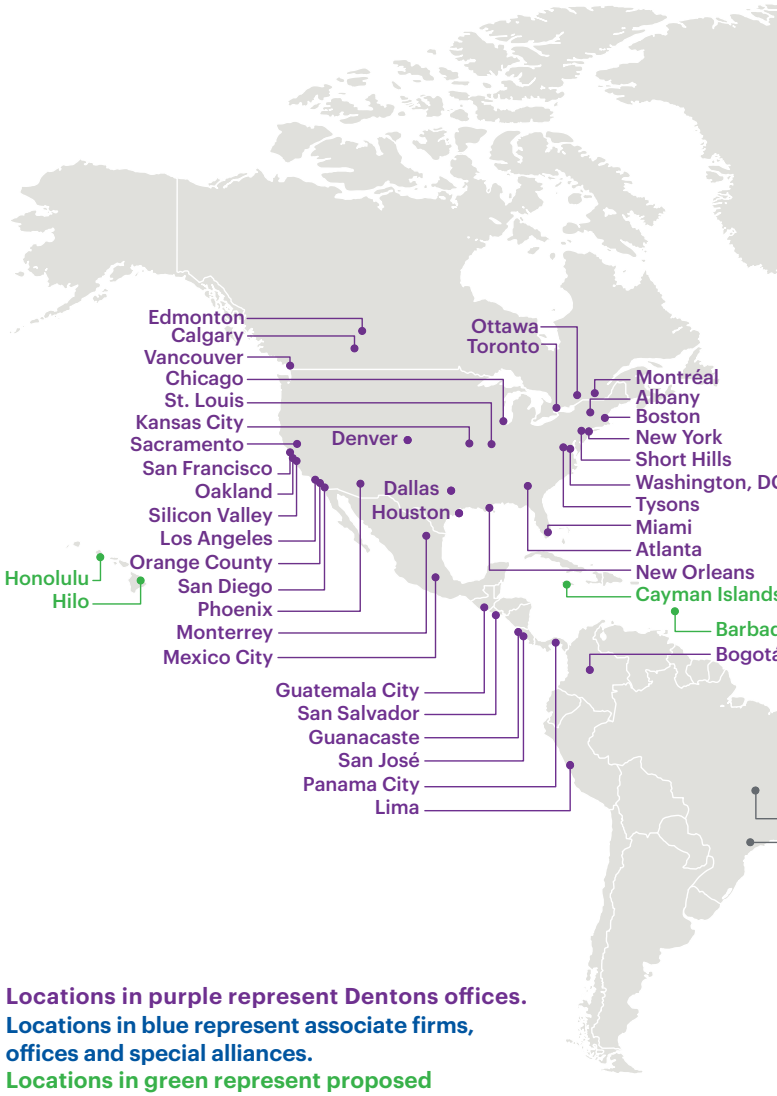
About Dentons

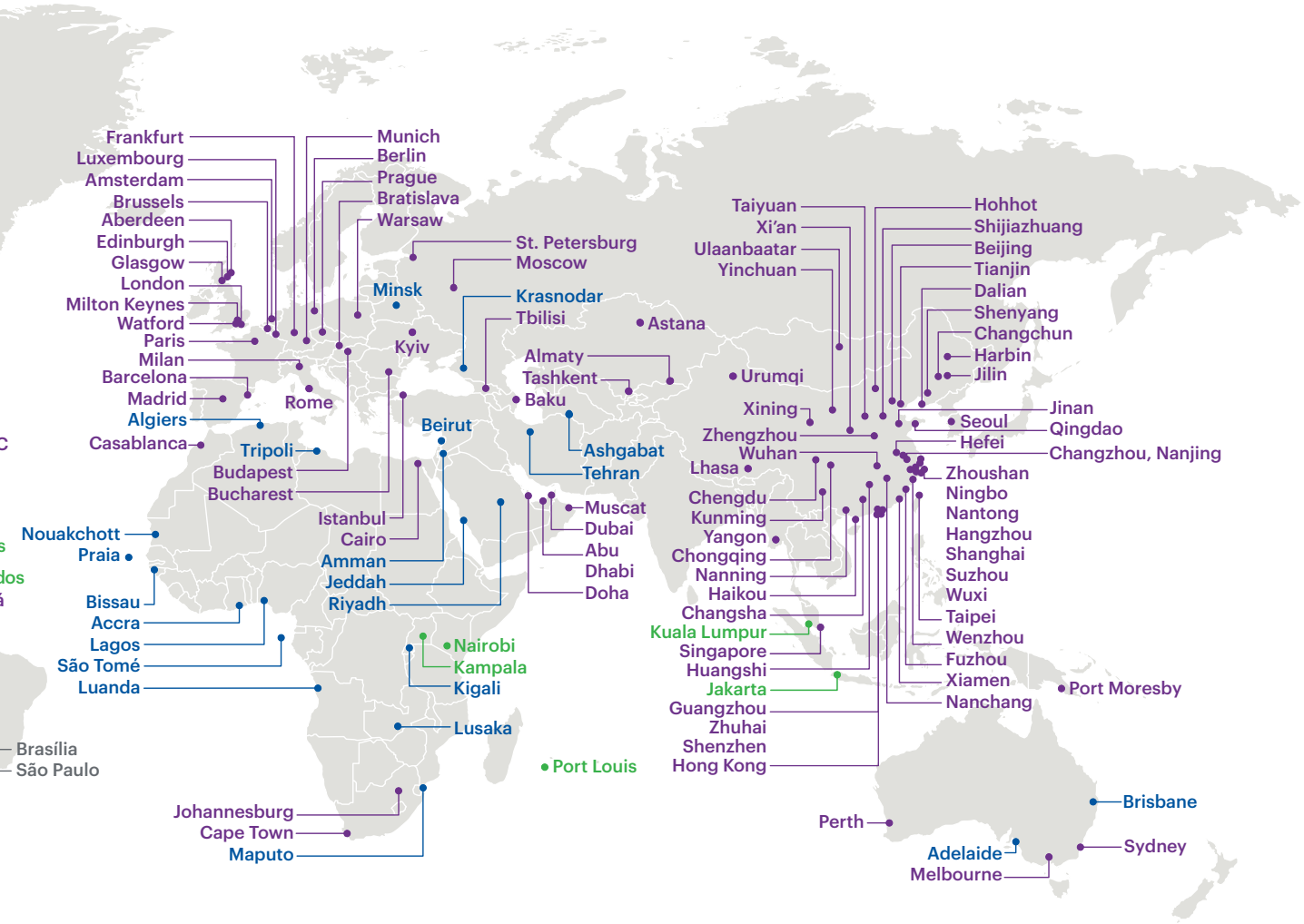
Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.



Locations in purple represent Dentons offices.
Locations in blue represent associate firms, offices and special alliances.
Locations in green represent proposed combinations that have not yet been formalized.
Locations in gray represent Brazil Strategic Alliance.

Total number of lawyers

8,800+



Total people

15,000+

Litigation and Dispute Resolution Global practice

At Dentons our lawyers draw upon their extensive experience, trusted judgment and insight to develop a customized strategy — always with our clients' specific business objectives at the forefront of our minds. Together we tackle challenges efficiently and effectively so that our clients can stay ahead. Our litigation and dispute resolution (LDR) lawyers employ the most appropriate tools and strategies for each stage of the process and each unique situation. Whether through timely use of innovative alternative dispute resolution techniques or skillful and persuasive advocacy in the courtroom, you can count on our lawyers to maximize your chances for a successful outcome. We also work with our clients to assess and manage their risks in relation to the legal costs of the dispute and to minimize the likelihood of future litigation.

Dentons' litigation professionals have experience dealing with all types of disputes, including:

- Banking litigation
- Bankruptcy litigation
- Bribery, fraud and deceit
- Class Actions
- Construction disputes
- Consumer disputes
- Copyright and trademark law
- Corporate disputes
- Debt recovery
- Defamation
- Disputes involving intellectual property
- EU competition and anti-trust law
- General contractual litigation
- Healthcare disputes
- Infringement of intellectual property and personal rights
- Insurance litigation
- International arbitration
- Joint venture and partnership disputes
- Judicial review
- Landlord and tenant disputes
- Professional negligence
- Property-related claims
- Tax and customs litigation
- Unfair dismissal disputes
- White collar crime / Internal

Dentons' distinctive approach is to integrate international expertise with outstanding local lawyers. Our extensive network of offices and associated law firms – the largest associated network of any international law firm – provides our clients with first class

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Australia

John Dalzell and Louise Massey

1. OVERVIEW

1.1 Overview

The principal alternative dispute resolution methods used in Australia are negotiation, mediation, arbitration and conciliation.

Negotiation

Negotiation refers to a structured meeting between the parties to try to settle the dispute. Negotiation may take place before or after the commencement of litigation. Information exchanged in a negotiation is confidential and cannot be used in the course of the litigation. The discussion may be conducted either:

- in a formal setting, such as a pre-trial conference; or
- informally by telephone, or in face to face negotiations by the parties.

Mediation

Mediation is a structured negotiation process assisted by a third-party independent mediator. The mediator assists the parties in reaching their own private resolution of the dispute.

In most jurisdictions, there is provision in the rules for referring proceedings or parts of proceedings to a mediator. There is, however, variation across jurisdictions regarding whether this may be done without the permission of the parties.

In Queensland, subject to an order of the court, referral to mediation stays the proceeding until six business days after the mediator files a report with the registrar certifying that the mediation process is completed. In other jurisdictions, reference to a mediator only stays proceedings if the court makes an order to this effect.

Arbitration

Arbitration is, effectively, private litigation whereby an arbitrator hears the evidence of the parties and makes a (usually) binding determination. The arbitrator may be appointed under the terms of an agreement with the parties or by a court under a court-annexed arbitration scheme.

An arbitrator is usually given the power to impose a binding decision on both parties. Arbitration can, in that sense, be seen as a direct replacement for litigation and is usually complex and potentially expensive.

In Australia, there are many statutes which provide for the settlement of disputes by arbitration. Each of Australia's States and Territories in Australia have introduced uniform Commercial Arbitration Acts. In NSW, this legislation is the *Commercial Arbitration Act 2010* (NSW). These uniform Commercial Arbitration Acts now require that courts refer to arbitration any matter before them which is subject to a valid arbitration agreement.

Conciliation

Conciliation is a method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles. In Australia, conciliation is distinguished from mediation by the conciliator's input as to the substance of the agreement, although the process is similar to mediation in that the conciliator helps parties identify contentious issues and develop different options with a view to resolving the dispute.

2. LITIGATION

2.1 Court system

Australia's dual system

Australia has a dual system of courts, consisting of federal courts created by the Commonwealth and those created by the States and Territories.

Commonwealth

Federal jurisdiction is exercised by three superior courts of limited jurisdiction and an inferior court. The superior courts are the High Court of Australia, which possesses both an original federal jurisdiction and an appellate jurisdiction in relation to both State and federal courts; the Federal Court of Australia; and the Family Court of Australia.

The inferior court of federal jurisdiction is the Federal Circuit Court. Its procedures resemble those of other courts but, in contrast to other courts, it is constituted under legislation that includes among its objects the encouragement of alternative dispute resolution processes and the creation of a court which is to operate as informally as possible, and which is to use streamlined procedures.

State

In each of the States and Territories there is a Supreme Court, which is a court of plenary jurisdiction, and one or two further tiers of courts of inferior jurisdiction.

The first tier courts are generally called Magistrates Courts or, in the Northern Territory and New South Wales, Local Courts.

Where there is an intermediate court of inferior jurisdiction this is called the District Court or, in Victoria, the County Court. The practice and procedure in these inferior courts generally follows that of the Supreme Court in that jurisdiction.

Divisions within the Supreme Court of New South Wales

a. Commercial list

Except as otherwise provided, all proceedings arising out of commercial transactions, or in which there is an issue of importance in trade or commerce, are assigned to the Equity Division of the Supreme Court of New South Wales and may be entered in the Commercial List. Whether a particular proceeding is appropriate for assignment to the Commercial List depends upon the nature of the issues raised and the nature of the transaction out of which they arise, not upon whether the parties are traders.

b. Technology and Construction List

Proceedings that may be entered in the Technology and Construction List include:

- cases relating to or arising out of:
  - the design, carrying out, supervision or inspection of any building or engineering work;
  - the performance by any building or engineering expert of any other services with respect to any building or engineering work; or
  - any certificate, advice or information given or withheld with respect to any building or engineering work;
- cases relating to or arising out of, or the determination of which involves the design, acquisition, disposal or operation of technology in commercial transactions or in transactions involving government; or
- cases on a claim for rectification, setting aside or cancellation of any agreement with respect to matters in list items (1) or (2) above.

Other specialist lists in the Supreme Court of New South Wales include the Administrative Law, Defamation, Possession and Professional Negligence Lists in the Common Law Division, and the Admiralty, Adoptions, Corporations, Probate and Protective Lists in the Equity Division.

2.2 Pre-action conduct

There are a number of pre-litigation requirements with respect to proceedings in the Federal Court of Australia and Federal Magistrates Court. These require a party to take all 'reasonable steps' prior to litigation, with the object of minimizing cost and delay. What constitutes reasonable steps will depend on the circumstances of the case and the situation of the parties, however it will often include giving notice to the other parties of the issues in dispute, exchanging relevant information and documents critical to the resolution of the dispute, and consideration of alternative dispute resolution methods that may be more appropriate and cost-effective than litigation.

The *Civil Dispute Resolution Act 2011* (Cth) requires both applicants and respondents to proceedings in the Federal Court of Australia and Federal Magistrates Court to file a "genuine steps statement," either at the time of filing the application (in the case of the applicant), or before the hearing date specified in the application (in the case of the respondent).

In the case of the applicant, the genuine steps statement must specify:

- the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent; or
- the reasons why no such steps were taken, which may relate to, but are not limited to:
  - the urgency of the proceedings; and
  - whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

In the case of the respondent, the genuine steps statement must specify:

- that the respondent agrees with the genuine steps statement filed by the applicant; or
- if the respondent disagrees in whole or part with the genuine steps statement filed by the applicant, the respect in which, and reasons why, the respondent disagrees.

Lawyers acting on behalf of a party who is required to file a genuine steps statement have a duty to advise the party of the requirement, and to assist the party to comply with the requirement.

Failure to file a genuine steps statement in proceedings where it is required will not have the effect of invalidating the application, the response to the application, or the proceedings. However, the court may take such action into account in performing any function or exercising any powers in relation to the proceedings, as well as when exercising its discretion to award costs (*Superior IP Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282).

2.3 Typical proceedings

Typical proceedings include:

- Filing of originating process (e.g. statement of claim, summons, originating process);
- Requests for and answers to requests for further and better particulars of claim;
- Filing of defence or response to claim;
- Filing of any cross claim and a defence to the cross claim (if applicable);
- Discovery and issuing of subpoenas and notices to produce;
- Expert evidence and lay affidavits / witness statements;
- Mediation; and
- Hearing.

Interposed in the above list will be directions hearings and interlocutory processes, as required.

2.4 Limitation periods

Limitation periods vary for different causes of action and between jurisdictions. In each case, one must consult the appropriate legislation to confirm whether there are any special limitations on the time for commencement of the particular action. However, the limitation periods for the most common causes of action are as follows:

Contract

The limitation period for causes of action founded on contract is 6 years pursuant to section 14 of the *Limitation Act 1969* (NSW).

The limitation period for causes of action on a simple contract is six years from the time of the breach, except in the Northern Territory where the period is three years. A simple contract is any contract made other than by deed, whether in writing or not.

In most jurisdictions, the limitation period for action on a specialty contract is 12 years from the time of the breach. In South Australia and Victoria, the limitation period is 15 years. A specialty contract includes a bond, a contract under seal, a deed, a covenant and a statute.

Tort

The limitation period for causes of action founded in tort is generally six years pursuant to section 14 of the *Limitation Act 1969* (NSW).

In all jurisdictions except the Northern Territory, the general limitation period for actions in tort is six years. The limitation period in the Northern Territory is three years.

Consumer law

The limitation period for actions for damages under section 236 of the *Australian Consumer Law* is six years from the date that the cause of action arose.

In all jurisdictions, the limitation legislation gives the court the discretionary power to extend limitation periods for certain causes of action if certain criteria are satisfied. The causes of action for which an extension of the limitation period may be granted and the criteria which must be satisfied vary between jurisdictions.

2.5 Confidentiality

One of the underlying principles of common law legal systems is the principle of open justice, "that justice should not only be done, but should manifestly and undoubtedly be seen to be done." The conduct of proceedings in public is an essential quality of the Australian common law legal system. The principle is not only an overarching principle, but also gives rise to several substantive rules that a court and judicial system must follow, including that judicial proceedings are conducted, and decisions pronounced, in an open court, and that evidence is communicated to those present in court.

There are certain 'exceptional' circumstances in which courts will grant a closed court, non-publication or suppression order to allow for certain parts of proceedings, and certain documents, to be kept confidential (*Rinehart v Welker* [2011] NSWCA 403 at [26], [32]).

Pursuant to section 7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW), the court may make a suppression or non-publication order, either on its own initiative or on application by a party to the proceedings, or by any other person considered to have a sufficient interest in the making of the order.

The court may make a suppression or non-publication order that would prohibit or restrict the publication or disclosure of:

- information that would identify, or is otherwise concerned or associated with, a party to or witness in proceedings before the court; or
- information that comprises evidence, or information about evidence, given in proceedings before the court.

Section 8 of the *Court Suppression and Non-Publication Orders*

Act 2010 (NSW) sets out the grounds upon which a suppression or non-publication order can be made, including where the order is 'necessary' to:

- prevent prejudice to the proper administration of justice;
- prevent prejudice to the interests of the Commonwealth, or national or international security;
- protect the safety of any person;
- avoid causing undue distress or embarrassment to a party to, or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency); or
- where it is otherwise necessary in the public interest for the order to be made, and the public interest significantly outweighs the public interest in open justice.

2.6 Class actions

Class actions in Australia are commenced under the Federal Court of Australia's representative proceedings scheme (*Federal Court of Australia Act 1976* (Cth), Part IVA and also *Civil Procedure Act 2005* (NSW) s 157).

The following threshold requirements apply to class actions:

- There must be seven or more persons with a claim against the same defendant;
- The claims must be in respect of the same, similar or related circumstance; and
- The claims must give rise to at least one substantial common issue of law or fact.

In contrast to the position in the United States, in Australia the onus is on the defendant to establish that the above threshold requirements have not been met.

A class action is brought on behalf of all members by a small number of (or one) representative plaintiffs. The representatives are the only class members that are parties to the proceedings.

It is not necessary to define all members of the class by name, or to specify the exact number of individual people in the class. The class may be defined quite broadly by a set of criteria (for example, all employees of a specified company during a specified period). Usually, each potential claimant who falls within the class definition is considered to be a member of the class, unless they opt-out of the proceedings. However, it is possible to define the class in such a way that requires members to opt-in to the proceedings instead.

Upon commencement, the proceedings are assigned to a judge who is responsible for management. The proceedings are managed by way of case conferences, which are less formal than a directions hearing. Case conferences are designed to promote discussion between the parties and the judge, and find the best method of bringing the case to a hearing (Practice Note SC Gen 17).

Class actions often lead to settlement; however it is a requirement that any settlement must be approved by the court, which must be satisfied that the settlement is fair, reasonable and in the interest of class members.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

A lawyer must have an Australian Practising Certificate in order to represent their client in court. Pursuant to section 16 of the *Legal Profession Uniform Law* (NSW), the Supreme Court can admit an individual into the Australian legal profession as an Australian lawyer, only if:

- The designated local regulatory authority has provided the Supreme Court with a compliance certificate in respect of the person and the certificate is still in force;
- The person is not already admitted; and
- The person takes and oath of office or makes an affirmation of office.

To practice in a federal court, a person entitled to practice as a barrister, solicitor, or both in the Supreme Court of any State or Territory has the same entitlement to practice in the Federal Court of Australia. That is, provided that his or her name appears in the Register of Practitioners kept by the Chief Executive and Principal Registrar of the High Court of Australia in accordance with the provisions of section 5B of the *Judiciary Act 1903* (Cth).

If a lawyer does not hold a Practising Certificate but wishes to still appear in court, he or she will need to seek the leave of the Court to appear. Failing to seek leave may be regarded as holding oneself out to be entitled to practice.

Overseas lawyers wishing to conduct cases in New South Wales must first be admitted by applying directly to the Legal Profession Admission Board (LPAB) for a compliance certificate in accordance with the *Legal Profession Uniform Admission Rules 2015* (the Admission Rules). The "LPAB" will assess the lawyer's qualifications against the requirements of NSW.

The prerequisites for the issue of a compliance certificate are as follows. The person must:

- have attained the academic qualifications specified under rules of the Admission Rules;
- have satisfactorily completed the practical legal training requirements specified in the Admission Rules pursuant to rule 6; and
- be a fit and proper person to be admitted to the Australian legal profession.

3.2 Rules of service for foreign parties

Australia is a member of the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965*, which regulates the service of documents between countries party to the convention.

Australia does not object to the use of private process servers, diplomatic channels or local agents. However, Australia does require that documents be served by registered post if documents are to be served by post.

3.3 Forum selection in a contract

Australian courts recognize a distinction between exclusive and non-exclusive jurisdiction clauses in contracts. Exclusive clauses create a contractual obligation to sue or be sued in the stipulated jurisdiction. The bringing proceedings in a court other than the chosen forum is considered a breach of contract. Non-exclusive clauses identify a place for litigation but allow parties to proceed elsewhere if they wish.

For example, in *Ace Insurance Ltd v Moose Enterprise Ltd* [2009] NSWSC 724. The Supreme Court of NSW granted an anti-suit injunction to restrain proceedings brought in California in breach of a NSW exclusive jurisdiction clause.

3.4 Choice of law in a contract

Parties to a contract can expressly state that their contract is governed by a nominated law. However, this is not determinative and statute may invalidate this choice. A foreign law clause that limits or restricts statutory rights that would otherwise exist is not enforceable.

For example, section 77 of the *Bills of Exchange Act 1909* (Cth) provides that the validity of a bill is determined by the law in its place of issue.

3.5 Gathering evidence in a foreign jurisdiction

The primary method for taking evidence in Australia for a foreign proceeding is outlined in the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. Australia has made several reservations and declarations with respect to the Convention, which can be accessed online in The Hague Convention Status table.

Generally, the taking of evidence must comply with the procedural and evidentiary rules of both the relevant Australian court and the overseas jurisdiction.

3.6 Enforcing a foreign judgement in local courts

Foreign Judgments Act 1991 (Cth)

The *Foreign Judgments Act 1991* (Cth) provides for the registration (and enforcement) of foreign judgments in Australia. Fundamental to the legislative scheme is the concept of reciprocity. The *Foreign Judgments Act* only applies to judgments made in a particular country where the Governor-General is satisfied that substantial reciprocity of treatment will be afforded to corresponding Australian judgments in that country.

The Foreign Judgment Act applies to judgments of relevant courts in many foreign jurisdictions, including: Hong Kong, Japan, Singapore, Canada, France, Germany, and the UK.

A judgment creditor who has obtained judgment in a relevant foreign court may apply to the Supreme Court of an Australian State or Territory for registration of the judgment. Such application must be made within six years after the date of judgment or the determination of any appeal proceedings.

A judgment cannot be registered if, at the date of the application for registration, it has been wholly satisfied or it cannot be enforced in the country of the original court.

Common law

The *Foreign Judgments Act* does not apply to judgments made in the US, China, or Indonesia (in addition to numerous other foreign jurisdictions). Parties who obtain judgments in these jurisdictions must seek recognition and enforcement of those judgments at common law. In order to entitle a foreign judgment to recognition at common law, four conditions must be satisfied:

- The foreign court must have exercised a jurisdiction that Australian courts recognize;
- The foreign judgment must be final and conclusive;
- The parties must be identified; and

- If based on a judgment *in personam*, the judgment must be for a fixed debt.

Foreign antitrust proceedings

The *Foreign Proceeding (Excess of Jurisdiction) Act 1984* (Cth) is primarily aimed at protecting Australian businesses from foreign antitrust proceedings, particularly those arising in the US.

The *Foreign Proceeding (Excess of Jurisdiction) Act* allows the Attorney-General to make a declaration in respect of a foreign antitrust judgment if the declaration is desirable for the protection of the national interest or if the jurisdiction exercised by the foreign court was contrary to international law or inconsistent with international comity.

A declaration made by the Attorney-General has the effect that the whole or part of the foreign judgment will not be recognized as enforceable in Australia. However, the Act goes further, allowing a defendant to recover money paid to a plaintiff pursuant to a foreign antitrust judgment which is the subject of a declaration by the Attorney-General. Where the plaintiff is a corporation, the defendant may also recover from any related entity.

4. EVIDENCE

4.1 Fact witnesses

In common law civil trials, fact witnesses can give oral and written evidence. Generally, a witness will be required to provide written evidence in the form of an affidavit unless otherwise ordered by the court. A witness in a proceeding must either take an oath, or make an affirmation before giving evidence (including written evidence) (*Evidence Act 1995* (NSW) s 21). Affidavits for each fact witness are normally exchanged by the parties prior to the hearing, and the affidavit is notionally 'read' in court as the witness' evidence in chief.

Legislation states that parties may cross-examine any witness but not before examination in chief takes place (*Evidence Act 1995* (NSW) sections 27-28; UCPR r 35.2). Practically, if required by the opposing party, the witness will be called at the trial for the purpose of cross-examination, and their affidavit evidence will be considered their evidence in chief.

4.2 Expert witnesses

Admission of expert evidence falls under the specific exception to the general rule against opinion evidence (*Evidence Act 1995* (NSW) sections 76, 79).

The rules for admissibility of expert evidence require that the expert evidence be relevant, and that it have significant probative value. The expert must be a person with specialized knowledge, based on their training, study, or experience. Their opinion must be wholly or substantially based on that knowledge.

Under the UCPR, any person wishing to adduce expert evidence at trial must seek directions from the court (UCPR r 31.19). The court may give directions in relation to expert witnesses, including (but not limited to) the following directions (UCPR r 31.20):

- as to the time for service of experts' reports;
- as to the specified issues in relation to which expert evidence may be adduced;
- as to the limit on the number of expert witnesses who may be called in relation to any issue;
- for the appointment and instruction of a court-appointed expert;
- requiring experts to confer in relation to the same issue; or
- any other direction that may assist an expert in the exercise of their functions.

Expert evidence in chief is to be given by way of written report (UCPR r 31.21). The report must include (UCPR, Sch 7, cl 5):

- the expert's qualifications as an expert on the issue which is the subject of the report;
- the facts and assumptions of facts upon which the opinions in the report are based (including any letter of instructions);
- the expert's reasons for each opinion expressed;
- any literature or other materials utilized;
- any examinations or investigations on which the expert has relied; and
- in the case of a lengthy report, a brief summary of the report, which is to be located at the beginning of the report.

Expert witnesses must comply with the expert witness code of conduct set out in Schedule 7 to the UCPR, including the overriding duty to assist the court impartially on matters relevant to the witness' area of expertise. The witness' paramount duty is to the court; and not to any party to the proceedings, including the party retaining the expert witness.

4.3 Documentary disclosure

Discovery and inspection of documents, interrogatories, preliminary discovery, and discovery by non-parties are all dealt with by the UCPR.

Discovery

Discovery is the process whereby parties are required to disclose documents and evidence that is in existence and relevant to the issues in dispute. The objective of the discovery process is to place the parties on equal footing prior to the hearing, to reduce surprise, and to define the real issues in dispute. Discovery is by way of categories, whereby a category or class of document must be described by the party seeking an order for discovery either by relevance to one or more facts in issue, by description of the nature of the documents and the period within which they were brought into existence, or in such other matter that the court considers appropriate (UCPR r 21.2). Where orders for discovery are made by the court, the obligation is ongoing, in that the party must continue to discover any documents which have not previously been discovered. However, a party is not required to discover any document that was created after the proceedings were started or if the party is entitled to claim privilege from production of the document.

Disclosure in the equity division of the NSW Supreme Court is also governed by NSW Supreme Court Practice Note SC Eq 11, which came into effect on 26 March 2012. The effect of the practice note is that there is no longer an automatic right to discovery. This means that a party cannot require another party to give discovery merely by service of a notice. Evidence is to be served before any order for disclosure is granted by the court, except in the case of 'exceptional circumstances'. An application for disclosure is required to set out reasons why disclosure is necessary for resolution of the issues in dispute, the class of documents in respect of which disclosure is sought and the estimated costs of disclosure.

What constitutes 'exceptional circumstances' includes:

- when the documents are necessary to fairly prepare a case for trial (*Danihel v Manning* [2012] NSWSC 556);
- when the information sought is predominantly in the possession of the party against whom disclosure is sought (*Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue (No 2)* [2013] NSWSC 89; *Mempoll Pty Ltd, Anakin Pty Ltd and Gold Kings (Australia) Pty Ltd* [2012] NSWSC 1057); and
- when disclosure sooner rather than later is required for the 'just, quick and cheap resolution of the issues in dispute' (*RSA (Moorvale Station) Pty Ltd v VDM CCE Pty Ltd* [2013] NSWSC 534).

Generally, discovery is ordered after the close of pleadings, after the real issues in dispute have been identified, but prior to the parties having exchanged evidence. The court's order must specify the class or classes of documents of which discovery is to be given (UCPR r 21.2(1)(a)).

Interrogatories

Another process for discovery is by way of interrogatories, whereby a party or its representative is required to answer (in writing and on oath) a specific set of questions prior to the trial. Answers (or certain parts of answers) to interrogatories may be tendered against the answering party as evidence (UCPR r 22.6).

Subpoenas

Subpoenas can be issued requiring a person to attend court to give evidence and/or to produce documents. Leave of the court is required for a party to issue a subpoena. Applicants seeking leave to issue a subpoena must adequately set out the reasons why the subpoenaed documents or the subpoenaed person's evidence would be relevant to the proceedings. The court will also make an order as to who has access to the documents produced on subpoena and on what terms.

Notice to produce

In the absence of an order for discovery, a party may serve on another party a notice to produce for inspection, any document or thing referred to in an originating process, affidavit, statement or pleadings filed or served by the other party or any other documents relevant to a fact in issue (UCPR r 21.10). Unless the court orders otherwise, a party served with a notice to produce for inspection must, within a reasonable time after being served with the notice (usually 14 days), produce the documents for the other parties' inspection, or, in respect of any documents not produced, serve a notice stating that a certain document or documents are privileged or that the document or documents are not in that party's possession (UCPR r 21.11).

4.4 Privileged documents

At common law, legal professional privilege protects confidential information and communications between a lawyer and their client from compulsory production in the context of legal proceedings. Common law privilege protects

communications made between a lawyer and client during the pre-trial evidence gathering process, including by way of discovery and subpoena.

Legal professional privilege (also known as client legal privilege)

Generally, correspondence and documents between a lawyer and their client are privileged and cannot be used in court proceedings unless the client gives their consent or the privilege is waived. The common law concept of client legal privilege is now reflected in sections 118 and 119 of the *Evidence Act 1995* (NSW). Confidential communications may not be given in evidence or otherwise disclosed by a lawyer if the communications (including documents) were made:

- to enable the client to obtain, or the lawyer to give, legal advice (advice privilege) (*Evidence Act 1995* (NSW) s 118); or
- with reference to litigation that is currently taking place or litigation that was contemplated, at the time the communications were made (litigation privilege) (*Evidence Act 1995* (NSW) s 119).

Without prejudice privilege

The basis of "without prejudice" privilege is to encourage parties to resolve disputes and reach settlement by allowing opposing parties and their lawyers to speak openly and make concessions, with the comfort of knowing that the communications cannot be used in court if the negotiations fail to achieve a settlement. For without prejudice privilege to apply, the communication must have been made in the course of a genuine attempt to resolve the dispute. The court will look to the surrounding circumstances in deciding whether protection will apply.

Common interest and joint privilege

Common interest privilege applies to communications between parties who share a 'common interest', for example, companies that form a group of companies; an insured and its insurer; or an agent and its principal. Common interest privilege applies in such situations, despite the fact that the parties may have different interests and views.

Joint privilege applies where one or more parties retain the same solicitor, or share a joint interest in the subject matter of a communication over which privilege is claimed, to the extent that they could have instructed or retained the same solicitor. Privilege in such a case belongs to all of the parties, and all parties must agree to waive privilege in order for privilege to be waived.

5. REMEDIES

5.1 Dismissal of a case before trial

Strike out

A claim may be struck out if it does not comply with UCPR 14.28 – namely, where it discloses no reasonable cause of action; has a tendency to cause prejudice, embarrassment or delay; or is otherwise an abuse of process of the court. UCPR 14.28 looks to the form of the pleading, rather than the substance of the party's claim. The strike out application is brought by way of notice of motion. The court will ordinarily take all the allegations of fact that are set out in the claim as accepted. If there is a prospect that the defects in the defence can be cured by amendment, it is likely that the court will grant leave to amend rather than strike out the pleading.

Strike out under UCPR 14.28 will not prevent the plaintiff commencing a fresh set of proceedings.

Summary dismissal

To have the plaintiff's claim finally disposed of with a judgment, an application may be made under UCPR 13.4 which permits a claim to be struck out and the proceedings dismissed where the proceedings are frivolous or vexatious; disclose no reasonable cause of action; or are an abuse of process of the court. The application is made by way of notice of motion and affidavit in support. A court will only grant summary dismissal in the clearest of cases.

5.2 Interim or interlocutory injunction before a trial

- The applicant must identify the legal or equitable rights which are to be determined at trial and in respect of which final relief is sought: *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
- The applicant must make out a prima facie case (i.e. that there is a "serious question to be tried"): *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618; *American Cynamid Co v Ethicon Ltd* [1975] AC 396.
- The applicant must show that the balance of convenience is in favor of granting the relief. Relevant matters may include whether irreparable harm will be suffered by the plaintiff if the relief is not granted; whether damages will be a sufficient remedy and whether the defendant will be in a position to pay such damages if ordered; whether delay in making the application has or may prejudice the defendant in some

way; whether the interlocutory relief sought would overturn or merely maintain the status quo; and the sufficiency of the plaintiff's undertaking as to damages.

- Finally, an applicant will usually be required to give the usual undertaking as to damages, the terms of which are set out in UCPR 25.8.

5.3 Interim attachment orders

A number of interim remedies and orders are available where there is a risk that a party or third party will leave the jurisdiction, or remove or deal with their assets in a manner that is likely to interfere with the applicant's ability to enforce a judgment and recover damages or prospective damages.

Search orders (also known as Anton Piller orders)
Ordinarily, an Anton Piller order is made ex parte and compels the respondent to permit persons specified in the order to enter the relevant premises and search for, inspect, copy, and/or remove the things described in the order. Anton Piller orders are a particularly intrusive remedy, designed to preserve evidence pending a hearing.

Specific rules relating to Anton Piller orders include the following:

- The search party must include an independent solicitor whose role is to supervise the search, a solicitor representing the applicant, as well as any other relevant persons such as independent computer experts, or persons able to identify the things being searched for as identified in the order;
- The search party cannot include the applicant, or persons related to the applicant including directors, officers, employees or partners of the applicant (if a company);
- The order is required to be clear about the maximum number of persons in the search party, which should be as small as possible; and
- An application for a search order is required to be accompanied by an affidavit in support, which must include:
  - a description of the things, or categories of things, and the address or location of any premises in relation to which the order is sought;
  - why the order is sought, including why there is a real possibility that the things to be searched for will be destroyed or otherwise made unavailable for use in evidence before the court unless the order is made;
  - the prejudice likely to be suffered by the applicant if the order is not made;
  - the identity of the independent solicitor appointed to serve the order and supervise its execution; and
  - who the applicant believes will be in occupation of the premises at the time of the search.

Freezing Orders (also known as Mareva Orders)
A freezing order is also generally obtained ex parte, without notice to the respondent, and prior to service of the originating process. This is because notice or service may prompt the very dissipation or dealing with assets that the freezing order seeks to prevent.

An applicant for a freezing order is required to:

- prove that judgment has been given in its favor or that it has a good arguable case on an accrued or prospective cause of action. A good arguable case is "one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes would have a better than 50 percent chance of success" (*Ninemia Maritime Corp v Trave GmbH & Co KG* [1984] 1 All ER 398 at 404);
- prove that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the judgment debtor or prospective judgment debtor might abscond, or the assets might be removed, disposed of, dealt with or diminished in value;
- where the order is sought against a third party, the applicant must prove that there is a danger that its judgment or prospective judgment will be wholly or partly unsatisfied because:
  - the third party holds, or is using, or exercising, a power of disposition over assets of the judgment debtor or prospective judgment debtor;
  - the third party is in possession of, or in a position of control or influence concerning, assets of the judgment debtor or prospective judgment debtor; or
  - there is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, a process whereby the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment.
- address the form of the order, including the value of frozen assets, exclusion of dealings with assets for living; legal and business expenses and pre-order contractual obligations;

the duration of the order; and liberty to apply;

- provide an undertaking as to damages as well as any other appropriate undertakings; and
- on an ex parte application, make full disclosure of all material facts.

5.4 Other interim remedies

Interlocutory injunctions

An application for an interlocutory injunction will often be made at the commencement of or during the course of proceedings, by way of notice of motion in the proceedings, served on the party against whom the order is sought. As with applications for freezing or search orders, often it is necessary to obtain such interim injunctions as a matter of urgency before the other side is notified, so as to prevent the subject property or right being lost or diminished before the order is obtained. In such circumstances, the application can be made *ex parte*.

In order to obtain an interlocutory injunction, the applicant must establish the following:

- that there is a prima facie case, specifically "that there is a serious question to be tried";
- that attempts to rectify the situation other than by order have failed;
- that there is a reason for urgency, and that the applicant has acted promptly;
- that the balance of convenience is in favor of granting the relief. Matters that will be taken into account may include:
  - whether irreparable harm will be suffered by the applicant if the relief is not granted;
  - whether damages will be a sufficient remedy;
  - whether the defendant will be in a position to pay damages if ordered;
  - whether delay in making the application has or may prejudice the defendant;
  - whether interlocutory relief sought would overturn, or merely maintain the status quo; and
  - the sufficiency of the plaintiff's undertaking as to damages.
- that the applicant is prepared to give the usual undertaking as to damages, and that they have the means to make good on that undertaking.

5.5 Remedies at trial

Declarations/orders

A court may grant a declaration as to the proper construction of a contract, a contractual term, an entitlement to property, or in regards to a right to revenue from property. Declarations are not subject to the usual discretionary considerations by the court in relation to the grant of remedies. Once it is shown that a grant of declaration is justified, the court must grant the relief (*Bass v Permanent Trustee Company Ltd* (1999) 18 CLR 334).

Specific performance

An order for specific performance is a discretionary remedy, whereby the party to whom the order applies is forced to perform its obligations under the original contract or agreement and according to the terms of the agreement. The remedy is useful to compel the execution of a contract; in circumstances whereby a certain definite action is required to be done before the transaction is complete. The remedy is only available where complete relief can be given (i.e. where it is possible for the contract to be carried into full and final execution) so that the parties may be put in the position contemplated by their agreement.

The court will look to the existence of a binding agreement between the parties, whether the defendant has breached or has threatened to breach the agreement, and whether or not damages would be an adequate remedy for such a breach. However, even where the above issues are satisfied, the court has discretion to refuse to grant relief of specific performance (for example, where the grant of the order may have an adverse effect on a third party, where the defendant is entitled to rescind the contract, or where the plaintiff is also in breach of contract).

Account of profits

An order for account of profits may be made where a party has made a profit, between it and the plaintiff, which it is not entitled to retain. This order requires the defendant to 'account' for the profits made out of its wrong, such as in the case of breach of trust, or breach of fiduciary duty. An order for account of profits does not require that the plaintiff have suffered a loss as a result of the defendant's conduct.

Damages

Damages are awarded as a monetary sum, paid to a successful plaintiff as compensation for damage sustained. A fundamental principle of damages is the principle of '*restitutio in integrum*' that damages should represent no more and no less than the plaintiff's actual loss. In the case of damages for breach of

contract, damages are viewed as a 'substitute for performance'. Their purpose is to put the plaintiff in the same position they would be in had the contract been properly performed. Liquidated damages are available where the loss suffered can be particularized as being payable; otherwise, the onus is on the plaintiff to quantify damages.

Punitive damages

Damages for breach of contract are rarely punitive in nature. On rare occasions a court may award damages of a punitive nature in a breach of contract matter where a loss of expectation has occurred. 'Aggravated damages' may be awarded to a plaintiff who has suffered distress as a result of the behavior of the defendant at the time of committing the wrong and thereafter. 'Exemplary damages' may be awarded where the court disapproves of the defendant's conduct and it is appropriate to make a specific award for damages as a means of deterrence in relation to the defendant or others.

The other circumstance in which punitive damages may be awarded is in the case of regulatory action commenced by a regulatory authority such as the Australian Prudential Regulatory Authority (APRA), Australian Securities and Investments Commission (ASIC), or the Australian Taxation Office (ATO).

5.6 Security for costs

The power to order costs is discretionary, requires consideration of the particular facts of the case, and is to be exercised judicially and not arbitrarily, capriciously or so as to frustrate legislative intent. The following (non-exhaustive) list of principles are relevant to the exercise of the court's discretion:

- The basic rule is that a natural person who sues will not be ordered to give security for costs: *Oshlack v Richmond River Council* [1998] HCA 11.
- Impecuniosity of the corporate plaintiff: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564.
- Bona fides of the claim and reasonable prospects of success. As a general rule, where a claim is prima facie regular on its face and disclosed a cause of action, then in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564; *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189.
- Whether the effect of an order for security for costs would stall or end the plaintiff's claim. It is appropriate to examine whether the impecunious plaintiff is, in reality, the defender in the proceedings, not the attacker.
- Whether the plaintiff's lack of funds has been caused or contributed to by the defendant: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564
- Whether the plaintiff is suing for the benefit of other persons who are immune from the burden of an adverse costs order: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744.
- Where a plaintiff is ordinarily resident outside Australia and has no assets in the jurisdiction, there must be weighty reasons why an order for security for costs should not be made: UCPR 42.21(1).
- Whether there has been delay by a defendant in bringing an application for security: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744.

6. FEES AND COSTS

6.1 Legal fees

Hourly billing is the predominant legal fee structure. Pursuant to the *Legal Profession Uniform Law (NSW)*, solicitors are permitted to charge fees for legal services that are fair and reasonable. Lawyers are entitled to calculate costs in any of the following ways:

- fixed fee;
- hourly rate;
- capped hourly rate;
- on a no win, no fee basis (however the client will usually still be required to pay for reasonable expenses); or
- any other structure as negotiated between the lawyer and client to suit the specific circumstances of the case.

Lawyers are also entitled to charge clients for expenses incurred on behalf of the client, such as counsel's fees and court filing fees.

Fees are not fixed by law, although they are regulated in some areas of law, such as workers compensation claim, and grant of probate (see for example, *Workers Compensation Regulation 2010* (NSW), Schedule 7).

6.2 Funding and insurance for costs

Typically, litigation is funded by the parties to proceedings. However, third party litigation funding has become increasingly prevalent in Australia in recent years. Third party litigation funding enables a potential litigant, or class of litigants (in the case of a class action), to litigate a matter where the cost of litigation would otherwise prevent them from pursuing their claim.

There are a number of litigation funding companies operating in Australia, including IMF Bentham, Litigation Capital Management (LCM), Litigation Funding Solutions and Litigation Lending.

Generally, the litigation funding company enters into a contract with one or more potential litigants, pays the cost of the litigation and accepts the risk of having to pay the other party's costs if the case is unsuccessful. If the case is successful, the litigation funding company is paid an agreed share of the proceeds (after reimbursement of costs). The share that is paid to the litigation funder is generally between one-third and two-thirds of the proceeds.

Litigation insurance is also available in Australia, and again is becoming increasingly prevalent within the Australian legal market. Insurance products are available to cover the legal costs incurred in bringing or defending litigation, including the defendant's costs and disbursements, as well as the plaintiff's disbursements. Companies operating in Australia include JLT, Litigation Insurance and LCM Litigation Fund.

6.3 Cost award

The general rule is that costs follow the event, meaning that a successful party has a 'reasonable expectation' of being awarded costs against the unsuccessful party (*Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and [134]). However, costs cannot be recovered without a court order (*Civil Procedure Act 2005* (NSW), s 98(2)).

Costs generally refer to the costs payable in relation to the proceedings (including interlocutory applications and hearings) including fees, disbursements, expenses, and remuneration (*Civil Procedure Act 2005* (NSW), s 3). The object of party-party costs (or costs on an ordinary basis) is to compensate the successful party for having to pursue or defend their rights in court (known as the 'indemnity principle').

Subject to s 98(1) of the *Civil Procedure Act 2005* (NSW):

- costs are in the discretion of the court;
- the court has full power to determine by whom, to whom, and to what extent costs are to be paid; and
- the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

While costs orders may be made at any time, they are not 'assessed' until the end of proceedings. At this stage, judges are required to determine whether or not costs should follow the event, and if so, whether the award for costs should be restricted to party-party costs, or extend (by reason of the indemnity principle) to the payment of solicitor-party costs.

Calderbank offer / offer of compromise

A Calderbank offer (*Calderbank v Calderbank* [1975] 3 All ER 333) is an offer of settlement made by one party to another party, on a without prejudice basis, save as to costs. The offer may be made in writing or orally, however it will carry more weight if made in writing. If the offer is not accepted, the court has discretion with respect to an order for costs after the event, dependant upon the existence of two elements:

- whether there was a genuine offer of compromise; and
- if so, whether it was unreasonable for the offeree not to accept it?

Where a party has unreasonably failed to accept a Calderbank offer, evidence of the offer (the letter) may be tendered by the offeror in support of an application for a special order for costs.

UCPR Part 42, Division 3 provides a formal method by which a party can make an offer of compromise. An offer of compromise under the UCPR provides an alternative to the more informal Calderbank letter, and provides a relatively certain consequence as to costs pending the outcome of the proceedings.

Calderbank offers and offers of compromise are seen as a way to encourage early settlement, in that a party who unreasonably fails to accept an offer to settle will be liable to costs as a consequence of such unreasonable conduct. They are also intended to provide a form of relief to the party who incurred costs unnecessarily after making an offer to settle at an earlier stage of the proceedings. An offer of settlement made by Calderbank offer leaves costs in the discretion of the court. Whereas an offer of compromise made under UCPR Part 43, Division 3 provides a more certain outcome as to costs.

6.4 Cost interest

Interest is payable on an amount due under an order for costs in two scenarios, either:

- the amount of costs up to the judgment; or
- after judgment.

Part 7, Division 3 of the *Civil Procedure Act 2005* (NSW) and r 36.7 of the UCPR deals with the payment of interest.

Pursuant to s 100(1) of the *Civil Procedure Act 2005* (NSW), the court may include interest in the amount for which judgment is given, calculated at such rate the court thinks fit:

- on the whole or any part of the judgment amount; and
- for the whole or any part of the period from the time the cause of action arose until the time judgment takes effect.

This rule applies in the proceedings for the recovery of money, including any debt, damages, or the value of any goods.

Similarly, section 101(1) of the *Civil Procedure Act 2005* (NSW) outlines the payment of interest on costs awarded after judgment has been made.

Interest is calculated at the prescribed rate (the rate of interest prescribed by the uniform rules for the purposes of this section), or at any other rate that the court orders, as from the date that the order was made (or any other date that the court orders).

The prescribed rate from 1 January to 30 June in any year and from 1 July to 31 December in any year, is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced (UCPR r 36.7).

The Local Court may not order the payment of interest up to judgment in any proceedings in which the amount claimed is less than $1000.

7. APPEAL

7.1 Appeal

The New South Wales Court of Appeal hears applications for leave to appeal, and appeals from single judges of the Supreme Court of New South Wales, and also from other NSW courts and tribunals. The Court of Appeal sits in panels, usually comprising three judges of appeal. If the judges do not reach an agreement on appeal, the majority view prevails.

If a party has a right to appeal to the Court of Appeal, the party is required to file a notice of appeal, or a summons seeking leave to appeal, within 28 days of the judgment (UCPR, r 50.3, r 50.12). The appealing party must serve the respondents to the appeal, as well as the court or tribunal that the party is appealing from, with a sealed copy of the appeal (UCPR 51.42).

In many cases, it is a requirement that parties obtain leave before being permitted to appeal (*Supreme Court Act 1970 (NSW)*, s 101(2)). In order to obtain leave, the appealing party is required to file a summons seeking leave to appeal, and serve the respondents to the appeal, as well as the court or tribunal that the party is appealing from with a sealed copy of the summons seeking leave to appeal received from the registry (UCPR 51.42).

The summons seeking leave to appeal must state whether the appeal applies to the whole, or part only, and what part of the decision of the court below, as well as what decision the plaintiff seeks in place of the decision of the court below. The summons must also contain a statement of the nature of the case, the reasons why leave should be given, and briefly set out the grounds relied upon in support of the appeal, including any grounds on which it is contended that there is an error of law in the decision of the court below (UCPR r 50.12).

8. ENFORCEMENT OF JUDGEMENT

8.1 Enforcement of judgment

A number of options are available to a party seeking to enforce a judgment debt.

Where a judgment debt is owed by an individual, bankruptcy proceedings can be initiated by a judgment creditor in attempt to enforce a judgment. Bankruptcy proceedings are heard by the Federal Court of Australia or the Federal Circuit Court. The judgment creditor must file a Creditor's Petition with the Federal Court or Federal Circuit Court, in order to initiate proceedings to have the judgment debtor declared bankrupt. The onus is on the judgment creditor to prove to the court that the judgment debtor is unable to pay their debts. The creditor must provide a copy of the Creditor's Petition to the judgment debtor. Both parties are required to attend court on the date specified in the Creditor's Petition.

At the hearing, the court will decide whether or not the judgment debtor has committed an act of bankruptcy. The court will consider whether:

- the judgment debtor is in fact the person or entity who owes the judgment creditor the money;
- the amount of the debt shown in the bankruptcy notice (issued by the Australian Financial Services Authority (AFSA)) is correct; and
- whether the person or entity is able to pay the debt.

A judgment debtor may agree to be made bankrupt, in which case the court will make an order declaring the debtor bankrupt. Alternatively, the judgment debtor may not agree to being made bankrupt, in which case the debtor will be required to explain and provide reasons to the Court at the hearing as to why they do not agree to being made bankrupt.

If the judgment debtor is declared bankrupt, the debtor is released from their responsibility for most of their existing debts; however, their assets and control of their finances will be handed over to an appointed trustee, who may sell the debtor's assets to pay their creditors.

Garnishee order

A garnishee order is an order to a bank, or the employer of a judgment debtor, to deduct money from the bank account, or the employee's wages for the amount owing over a period of time. A garnishee order permits the attachment, to the extent of the amount outstanding under the judgment, of all debts that are due or accruing from the garnishee to the judgment debtor at the time of the order.

Any amount that is a credit to the judgment debtor in a financial institution is considered a debt owed to the judgment debtor by that institution and may be attached to the judgment.

Not all types of debt are able to be attached under a garnishee order. For instance, the following debts are excluded:

- money alleged to be due as a result of an insurance claim;
- a verdict for damages (although a judgment is allowed); and
- an entitlement to costs under a costs order.

Examination notice

An examination notice is used as a means of gathering information about the financial circumstances and ability to pay back the money owed by that person.

Writ of execution, or writ for the levy of property

A writ of execution involves the sheriff taking and selling the property of the person from whom the money is owed. Where there are also additional costs involved, these are added to the amount owing.

Corporations

A judgment debt against a corporation can give rise to winding up proceedings. The initial step requires serving the company with a statutory demand to reclaim the debt. If the debt remains unpaid 21 days after service of the statutory demand, there is a rebuttable presumption that the company is insolvent (*Corporations Act 2001*, 459C(2)). This forms the basis for making an application for a winding up order which can be commenced in either the Supreme or Federal Court (*Corporations Act 2001,* 459E(2)).

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

Mediation is the most widely used form of ADR in Australia, including in respect of large commercial disputes. As noted below, generally courts will require parties to participate in mediation at some point before proceedings progress to a hearing.

A second important avenue for ADR is under the uniform *Commercial Arbitration Acts*, pursuant to which parties are prevented from commencing litigation in breach of a valid commercial arbitration agreement.

The success rate of ADR (in its various forms) in Australia is cited as between 65 – 90%. As one of Australia's pre-eminent Senior Counsel, Campbell Bridge, has noted:

Virtually all cases now settle before the commencement of the hearing... Of the relatively few matters that now proceed to hearing in our superior courts, virtually none do so without at least one mediation on the way. ('Comparative ADR in the Asia-Pacific – Developments in Mediation in Australia', ADR Conference Singapore 4-5 October 2012).

9.2 Costs in ADR

If the proceedings are referred for mediation, the court may make an order as to the payment of the mediator's costs or, in any other case, the parties may agree among themselves as to the proportions of same: *Civil Procedure Act*, s 28.

In non-court referred ADR, generally the parties agree as to the proportions of costs to be borne between them, or it may be set out in contract.

9.3 ADR and the court rules

Generally, courts will require parties to participate in ADR (specifically, mediation) at some point before proceedings progress to a hearing. However, ADR is not an obligatory part of every proceeding. For example, in NSW a court may refer the proceedings for mediation (with or without consent of the parties) "if it considers the circumstances appropriate" (*Civil Procedure Act 2005* (NSW), s 26.). If proceedings have been referred for mediation, the parties must participate in the mediation in good faith (*Civil Procedure Act 2005* (NSW), s 27.).

9.4 Evidence in ADR

Generally, new evidence is not led in mediations, with the parties relying on evidence served up to the date of the mediation. Generally, these documents are agreed between the parties, and provided to mediators for review prior to the mediation. Mediations are almost always confidential or without prejudice by agreement between the parties which prevents anything said in a mediation being admitted into evidence.

For commercial arbitrations under the uniform *Commercial Arbitration Acts*, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings – failing this, the tribunal may conduct the tribunal in the manner it considers appropriate (including in respect of the admissibility and weight of any evidence): *Commercial Arbitration Act 2010* (NSW), s 19. Standard confidentiality obligations are generally presumed to apply unless the parties opt out: *Commercial Arbitration Act 2010* (NSW), s 27E – 27I.

9.5 ADR reform

Australian jurisdictions have gone through a significant amount of dispute resolution reform in the last 10-15 years (see, for example, the enactment of the *Uniform Civil Procedure Rules 2005* (NSW)). Currently, the courts are primarily concerned with a shift towards electronic management of proceedings – including appearances, filing and document management. Some jurisdictions are more progressed in this shift than others – compare, for example, the Victorian pre-trial review hearing procedures already in place to the NSW pre-trial review hearing procedures only now being trialled for small claims in the Local Courts.

9.6 ADR organizations

For mediations in most types of dispute, parties generally engage Queen's Counsel / Senior Counsel or an accredited mediator to act as mediator.

Third party providers of ADR services (including for commercial arbitrations) include: Australian Disputes Centre, Institute of Arbitrators and Mediators Australia, ACCESS Programs Australia Ltd and LEADR.

EUROPE

Belgium

Yolande Meyvis, Aurore Ancion, Samuel Berneman and Laurens Engelen

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

In Belgium, the main avenues used to resolve large commercial disputes are litigation, arbitration, mediation and negotiation.

Litigation

The Belgian court system forms part of the civil law tradition, meaning that litigation is subject to codified rules. The main national rules regarding civil litigation are codified in the Judicial Code ("*Gerechtelijk Wetboek / Code Judiciaire*") of 10 October 1967.

As a civil law country, Belgium has a civil legal order and a separate administrative legal order. In the civil legal order, there are 229 justices of the peace, 15 police courts, 13 courts of first instance, 9 labour courts, 9 courts of commerce, 5 courts of appeal, 11 assize courts, 5 labour courts of appeal and one court of cassation. Besides these civil law courts, there are also specialized administrative courts. Territorially, Belgium is divided into 27 regions, referred to as "*arrondissementen / arrondissements*". Proceedings are held in Dutch in Flanders, in French in Wallonia, and in one of either language in Brussels-Capital, depending on the language opted for by the parties. Special language rules exist for courts in the German-speaking region of Belgium.

Arbitration

Arbitration presupposes the entering into an arbitration agreement by parties. This could be inserted as an arbitration-clause to an agreement. There are two types of arbitration, namely *ad hoc* arbitration and institutional arbitration. For more information, see responses to questions 10.1 – 10.5.

Mediation

The essential feature of mediation is its confidentiality. Contrary to arbitration, mediation may be ordered by a court, but may also take place voluntarily. For more information, see the responses to questions 10.1 – 10.5.

Negotiation

Large commercial disputes are also settled following intensive negotiations usually between the lawyers of the parties concerned. An advantage of this method of dispute resolution is that all negotiations between lawyers are strictly confidential.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

Limitation periods are certain pre-defined time periods after which a claim can become time-barred. Whereas the specific limitation period differs from claim to claim, most contractual claims become time-barred within a period of ten years. Generally, the ten-year limitation period of ten years is more generally the default limitation period for claims based on a personal right. Most claims relating to extra-contractual damages (i.e. tort) have a five-year limitation period, usually commencing upon discovery of the damages.

In Belgian civil law, a limitation period can be interrupted in two main ways. The interruption of a limitation period means that the limitation period is reset. First most acts of procedure lead to the interruption of the limitation period. However, this legal consequence is limited to the parties involved in the dispute at hand. Second, a limitation period can be suspended for certain periods of time, meaning that the limitation period will be temporarily frozen during the period of suspension.

2.2 What is the structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The court of commerce is a specialized civil court of law, competent for all disputes between enterprises, as well as any disputes relating to bankruptcy and judicial reorganization. Appeals against judgments of the court of commerce are heard by the courts of appeal.

The court of commerce consists of one professional judge and two lay judges, who are recommended by representative professional associations and appointed by the court itself.

From an internal organizational point of view there are specific chambers dealing with e.g. IP matters, tax, etc. It is also possible to bring certain claims before the president of the court of commerce. The cases in which the president of the court of commerce is competent to rule on his own are exhaustively described in the Judicial Code. They are regarded as jurisdictional issues. Mostly, they relate to time-pressing cases such as summary court proceedings heard by the president of the commercial court.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

The conditions under which foreign lawyers may appear before a court of commerce are the same as conditions under which foreign lawyers may appear before most Belgian courts.

In Belgium, only registered lawyers and trainee-lawyers may plead before courts. This means that, in order to be allowed to plead before a Belgian court, a lawyer must be registered with a bar association, which requires having completed a three-year traineeship. In addition to the Belgian lawyer registers with the relevant bar associations, Belgium has an EU-list and B-list for foreign lawyers. While these foreign lawyers are allowed to provide legal services, they may not plead before a Belgian court, except in cooperation with a registered Belgian lawyer and on the condition that they have been introduced to the president of the court concerned.

In any event, all procedures are in one of the official languages of Belgium: Dutch, French or German. Any lawyer appearing before a court must master the language of the court.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

There are no legal requirements concerning legal fees. However, there are however ethical rules which all lawyers must abide by relating to fees, such as the prohibition on accepting cases on a "no win, no fees" basis. However, lawyers are permitted to arrange for the payment of additional fees if a dispute results in a positive outcome for that party.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

In Belgium, lawyers are, in principle, free to determine their honorary fees. There are no minimum fees, and lawyers may calculate their fees as they choose (i.e. on an hourly basis, on the basis of the value of the case, based on services performed, a fixed fee, an annual contract or any combination of these calculation bases). It is, however, prohibited to enter into a so-called *no win, no fee* arrangement.

There is no legal framework applicable to the issue of third party funding. Therefore, despite such funding not being prohibited, there are a number of practical difficulties. For example, Belgian lawyers are subject to stringent client-lawyer confidentiality duties, which could hinder third party funding. As "*no win, no fee*" arrangements usually go hand in hand with third party funding in other jurisdictions, the absence of a legal arrangement concerning third party funding in Belgium may be explained by pointing to the prohibition to enter into such arrangements.

There are, however, multiple examples of legal insurance coverage. Most mandatory insurance in Belgium, (e.g. car insurance) comes with some kind of legal insurance. Stand-alone legal insurance is also available, but are rarer in Belgium.

The Belgian legal system also contains rules on the possibility of fee-shifting during legal proceedings.

Pursuant to relevant Belgian rules contained in the Judicial Code, each final judgment refers to expenses, which are assigned to the party found in the wrong by the judge. The Judicial Code explicitly states that no case is final until a decision on expenses is issued. Litigation expenses include: various court fees, registration duties, stamp duties, prices for emoluments, prices for authenticated copies, expenses covering investigation measures, expenses for travelling of judges and clerks when visiting certain places has been imposed on the judge's order and, if applicable, mediator fees. It does not cover fees of the counterparty's legal counsel However, in 2008, a forfaitar fee was created, to be paid to the counterparty to partially cover these legal fees. This fee is referred as "litigation remuneration" and is determined as a fixed fee per category of costs of a dispute. This fixed fee can then be raised and lowered in case of special circumstances, such as an unreasonable attitude during the proceedings (which would raise the fixed price) or an opposing party enjoying the benefit of *pro bono* representation (which brings the fixed fee to its legally defined minimum).

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

In principle, all court proceedings in Belgium are open to the public. This general rule has been explicitly included in the Belgian constitution, and was traditionally seen as the emanation of the legal principle of judicial fairness and an unprejudiced working of the judicial branch of the government.

There are however many possible exceptions to this general rule. In essence, the court may decide to close the proceedings to the general public. Such court proceedings are referred to as "closed door proceedings". Courts may decide to hear a case behind closed doors in the event of possible endangerment of the public order or public decency. In addition, any defendant may request that his case be heard behind closed doors if he fears that public treatment will damage his interests. The competent court will first issue a decision on this request. If granted, the proceedings will take place behind closed doors, meaning that only the parties and their legal counsel are allowed to be present during the proceedings.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

While there are no mandatory pre-action *procedures* imposed by the Belgian judicial system, some examples of mandatory pre-action conduct by the parties do exist. This usually relates to the obligation to enter into mediation efforts. Examples include cases where the parties have contractually agreed to enter into mediation in case of any dispute prior to bringing the dispute before a court, or where mediation efforts have been mandated by the court.

In these cases, the failure to comply with this mandated pre-action conduct will normally give rise to inadmissibility of a case until this pre-action conduct has been complied with.

4.3 How does a typical court proceeding unfold?

Court proceedings are initiated by either a writ of summons or a request. In most cases, the official serving of the writ of summons to the counterparty is a legal formality to be complied with before proceedings can be initiated.

This is usually followed by an introductory hearing, where a time-frame concerning the further procedural steps is agreed upon. Sometimes it is possible to plead the case at the introductory hearing itself, or within a short term thereafter. In all other cases, pleadings will only take place after the exchange of written submissions between the parties, usually over several rounds. A judgment will be issued following the actual pleadings, against which appeal or opposition (in case the opposing party was not present before the court in first instance) may be brought.

It is not uncommon for proceedings in first instance to take up to one and a half to three years. On appeal, the conclusion of proceedings could take up to additional two or three years.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Whether or not a specific procedure exists for seeking to have a case dismissed before a full trial depends on which actions are brought before the court.

Dismissal based on lack of interest of the counterparty, or lack of object of the claim, must be invoked before the court. Usually, there is a legal requirement that these formal arguments are invoked prior to substantive legal arguments.

When invoking incompetence of the judge before whom the case was brought, the invoking party will usually have to identify the competent court. Each judge is authorized to rule on his own competence to hear a case. When a judge declares himself incompetent to rule in a given dispute, the court to which he will refer the case depends on the party having invoked the claim of incompetence. When this party indicates the competent court, the judge may refer directly to this competent court. When this is not the case, the judge will usually refer the decision to a specialized court.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

The Belgian Judicial Code does not contain any rules concerning security for legal costs.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Interim or provisional measures are available such as seizure of assets and summary hearing. Generally, the requesting party must be able to demonstrate irreparable harm and urgency in the absence of this request being granted.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

Any party wanting to preserve assets can request measures aimed at providing some kind of protection against asset value

diminution. In essence, there are four kinds of measures which can be useful in this regard.

First, any creditor may request the court's permission to impose precautionary attachment. This is also known as a conservatory order for attachment. By way of this measure, the debtor no longer has power of disposal over his goods, however, he still remains the owner thereof.

Second, in case of a dispute, parties can agree or be ordered by the court to give the assets forming the subject of the dispute in sequestration, meaning that these goods must be preserved until a final judgment.

Third, in case of undivided property, parties may draw up an inventory of their various shares therein.

Fourth, assets may be placed under a seal, meaning that they may no longer be disposed of. The placement of assets under a seal is ordered by a civil magistrate.

5.5 Are there other interim remedies available? How are these obtained?

As stated in the response to question 5.3, Belgian procedural law knows many applications of the concept of interim measures. Generally, a party must be able to demonstrate irreparable harm and urgency in the event of the requested measure not being granted.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Under Belgian law, the general principle is that of full compensation. In essence, parties must be placed in the position that they would have been had the behavior causing damage not occurred. For this reason, the application of punitive damages is generally rejected in Belgium, and the general rule of compensatory damages continues to prevail.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

The concept of discovery, as it exists in common law countries, does not exist in Belgium. There is no general legal requirement to disclose evidence to the other party in the proceedings. However, the ethical rules applicable to lawyers do prescribe that all relevant documents should be disclosed to the other party. It should be noted that, in the absence of such a disclosure, the counterparty which has not been provided with the relevant documents may invoke a violation of its rights of defense.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

As set out in the response to question 7.1, the legal concept of discovery does not exist in Belgium. The disclosure of relevant documents to a counterparty is based on the legal principle of good faith and is included as part of the ethical code binding on lawyers. Pursuant to the Judicial Code, the disclosure of documents to a counterparty may be refused on the basis of a legitimate reason. An example of legitimate reason includes client-attorney privilege, which prohibits a lawyer from disclosing certain information to the counterparty.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

In civil law, witnesses must be allowed by the judge to provide facts to the court. This is only possible when suggested by one of the parties. Pursuant to the relevant procedural rules, witness statements are only to be used to support facts, and may not contain vague allegations. When accepted, a witness will be summoned to appear in court and must take an oath prior to giving his witness statement. The witness statement must be given before a judge and a transcript thereof is to be added to the court's files.

Civil law does not provide for the possibility of cross-examination. The counterparty may, however, suggest that the court hear other witnesses who may contradict the initial witness statement.

7.4 What are the rules pertaining to experts?

A court may appoint an expert to provide an opinion on matters for which technical expertise is required. Expert opinions are limited to technical matters and may not extend to matters of law, for which only the courts are competent.

The court may appoint such an expert at his own initiative, or at the unilateral or joint request of one or both parties. In the event that both parties agree on which expert is to be appointed, the judge may only deviate from this choice by way of a reasoned and motivated decision. The costs are to be paid by the losing party. However, the judge may however also rule that the costs are to be borne by the party who, because of their behavior, has necessitated the technical expertise to be requested (e.g. by not coming forward with certain information or by falsely providing wrong information). Experts may be challenged or objected to for the same reasons as those that apply to the challenging of judges.

When an expert is appointed, the decision for his appointment must contain the scope of his task, his identity and a description of the circumstances which necessitate his appointment. If the judge deems it necessary or if requested by one or more parties, the judge may organize an installation hearing, where the expert is normally present and where preliminary questions can be posed and answered.

The parties are required to cooperate in good faith with the expert's task. It is important to note that the expert report is considered a contentious procedure, meaning that both parties will get the opportunity to challenge certain elements of the report. These comments must be submitted within a reasonable time from the date of the expert report, which is determined by the judge. The judge may request that the expert provide more information verbally during a pleading session.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

Since large commercial disputes are subject to the same procedural rules as other types of disputes before Belgian courts, the rules on bringing appeal against these disputes are similar to the ones applying to normal judicial proceedings in Belgium, meaning that an appeal may be brought by the losing party within one month from the notification of the judgment in first instance. An appeal must be brought by way of a writ of summons, served on the counterparty.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Due to the traditional prohibition of a so-called *actio popularis*, or a claim to defend the general interest, the individual interest requirement has traditionally been interpreted quite strictly in Belgium. In March 2014 however, Belgium introduced a class action procedure, albeit limited to the legal area of consumer law. Apart from this recently introduced procedure, there is no legal procedure to achieve collective redress.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

There is no "*winner takes all*" principle in Belgian law. As set out above, each final judgment must contain an allocation of the litigation costs. Litigation costs include various court fees, registration duties, stamp duties, prices for emoluments, prices for authenticated copies, expenses covering investigation measures, expenses for the travel of judges and clerks when visiting certain places has been imposed by the judge's order and, if applicable, mediator fees.

Legal fees are generally not included in litigation costs, however, since 2008, the concept of litigation remuneration has been introduced in Belgium, setting certain fixed fees per total amount of the claim involved.

8.4 How is interest on costs awarded and calculated?

Legal interest applies to awarded costs. The legal interest is determined by law and annually published in the Belgian Official Gazette. For 2016, the legal interest stands at 2.25%.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Enforcement of a judgment is done by bailiffs who will notify the debtor. In the absence of payment, the bailiff may organise the sale of the assets of the debtor.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Free choice of applicable law is the general principle set forth

by the Belgian Code of Private International Law (Conflicts of Law Code), however, the application of the choice of law is denied if it would lead to a result which is apparently irreconcilable with the *ordre public* of the Belgian legal order.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The Belgian Code of Private International Law allows parties to a dispute to submit the dispute to a foreign court. Pursuant to article 7 of the Belgian Code of Private International Law, Belgian courts must accept this choice of jurisdiction, unless it is clear that the foreign decision cannot be recognized or enforced in Belgium, or unless the Belgian courts determine that the dispute is closely connected with Belgium and foreign proceedings appear impossible or unreasonable.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

The applicable rules depend on whether the serving party is an EU person, in which case EU law prevails, or a non-EU person, in which case international agreements prevail.

Relevant EU law is laid down in multiple EU Regulations. The relevant rules for non-EU persons are contained in international agreements, such as The Hague Convention concerning service abroad of judicial and extrajudicial documents in civil or commercial matters made 15 November 1965, which has been ratified by Belgium.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

At the international level, it should be noted that Belgium is not a signatory party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Accordingly, the only binding international rules concerning the collection of evidence by a foreign court are laid down in The Hague Convention of 1 March 1954 on civil procedure. Pursuant to this Convention, the requesting judicial authority may request that the competent authority of another signatory party obtain evidence or that perform some other judicial act, by way of a letter of request. The execution of this letter of request may only be refused if: (i) the authenticity of the document is not established, (ii) the execution of the letter does not fall within the functions of the judiciary in the State of execution, or (iii) the executing State considers that its sovereignty or security would be prejudiced by the execution. In the execution of the request, Belgian law is to be applied, unless a special method or procedure is requested which is not contrary to the laws of the executing State.

At the European level, Belgium is bound by the provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.06.2001, p. 1-29). The relevant forms by which requests are to be made pursuant to this Regulation are attached to it in the form of several Annexes.

These requests for the taking of evidence are carried out by applying Belgian judicial legal rules, or special procedure, if requested, as long as it is not incompatible with Belgian law.

9.5 How can a party enforce a foreign judgment in the local courts?

For non-EU judicial decisions, a declaration of enforceability of foreign judicial decisions must be requested in line with the relevant rules, contained in the Belgian Code of Private International Law (the so-called Conflicts of Law Code). Pursuant to article 23 of this Code, the Court of First Instance is authorized to rule on requests for enforceability and recognition of foreign judicial decisions, except for the enforceability or recognition of a decision declaring insolvency, which is reserved for the Court of Commerce. The recognition or declaration of enforceability of a foreign judicial decision may only be refused if (i) the consequence thereof would be incompatible with the judicial *ordre public*, (ii) the rights of defense have been violated in coming to this decision, (iii) the decision has only been obtained to escape application of the legal rules identified pursuant to the Conflict of Laws Code in a dispute where parties have not been able to determine the choice of law freely, (iv) the decision may still be appealed pursuant to the laws of the State where the decision has been issued, (v) it is incompatible with an already existing Belgian judicial decision or a foreign judicial decision that has already been recognized or declared enforceable, (vi) the claim has been introduced abroad after a similar claim has been brought before a Belgian court between the same parties with the same

subject, (vii) Belgian courts were exclusively authorized to rule in the dispute at hand, (viii) the competence of the foreign court was exclusively based on the presence of the defendant or goods without any direct link to the dispute in the State to which that judge belongs, or (ix) if the recognition or declaration of enforceability would violate one of the legally prescribed grounds for refusal in any of the following types of cases: name change carried out abroad, foreign dissolution of marriage, recognition of legal adoption determined and carried out abroad, intellectual property, any ruling on the state of existence of a Belgian legal entity and any foreign judicial decision relating to insolvency.

For judicial decisions issued in other Member States, EU law applies. In civil and commercial matters, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters provides for automatic recognition and enforceability without any special procedure. In criminal cases, the principle of mutual recognition of final decisions in criminal cases applies between EU Member States.

In addition, Belgium has ratified the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention applies to the recognition and declaration of enforceability of foreign arbitral awards. The judicial recognition or declaration of enforceability of an arbitral ruling is regulated by article 1721 of the Belgian Judicial Code.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Under Belgian law, both arbitration and mediation can be used as forms of alternative dispute resolution proceedings. Recourse to ADR proceedings are more commonly used to resolve disputes on highly complicated technical matters, (e.g. in the energy sector).

The Belgian legal framework of both mediation and arbitration can be found in the Judicial Code. Part VI (articles 1676 to 1722) covers the rules with respect to arbitration, while part VII (articles 1724 to 1737) deals with mediation.

There are two types of arbitration, namely:

a. *ad hoc* arbitration, where the parties or the arbitrators themselves determine and define the rules applicable to the proceedings, insofar as they comply with mandatory rules laid down in the Judicial Code, which further provides the legal framework for *ad hoc* arbitration (article 1693 of the Code). If certain aspects are not covered by the parties' agreement, the arbitral tribunal itself shall determine the procedural rules; and

b. institutional arbitration (e.g. ICC, CEPANI).

Mediation does not always occur on a voluntary basis. A court may order mediation in pending proceedings if a request for mediation was made by the parties, or of its own initiative but with the consent of the parties.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Arbitration: Parties submit to arbitration following an arbitration agreement. In other words, an arbitration proceeding may only take place with the explicit agreement of all the parties involved. This agreement can either be inserted as a clause in an existing contract or the parties may enter into a specific agreement to arbitrate once a dispute has arisen.

Mediation: As mentioned under the previous question, mediation can occur both on a voluntary basis and on the basis of a court order, subject to the agreement of the parties to the proceedings.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Mediation: One of the main characteristics of mediation is the confidentiality of the process. The Belgian Judicial Code provides that all documents drafted and all communications made during, and for the purpose of, the mediation process are confidential.

Parties to mediation proceedings, as well as their counsel, are bound by a mediation privilege. This means that, except with the unanimous consent of all parties, evidence used during these proceedings may not be used in judicial, administrative, arbitral or other proceedings

Arbitration: Contrary to the rules on mediation in the Belgian Judicial Code, there are no explicit rules which provide for a disclosure privilege in arbitration proceedings. Nevertheless, institutional arbitration proceedings are generally characterized by their confidentiality. The parties are free to agree on confidentiality and should do so or be subject to institutional rules providing for confidentiality. if they wish to ensure confidentiality. In other words, Belgian law does not prevent information in arbitral proceedings from being disclosed in subsequent proceedings. The parties are free to make agreements on this issue.

10.4 How are costs dealt with in ADR?

In relation to the costs of arbitration proceedings, article 1713, §6 of the Belgian Judicial Code stipulates that the final award shall determine the costs of the arbitration and decide which of the parties shall bear them, or in what proportion they shall be borne by the parties. Unless otherwise agreed by the parties, these costs shall include the fees and expenses of the arbitrators, the fees and expenses of the parties' counsel and representatives, the costs of services rendered by the administrators of the arbitration and all other expenses arising from the arbitral proceedings.

In mediation proceedings, the mediation costs and fees are payable in equal shares by the parties, unless agreed otherwise by the parties.

10.5 Which bodies offer ADR in your jurisdiction?

The best-known arbitration center in Belgium is the CEPANI, the Belgian Centre for Mediation and Arbitration, which offers several methods for the settlement of disputes (arbitration, mediation, mini-trial, etc.).

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

There are no current proposals for a review of the existing alternative dispute resolution framework.

The Belgian Judicial Code rules on arbitration have most recently been amended by the Belgian Arbitration Act of 24 June 2013

Czech Republic

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1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the main dispute resolution methods used to settle large commercial disputes?

Litigation: A large number of commercial disputes are brought before the courts in the Czech Republic and filing an action with the relevant court remains the definitive method of determining commercial disputes between the parties who are not willing to agree on alternative dispute resolution. The process is governed by the Act no. 99/1963 Coll., Civil Procedure Act. For the structure of the civil courts in the Czech Republic and their jurisdiction please see Q. 2.2.

Arbitration: The second most popular method of dispute resolution is arbitration. Please see Q.10.1.

Other dispute resolution methods, such as mediation, etc., are not used to any significant extent for the settling of large commercial disputes in the Czech Republic.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

There are various limitation periods for different categories of claims. The general statutory limitation period is 3 years for civil claims. The limitation period for property rights is 10 years and certain claims are not subject to any ultimate limitation period. The parties to the contract may agree on a different limitation period than the statutory limitation period (however, the minimum is 1 year and the maximum is 15 years).

The limitation periods for claims enforceable by public authorities (i.e. the courts) are triggered at the time the claim can be brought before the court for the first time.

2.2 What is the structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The structure of the courts in the Czech Republic is a four-level system:

District Courts (86)

Regional Courts (8)

High Courts (2)

Supreme Court (1)

The District Courts are the courts of first instance for all commercial disputes, except disputes related to, or arising from the following:

- IP;
- Unfair competitive behavior or illegal restriction of competition;
- Protection of name and reputation of a legal entity;
- Financial security;
- Bills, checks or investment tools;
- Commodity exchange trades;
- Transformation of business companies;
- Enterprise purchase or enterprise tenure;
- Construction agreements which are not public contracts, including related to supplies necessary to carry out such agreements;

for which the Regional Courts serve as of first instance.

The disputes before the District Courts are usually judged by a single judge. The disputes before the Regional Courts as first instance courts are usually presided over by a single judge, except for IP disputes which are judged by a 3-member senate of the Municipal Court in Prague (which is a Regional Court for the Prague region).

Judges are divided into internal departments within the relevant courts in order to ensure their specialization; thus each court comprises civil, commercial and criminal departments.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

1. Foreign lawyers from EU countries may conduct large commercial disputes, provided the following conditions are met:

Foreign lawyers from EU countries/EEA or Switzerland or from other countries provided they are permanently settled in the above-mentioned countries:

Such foreign lawyers may provide services as:

a. Visiting European attorney – with the exception of

agreements on the transfer of real property, mortgage agreements, agreements on transfer or lease of enterprise if related to real property or making declarations of signature authentication. The provision of legal services by visiting European attorneys is governed by the laws of the individual attorney's home state.

A visiting European attorney may represent clients before courts or other authorities. Such representation is governed by Czech laws. A visiting European attorney must have a representative (a Czech attorney) for service of mail and the address of such representative must be notified to the court as the first act in the matter. In cases before the court where the representation of a client by an attorney is obligatory, the visiting European attorney must be assigned a consultant (a Czech attorney) in matters of Czech procedural law.

If the visiting attorney provides legal services in the Czech Republic for a period longer than 1 month (without a substantial interruption), they are obliged to notify the Czech Bar Association of their delivery address in the Czech Republic.

b. Settled European attorney – these are registered in the list of European attorneys at the Czech Bar Association and may provide legal services in the Czech Republic continuously.

The settled European attorney must also be assigned a consultant (a Czech attorney) in matters of Czech procedural law.

2. Foreign lawyers from outside the EU are restricted in conducting a case before the court as they are conducted pursuant to Czech law:

Foreign lawyers from countries outside the EU/EEA or Switzerland:

Foreign lawyers are entitled to provide legal services only in the area of law of their home country and in the field of international law. Additionally, foreign lawyers must prove they are entitled to provide legal services as independent attorneys in all fields of law in their home country under conditions compatible with Czech Act no. 85/1996 Coll., on Advocacy, and pass a recognition test (a test of knowledge of legal regulations concerning the provision of legal services, professional regulations and basic knowledge of laws of the Czech Republic).

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Legal fees are either agreed to in a contract between the attorney and the client or, if not agreed to, fees will be set by a ministerial decree no. 177/1996 Coll., on fees of attorneys and reimbursements of attorneys for provision of legal services.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Litigation: It is typically funded by the parties to the proceedings. Any third-party funding is not typical in the Czech Republic.

Insurance: liability insurance of legal entities, covering litigation costs in disputes over damages or bodily harm caused by operation of business, defective products, or connected to ownership of property or leases etc., is customary in the Czech Republic.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings are generally open to the public. The public may be excluded from the hearings only in cases set by law (e.g. for purposes of protection of classified information, business secrets, morality or important interests of the parties to the proceedings).

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

In Czech law, there are only a few obligatory pre-action conduct requirements. The most common requirement that a corporation/entrepreneur may encounter during legal commercial disputes is the obligation to send the counterparty a pre-litigation call to perform its obligations that it has failed to perform so far. If the plaintiff does not send the counterparty such pre-action call to perform its due obligation and it directly files a petition against the counterparty claiming fulfillment

of the due obligation, the court will not grant the plaintiff the reimbursement of the costs of the proceedings even if the plaintiff is successful. The pre-litigation call must be sent to the counterparty at least 7 days before filing the petition for initiating the proceedings at court.

4.3 How does a typical court proceeding unfold?

1. Commencement: In Czech civil law, the court proceedings may be started only by one of the parties (with some exceptions where the proceedings may be initiated by the court itself) by filing an action with the relevant court (please see Q. 2.2). The proceedings are commenced by a delivery of the action to the relevant court.
2. Meeting preparation: After proceedings have been initiated, the presiding judge examines whether the conditions of the proceedings have been met and that any errors in the action have been removed.
3. Interlocutory proceedings: In certain cases, the court may intervene before proceedings begin (e.g. conciliation, interim measures or safeguarding evidence).
4. Hearing: If it is not possible to decide on the merits of case without a hearing, the court orders a hearing to be held. However, it is not necessary to order the hearing if the matter can be decided based on documentary evidence submitted by participants and the participants have waived their right to take part in the hearing, or they agree that a decision can be made without holding a hearing.
5. Decision: The court issues a decision based on the merits and resolves the reimbursement of costs of proceedings. The losing party is usually obliged to cover the costs for the winning party.
6. Appeal: Either a party to the proceedings may appeal against the rulings of a decision to the respective court of second instance.
7. After the final decision of the court of second instance (if an appeal is filed), the parties to the proceedings may file an extraordinary appeal to the Supreme Court. An extraordinary appeal is admissible against any decision of the court of appeal by which the appellate proceedings are terminated, if the contested decision depends on the resolution of an issue of substantive or procedural law in respect of which the respective court of appeal deviated from the established decision-making practice of its own court of appeal. Alternatively, it can occur if an issue has not been resolved yet in the adjudicating of the Supreme Court, or has been decided on differently by the Supreme Court, or if the Supreme Court is to review the resolved legal issue differently.
8. In some cases, the final decision of the court of second instance may be challenged by an action for retrial and nullity plea. However, those are considered extraordinary remedies, and they are rarely used.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, through what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Czech law, in contrast to the Anglo-American legal system, does not provide a defendant with a pure legal instrument such as a motion to dismiss, which will automatically result in dismissing the case. However, in each case the defendant still has an opportunity to express its views and suggest the action be dismissed.

Usually, this expression of view and position as to the statement of claim is provided to the court, upon its request, in writing and shall contain all defenses which the defendant invokes, including the submission of respective documentary evidence.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Czech law does not entitle the defendant to request that the claimant provide security for the defendant`s costs. Such an obligation could only arise only from an interim remedy granted by the court in the event that there is reason to believe that the party will not be able to fulfil its obligations arising from the final decision. For more information about interim remedies please see Q 5.3.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The court may order an interim measure to temporarily set legal relations among the participants, or when the enforcement of the eventual decision could be jeopardised.

An interim measure may be ordered by the presiding judge upon request and after fulfilment of all legal obligation and

conditions.

The party must file an application for ordering an interim measure containing all required information. To cover any compensation for damages or any other loss that would be caused by the interim measure, the claimant is obliged to give security amounting to CZK 10,000 – 50,000.

Through an interim measure, the court may impose an obligation:

- to pay a financial amount or deposit an item with the court;
- not to dispose of certain property or rights; or
- to perform, refrain from, or permit a certain action.

An interim measure may also be imposed on a third party, if so justified. In the event that an interim measure is ordered before initiation of the judicial proceeding by the claimant, the claimant is obliged to bring an action within a period specified by the court.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

The civil law does not provide any kind of interim attachment. The general interim measure is applicable to all situations where a breach of obligation or endangering of other rights can be expected. Please see Q 5.3.

5.5 Are there other interim remedies available? How are these obtained?

A special form of interim measure seeks to safeguard evidence. Evidence may be safeguarded by making a request before proceedings are initiated, if there is a concern that such evidence may later not be produced or obtained at all, or only with difficulty. The evidence can be safeguarded by the presiding judge, a notary public, or executor in the form of an executor/notarial deed.

In addition, a special legal regulation applies for the purpose of safeguarding the subject of evidence in matters regarding intellectual property rights.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of the damages, are they compensatory or can they also be punitive?

According to Czech civil procedural law, available remedies differ according to the type of proceedings and the claim of the claimant. The final remedy may therefore be as follows: (i) decision as to whether there is a right or not, (ii) decision regarding determination of personal status (marriage, divorce, paternity etc.) or (iii) decision regarding performance or obligations.

The most common claims are those regarding (non) performance by the defendant, such as fulfilment of an obligation or liability for damage and its compensation. Civil proceedings are dominated by compensatory remedies. Punitive damages are not used in the Czech Republic.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

As a basic principle of civil litigation proceedings, it is up to the parties to identify evidence to prove their claims.

The court then decides which of the proposed evidence to adduce. The court may adduce evidence other than that proposed by the parties if such evidence is necessary for the court to verify the facts and if such evidence is already available in the case file.

The court is authorized to order the parties, and also any third party possessing a document necessary for providing evidence, to submit evidence to the court. The presiding judge may also procure such piece of evidence from another court, body, or legal entity. Such person is then obliged to provide the requested evidence.

Parties to the proceedings have no direct legal claim for requesting document disclosure. It is at the court's sole discretion to decide whether and who should provide the evidence. The parties shall provide the court with all requested documents, unless the provision of such evidence would cause a risk of criminal prosecution to such party or a person specifically identified by law as being "closely related" to such party.

7.2 Are there any rules allowing a party not to

disclose a document, such as privilege? What kinds of documents fall into this rule?

According to Czech law, parties to a proceeding and third parties have a right not to disclose documents to the court if:

The provision of such evidence would cause a risk of criminal prosecution to such party or a person specifically identified by law as being "closely related" to the party; or

Such a document contains classified information (pursuant to special law); or

Other confidentiality obligations set by law, or recognized by the state, could be violated (e.g. client-attorney privilege, confidentiality set by relevant tax laws, judge's obligation of confidentiality).

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witness testimony as oral evidence

Any person that is not a party to the proceedings is obliged to appear at the court, based on a summons, and testify as a witness. The witness provides facts to the court orally. The testimony may only be refused if it causes a risk of criminal prosecution to such person or person identified by law as being "closely related" to the person testifying.

Right to cross-examine

The presiding judge typically calls the witnesses to give an ongoing account of all they know about the subject of the examination. The witnesses can be cross-examined by other parties and their representatives on matters relevant to the proceedings after they are questioned by the court.

7.4 What are the rules pertaining to experts?

Experts appointed by the court

A court appoints an expert from the list of experts maintained by regional courts, if the decision depends on a review of facts for which expertise is needed and an expert statement from the relevant body of the State which might be requested by the court is not sufficient.

The court may question the expert orally or order that the expert prepare an expert opinion in writing. In particularly difficult cases, the court may also appoint specialised institutions, such as a relevant body of the State, scientific institution, or university, etc. to draw up the expert opinion. If there is any doubt about the correctness of the opinion, the court will ask the expert for explanation. Eventually, upon the request of the court, such expert opinion might be further reviewed by another expert or specialized institution.

Experts chosen by the parties

The parties can also, at their own expense, choose their expert from the same list of authorized experts (maintained by regional courts) and provide the court with their expert opinion. The court does not distinguish between an expert opinion provided by parties and an expert opinion provided by a court-appointed expert. The court primarily questions the expert directly during the court hearing. Only in special cases will the court order the expert opinion to be provided in writing.

Impartiality of experts and their role

Experts are not allowed to offer an expert opinion if there are doubts about their impartiality. However, courts can order anybody to provide reasonable assistance to the expert, including by way of a meeting, delivering necessary items, giving necessary explanations, undergoing a medical examination, or taking a blood test, to the extent it is necessary for the production of an expert opinion. The role of experts is clear: They serve to verify facts important to the proceedings that require special knowledge or expertise (e.g. scientific, technical or artistic). No experts are admitted regarding matters of Czech law.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

The party may appeal against the decision of the court of first instance to the court of appeal. An appeal must be filed with the court that has issued the first instance decision within fifteen (15) days from delivery of the decision

Generally, an appeal is not available against decisions which:

i. are of a "procedural" nature and regulate procedures of the proceedings;

ii. approve the settlement reached by the parties; or

iii. order financial performance not exceeding CZK 10,000, with receivable attribution not being considered.

Further, appeals are not permitted if they only challenge the reasoning (justification) given by the court regarding its rulings.

An appeal from a judgment on its merits may only be based on the following assertions:

i. The proceedings conditions were not met or the court did not have jurisdiction;

ii. The court of first instance did not consider the facts claimed by the party or evidence identified by the party;

iii. There is any other procedural error that could have resulted in an incorrect decision in the matter;

iv. The court of first instance has not properly ascertained the relevant facts;

v. The court of first instance has drawn incorrect conclusions from evidence exercised in the proceedings;

vi. The facts determined in the proceedings so far are not sufficient as there are other facts or other evidence that has not yet been adduced; or

vii. The court of first instance has erred in law.

If the appeal is filed in a timely manner and is admissible, the first instance decision cannot enter into force until the appeal is finally decided on by the appellate court.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Generally, class actions are not available under Czech law. Nevertheless, there are some instruments resembling certain features of class actions.

The collective right of action

Under consumer protection law, an action for refraining from infringement can be brought before a court not only by individuals (consumers) but also by: (i) associations or professional organizations which have a legitimate interest in protecting consumers, and (ii) authorized persons specifically listed with the European Commission.

In the area of protection against unfair competition, in addition to a person directly harmed, a court action for refraining from infringement and for remedying harmful effects can also be brought by legal persons entitled to defend the interests of competitors or customers.

Lis Pendens and generally binding decisions

Pursuant to the Civil Procedure Act, formal commencement of proceedings:

i. for refraining from infringement or for remedying harmful effects in matters of unfair competitive behavior;

ii. for refraining from infringement in matters of the protection of rights of consumers; or

iii. in matters regarding damages or compensation for inadequate consideration in squeeze-out matters;

prevents another petitioner from initiating proceedings for claims of the same nature arising from the same conduct or circumstances against the same defendant. However, the final judgment on matters mentioned above shall be binding, not only on participants in the (first) court proceedings, but also on other parties entitled against the defendant for the same claims arising from the same conduct or circumstances.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

Costs of the proceedings

The costs of the proceedings specifically include the expenses of the parties and their representatives, in particular, court fees, loss of earnings, cost of advancing the evidence, cost of interpretation, VAT refund, and reimbursement of attorney's fees and expenses.

Principles of costs reimbursement and costs calculation

As a general rule, the prevailing party's costs shall be reimbursed by the losing party pursuant to the court ruling. If the party achieved only partial success in the matter, the court reduces the reimbursement of costs proportionally, or may rule that none of the parties is entitled to any reimbursement.

Regarding the calculation of costs, the court decides who is responsible to reimburse costs automatically as part of its final decision and it determines the final amount of the reimbursement based on the statutory rules. Regarding the recovery of the cost of legal representation, the court applies the statutory (reimbursement) tariff. All costs exceeding statutory limits for reimbursement must be borne by the party.

8.4 How is interest on costs awarded and calculated?

According to the decision-making practice of the Czech Supreme Court, interest on costs of the proceedings cannot be awarded or enforced.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

There are two types of enforcement procedures for judgments within the Czech jurisdiction: (i) distrainment enforced by a distrainer who is a natural person that the state commissions to lead the distrainment office (referred to in the Execution Act as "execution" and "executor") and (ii) court enforcement of the decision.

Execution

If the obliged party has not followed the court's decision voluntarily, execution proceedings are initiated by application of the entitled party, and must be delivered to the executor. Not every decision can be enforced by execution. Foreign decisions are subject to execution if they are recognized by a decision of the Czech courts. A decision of European authorities must be proclaimed as an "act executor" according to the applicable EU law.

Within 15 days of receipt of the application, the executor must request an enforcement (execution) order from the court. The court shall issue such order within 15 days. Afterwards, the executor sends notification of the execution to both parties. Upon the receipt of such notification, and unless the executor has specifically stated otherwise, the obliged party cannot dispose of its property, "except in the ordinary course of business use and maintenance".

Execution of a monetary obligation can be carried out in the following ways:

i. withholdings from wages and other income;

ii. charges against, or withholdings from, the obligor's bank accounts;

iii. the sale of movable and immovable property; or

iv. measures affecting an enterprise (i.e. business undertaking).

Execution of orders other than monetary obligation can be carried out in the following ways:

i. vacating the property;

ii. seizure of an item; or

iii. division of property co-owned by the obligor.

Court enforcement of the decision

Court enforcement of a decision is an older and, in many ways, less effective methods of enforcement of judgments. It is initiated by application of an entitled party delivered to the court. Unlike an execution, the entitled party must propose the specific method of carrying out the enforcement and the court is bound by such a proposal. In addition, depending on the method selected for carrying out the enforcement, the entitled party must provide information about the obligor's assets, such as specification of bank accounts; etc. (in contrast in execution proceedings, all such duties are performed directly by the executor). The entitled party is also obliged to pay court fees, otherwise the court will stop the enforcement proceedings. The methods for carrying out court enforcements of judgments are almost the same as in execution.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

The Czech Republic is bound by Regulation (EC) No. 593/2008 of the European Parliament and of the Council, which recognizes the principle of freedom of choice of governing law in commercial transactions. The choice shall be made expressly or be clearly demonstrated by the terms of the contract or circumstances of the case. In exercising their choice of law, the parties may select the law applicable to the whole contract, or just a part of it.

Choice of law is not available in all circumstances. If all the "elements" relevant to the matter at the time of choosing the governing law are located in a country other than that whose law has been chosen, the application of law of the other country which cannot be derogated by agreement shall not be prejudiced.

Further limitations to the choice of law are based on the parties to the agreement (e.g. consumer protection provided by the state of residence of the customer shall not be excluded by the choice of law, etc.)

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Local courts (with respect to commercial contracts) follow the applicable EU Regulation No. 1215/2012 (Art 25) and enforce prorogation clauses of EU courts according to this Regulation. Choice of jurisdiction is limited in matters of insurance, consumer contracts, and individual employment contracts (Sections 3,4,5 of the Regulation). Local Czech courts will

claim jurisdiction in instances of (i) exclusive jurisdiction such as jurisdiction, over immovable property, commercial registry, and corporate matters (Art 24); (ii) where the agreement on choice of a court within a member state is null and void as to its substantive validity under the law of that member state and the chosen court has not been seized/has not established jurisdiction (Articles 25 and 31); and (iii) where the defendant enters an appearance before Czech court (not only for the sole purpose of contesting the jurisdiction, Art 26).

Choice of jurisdiction of courts outside of EU can be disregarded and Czech courts shall have jurisdiction if: (i) the agreement on choice of jurisdiction is rescinded by the parties; (ii) the foreign court decision could not be recognized in the Czech Republic; (iii) the foreign court rejected its own jurisdiction; or (iv) the agreement on choice of jurisdiction is contrary to the public policy of the Czech Republic (provided that no international law instrument specifies otherwise).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

The Czech Republic has ratified The Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention). According to this convention, all [member] states are obliged to establish a central authority which will carry out the service of documents to local parties. All documents shall be in French, English or the official language of the state from which the documents have originated.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

The Czech Republic is a party to The Hague Evidence Convention, pursuant to which the international support and provision of evidence between contractual states in commercial and civil matters is provided.

According to this convention, all signatories are obliged to designate a central authority which will undertake to receive requests coming from a judicial authority of another signatory, and to transmit such requests to the authority competent to execute them.

The EU regulations allow the use of videoconferencing, taking of evidence by diplomatic officers, consular agents and commissioners, taking of evidence by the requested court, etc.

9.5 How can a party enforce a foreign judgment in the local courts?

Enforcement of foreign judgements is regulated by Act No. 91/2012 Coll., on International Private Law. According to this Act, there are several conditions and obligations to be fulfilled in order to recognize or enforce a foreign judgment.

According to article 16 of the Act, a foreign judgement (originating outside the EU) is effective in the Czech Republic only after being formally recognized by the respective Czech authority. Enforcement shall take place only after such recognition. Czech law distinguishes between decisions rendered in matters relating to the property and other matters.

Decisions on property matters are recognized by the Czech authority without ordering special proceedings, by a mere acceptance of the decision. On the other hand, decisions on non-property matters shall be recognized only on the basis of special proceedings.

The Act specifies instances in which the recognition shall not be granted. For example, where:

i. The decision is not consistent with public order;

ii. No reciprocity is guaranteed; or

iii. The issue falls within the exclusive jurisdiction of the Czech authority.

Enforcement of judgments originating in the EU is governed by the directly applicable Brussels I Regulation (recast) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Regulation (EU) No. 1215/2012) which came into force on January 10, 2015, and which replaced former Brussels I Regulation (EC) No. 44/2001. The Brussels I Recast applies to judgments handed down in court proceedings in any EU Member State, which commenced on or after January 10, 2015.

Under the recast Regulation, a party seeking enforcement of a judgment only has to present to the enforcing court a copy of the judgment and a standard certificate delivered by the court which rendered the judgment (form of such certificate is prescribed by the recast Regulation). No exequatur or any additional procedure for recognition and enforcement of a judgment is necessary. On the application of any interested party, the recognition and enforcement can be refused only

on a strictly limited set of grounds, including (Article 45 of the recast Regulation):

a. if recognition would be manifestly contrary to public policy (*ordre public*) in the Member State addressed;

b. where the judgment was given in default of appearance, if the defendant was not properly served with the document which instituted the proceedings, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

c. if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

d. if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

e. if the judgment conflicts with exclusive jurisdiction rules (Article 24) or protective jurisdiction rules for employees, insurance contracts, and consumers under the recast Regulation.

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed (Article 52 of the recast Regulation). The jurisdiction of the court of origin may not be reviewed (with the exception of previously mentioned review of exclusive jurisdiction specified under Article 24 of the recast Regulation and in case of insurance, consumer and employment contracts).

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

The principal ADR procedure used in the Czech Republic is arbitration. Arbitration takes the form of *ad hoc* proceedings before an arbitrator, or institutional arbitration before a permanent arbitration body. The only permanent arbitration body in the Czech Republic with jurisdiction over a general scope of commercial disputes is the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic.

As a result, the most common type of alternative dispute resolution used in commercial disputes throughout all industries, including large commercial disputes, is carried out by the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic.

Recent amendments to the Civil Procedure Act have highlighted the role of mediation; however, it has not yet become commonly used in commercial disputes.

10.2 How do parties come to use ADR? Is ADR a part of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Parties have to agree on the use of arbitration, typically by an arbitration agreement attached to a main contract. Arbitration cannot be compelled, unless agreed upon.

The use of mediation is regulated by the Civil Procedure Act. A court (in a civil/commercial dispute) can, at its own discretion, stall the proceedings and compel parties to a mandatory session with a mediator. This is quite a new concept and it is not yet frequently used by the courts. Mandatory participation in mediation can lead to a situation where no agreement is reached and parties return to the court to litigate their claims.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Rules of arbitral proceedings, including rules regarding evidence, are determined by the agreement of parties or by procedural rules of the permanent arbitration bodies. Although arbitrators can rule on evidence production, if such rulings are not deemed to be satisfactory, the intervention of a regular court may be necessary based on an official request by the arbitrators. Evidence is assessed by the arbitrators.

10.4 How are costs dealt with in ADR?

The Rules of Arbitration of the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic specify that the fee for initial proceedings are borne by the petitioner. The rules for granting the reimbursement of the costs to the parties are similar to the rules for traditional civil

proceedings, however, the parties can overrule them by agreement.

10.5 Which bodies offer ADR in your jurisdiction?

The following permanent arbitration bodies (Arbitration Courts) exist in the Czech Republic:

- Rozhodčí soud při Hospodářské komoře ČR a Agrární komoře ČR (Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic);
- Burzovní rozhodčí soud při Burze cenných papírů Praha (The Securities Exchange Court of Arbitration is a permanent arbitration court attached to the Prague Stock Exchange);
- Rozhodčí soud při Českomoravské komoditní burze Kladno (The Arbitration Court of the Czech Moravian Commodity Exchange Kladno).
- As previously noted, the only permanent institutional arbitration body with jurisdiction over a general scope of commercial disputes is the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. The other two institutions can only resolve disputes which arise out of respective Stock Exchange and Commodity Exchange operations or commodities traded thereby.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

Currently, there are no legislative proposals publicly available with regard to the reform of commercial arbitration.

European Union (Court of Justice of the EU)

Bogdan Evtimov

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

The European Union (the EU) has its own independent *supra-national* legal system, which includes legislative and executive institutions as well as its own Court of Justice. The EU legal system is separate from, yet connected to the national legal systems of each EU Member State. EU law prevails over the national law of the EU Member States (the so-called *primacy* of EU law). And while the national courts of Member States are empowered to apply EU law in national disputes, the EU's judiciary, the Court of Justice of the EU, remains the single authority with power to interpret and ensure uniform application of EU law across all Member States.

Consistent with those powers, the judgments of the Court of Justice are binding on the EU institutions (the Council, the European Commission, the European Parliament, etc.) and also on the Member States and on national courts.

The Court of Justice of the EU is located in Luxembourg. It is a truly multilingual institution, reflecting the multilingual reality of the EU Member States and the other EU institutions. Its language policies have no close resemblance to those of any other major international court. Each of the official languages of the EU can become the language of a case before it, depending on where it originates or what language is chosen by the applicants. Judgments are also translated into all official languages of the EU.

The work of the Court of Justice of the EU is divided in two administratively separate court instances:

- the General Court of the EU (previously Court of First Instance), which has jurisdiction to hear as a first instance all direct actions by private entities with personal or commercial interests seeking the review of legality of acts of the EU institutions, as well as actions by EU civil servants against the EU institutions;
- The Court of Justice, the supreme EU court, which hears appeals against judgments delivered by the General Court, decides on disputes between institutions and Member States, or issues rulings on "preliminary reference" questions from national Member State courts on the interpretation or clarification of EU law or the validity of EU acts.

Both large and small businesses can initiate litigation before the Court of Justice of the EU and very often large commercial interests are at stake, even if the dispute appears to have an institutional character. The most common types of litigation before the General Court and the Court of Justice are:

- an action for annulment – a direct action by private companies, or individuals, which have been affected by adverse acts or decisions by any of the EU institutions. The company or individual may be from any EU Member State or a third country, as long as it can show that it has legal standing (direct and/or individual concern) for the direct action. Respondents are typically the European Commission, the Council, or various EU agencies and bodies. Most often, companies challenge final acts of the EU institutions (Implementing Regulations or Decisions) following an official or secret administrative procedure in which the company has taken part or has been the object thereof. EU policy areas that regularly give rise to direct actions are registration or protection of intellectual property rights; antitrust; merger control; State aid (control over illegal Member State subsidies to business); anti-dumping and anti-subsidy measures; procedures for access to institutional documents; restrictive measures (economic sanctions) against persons and entities (such as asset freezes and entry visa bans), etc. Judgments in direct actions are also often subject to appellate review before the Court of Justice.
- Preliminary reference rulings. A preliminary reference ruling is an indirect action, which officially takes place between the referring national court in an EU Member State and the Court of Justice. However, private parties to large commercial disputes are often effective initiators of preliminary references. In essence, a national court, either on the motion of a party to the national case before it or on its own motion, can refer preliminary questions on EU law to the Court of Justice. The questions should concern either the interpretation of EU law (usually provisions of EU Regulations or Directives) or the validity of EU Regulations or Decisions. In order to be activated, the preliminary reference to the Court of Justice must originate from a national litigation procedure which is on-going at a national court of an EU Member State (please note, neither an arbitration tribunal nor an alternative dispute resolution forum). The Court of Justice subsequently issues a preliminary ruling on the matters of EU law raised in the questions. The preliminary ruling must then be observed by the referring national court in the final resolution of the original national litigation case, and may also serve as an EU law precedent for future EU or national cases.
- Very often preliminary reference rulings have serious implications for large national commercial disputes and are given priority by the Court of Justice over other EU litigation

cases. The Court of Justice has used the opportunity, in a preliminary reference ruling, to clarify that the arbitration dispute resolution system must remain separate from the system of application of EU law managed by the Court of Justice in cooperation with the national courts, including in procedures for enforcement of arbitral awards by national courts (e.g. Case C- 536/13 *Gazprom OAO v Lietuvos Respublika*). This is consistent with the legislative *arbitration exception* in the EU's Regulation *on* Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters).

- Actions for damages. In a direct action for damages, submitted initially at the General Court, a private party can claim compensation for the injury actually suffered by it and caused by a wrongful act or omission by an EU institution or its servants. The claimant must prove the actual injury, the wrongful (illegal under EU law) act of the EU institution or its servants, and also a causal link between the injury and the wrongful act or omission. Moreover, the causal link must be sufficiently direct. The Court of Justice of the EU has often rejected claims for damages either because the claimant could not show a causal link, or because the link was not sufficiently direct. Contributory negligence by the claimant is also a factor which may lead to rejection of damage claims.
- Other types of procedures. There are also other types of judicial actions before the EU Courts, which can be used by private parties, such as an action for a failure to act by an EU institution, requests for interpretative judgments, accelerated (summary) procedures, etc. Such other types of actions or procedures have relatively limited relevance in large and complex commercial disputes.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

Any direct actions against EU acts, such as actions for annulment, should generally be brought within a period of two months from the date of the notification of the EU act to the persons – addressees of that EU act. The time-limit for challenging EU acts which are subject to official publication (such as the Commission Implementing Regulations published in the Official Journal of the EU) is two months plus an additional 14-day period from the date of publication. The rationale is that the notification of published acts to their addressees happens within that 14-day period. Decisions issued against a specific person or entity are usually notified directly to that person and the 14-day period does not apply.

Applicants whose seat or address is not in Luxembourg (the seat of the Court of Justice) are given an additional period of ten days 'on account of distance', which is cumulated with the other period(s) above.

The triggering event for such limitation periods is the notification or publication of the challenged EU act. The day on which the act is notified or published is not counted as falling within the periods above.

Requests for a preliminary ruling are not subject to limitation periods at the EU level, since the procedures of the referring national court are governed by the national laws and procedural time-limits of the relevant Member State.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The judges of both the General Court and the Court of Justice are organized in Chambers. The Chambers are not designed to hear a particular type of disputes, and they in principle have a general competence. Closed internal meetings, chaired by the President of the respective Court, allocate incoming cases to a specific Chamber.

There is no formal or effective allocation of work to Chambers according to a specific EU policy area. Nonetheless, certain Chambers, or individual judges within a Chamber, tend to get cases relating to the same policy area, typically where they are known as having the relevant expertise.

Each 'regular' Chamber is composed of three judges and it is such Chambers that hear most cases. Each Chamber has a Chairman and a *judge-rapporteur* who is in charge of reporting to the Chamber and has the main drafting role for the findings in a case. Each judge is assisted by *legal clerks*.

More complex or sensitive cases are heard by an Extended Chamber, composed of five judges.

Cases of particular significance, such as those involving essentially new and important questions of policy or uniform application of EU law, and/or concern interests of several EU Institutions or several EU Member States, are heard by the Grand Chamber (twelve judges).

The judgments are prepared and delivered by the Chamber assigned to hear the case, and are signed by all judges in that Chamber.

Advocates-General are a feature of the cases heard by the Court of Justice (the supreme EU court). Recent trends show that Advocates-General are more likely to be called in to participate in more legally complex or high-profile cases. The Advocate-General takes part in the hearing of the case, and issues its written Opinion several months prior to the judgment by the Chamber. The Advocate General's Opinion is not legally binding and only has advisory and persuasive authority upon the judges hearing the case. Nevertheless, the Advocate Generals' opinions often have the force of legal precedents in subsequent cases, similar to judgments. The judgment in a case often, but not always, will follow the Advocate General's Opinion.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Only lawyers who are authorized to practice before a court of an EU Member State (i.e. duly admitted and registered with the bar in that Member State), or in another member of the European Economic Area (i.e. Norway, Iceland and Liechtenstein) may represent or assist a private party and plead before the General Court and the Court of Justice. Foreign lawyers are not allowed to submit documents on behalf of a party. In practice, foreign lawyers may physically accompany the representing lawyers, and will be allowed to enter the courtroom and assist the representing lawyer with hand-written notes or a toned-down discussion in the pauses between the statements of the parties in oral hearings ('audiences'), but they will not be entitled to speak on behalf of a party or address the judges.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Legal fees for litigation before the General Court and the Court of Justice are negotiated freely between the represented party and its lawyers, and are influenced by competition in the market for that type of legal services. Legal fees are not regulated by EU law.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

As a rule, funding for litigating cases before the Court of Justice of the EU is provided by the litigating parties themselves. Third-party funding or the use of insurance for litigation costs is not common. The European Courts have not issued any rules relating to third party funding. Accordingly, there is no prohibition on engaging in third party funding of litigation before the EU Courts. As a practical matter, interested third related or unrelated parties occasionally provide funding to litigating parties and may directly pay for the costs ordered by the Court for payment by the losing party.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

The names of the parties and a brief summary of the legal claims are made public – they are published online as well as in the Official Journal of the EU, but as a rule these do not contain secrets. A party may request that the Court not disclose its name, names of other entities or certain business confidential information if there are legitimate reasons for such confidentiality. The actual written pleadings of the parties are confidential and not made available to the public. The parties are also entitled to produce non-confidential versions of their documents where there is a third-party intervention or a decision by the Court for a joinder of two or more cases.

Confidential treatment may be requested only with respect to specific issues or documents, and not with respect to the case as a whole.

However, oral hearings are generally open to the public and often specialized legal or industry media attend oral hearings and can make records of the oral pleadings. The full text of the judgment is also made public.

There are detailed procedural rules by the Court of Justice of the EU on handling various situations where confidential or state secret information is relevant to a dispute.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

There are no rules for pre-action conduct in relation to actions of private parties before the Court of Justice of the EU.

4.3 How does a typical court proceeding unfold?

The typical procedure in a direct action (hereafter, the example follows a typical action for annulment) unfolds in two stages: (a) written procedure, and (b) oral procedure. Following the end of the oral procedure, the Chamber of judges enters into closed deliberation and delivers the judgment in a prescheduled open hearing.

The duration of an entire Court proceeding varies between 15 months and several years, depending on the complexity of the case, the workload of the Chamber, the priority assigned to the case internally by the Court, etc. According to the respective rules of procedure, The President of the General Court or the President of the Court of Justice may decide that a certain case be given priority over other cases, referring to special circumstances. In most other cases, the priority given to cases, as a practical matter, follows the chronological and numerical order of their registration, and generally is at the Courts' discretion.

Written procedure. The claimant (called 'applicant') will submit its application for annulment and annexes to the General Court's Registry within the applicable limitation period. According to the practice directions of the General Court, a standard application should generally not exceed 50 pages in length (without annexes). Exceptions to this rule are allowed by the Court if the number of pages exceeding the limit is not great (usually up to 10-15 pages) and if the complexity and/or number of legal claims justify the exception. If the Court does not accept the length of the originally submitted application, it may ask the party to shorten it within a reasonable time and would not serve the application on the defendant until that is done within the time-limit prescribed.

The General Court also verifies the compliance of the application with a long list of other requisites and practical requirements, such as requisite particulars, required formal documents not annexed to the application, the form of presentation of annexes to the application. If these requisites or practical requirements are not met, the General Court would request the applicant to "regularize" the application within a reasonable time, usually several calendar weeks. If a certain sub-set of stricter requirements, related to requisite particulars or formal documents, is not met, the Court will also refrain from serving the application on the defendant until compliance is ensured within the prescribed time-limit.

Once the Registry is satisfied with the application's compliance with the practice rules and requirements, it will transmit the application to the defendant (usually an EU institution) which then has a period of two months to submit a defense.

This time limit may be extended by the Court upon a reasoned request by the defendant. The applicant may file a reply to the defense, typically within forty days, to which the defendant will respond by a rejoinder. The Registry will fix the precise date by which those written pleadings must be submitted. After serving the rejoinder to the applicant, the General Court will close the written procedure.

The General Court may, however, decide that a second exchange of pleadings (a reply and a rejoinder) is unnecessary if it considers that it can continue the review of the case based on the application and the defense.

It has become common, for all purposes of the written procedure, for lawyers and defending institutions to use the electronic filing system e-Curia, common to the General Court and the Court of Justice. In this way, all legal and procedural documents are lodged and served in electronic file (.pdf) format.

Oral procedure. The oral procedure is opened either on the Court's own motion or upon a written request for an oral hearing by a party (the applicant or the defendant), and after a period of internal deliberations. A request for a hearing by a party must state the reasons why it would like to be heard. Such request must be submitted within three weeks after service on the parties of the notification for the closing of the written procedure. However, the Court may, if it considers that it has sufficient information to rule on the action, decide not to open the oral procedure.

When it decides to open the oral procedure, the Court fixes an advance date for the oral hearing (usually up to two months in advance) and notifies the parties. The hearings take place in one of the courtrooms of the Court of Justice of the EU in Luxembourg.

During the oral hearing, all parties are given an opportunity to make oral statements (usually 15 minutes for each main party and 10 minutes for an intervener). The judges of the Chamber hearing the case can subsequently ask oral questions to all parties and the questions-and-answers session can last from one-two hours up to a full working day (in very voluminous cases the hearing can also be extended to the next day, however this will be known in advance). Only the legal representatives of the parties and of interveners can address the Court and orally reply to questions. A party may also be allowed to comment on answers given by another party. After all questions are answered, the parties are allowed to make brief concluding statements. The President of the Chamber declares the oral procedure closed at the end of the hearing.

Interventions. Any natural or legal person who can prove an interest in the result of the case may intervene in an ongoing case. The meaning of an interest in the result of the case has been evolving in the case law of the EU Courts and at present requires an intervener to show that its legal, property rights or commercial interests are, or may be, sufficiently affected by the result of the case, (e.g. by annulment or the maintenance of the challenged EU act).

Any EU Member State (or a state of the EEA) and any other EU institution has a statutory standing and may request to intervene as a third party in the case without proving an interest.

An intervention can be done in either the written procedure or before the start of the oral procedure. The Court will accept the request to intervene of a private party if it agrees with the claim of interest, after hearing the main parties. Then, as a next step, the intervener will submit a statement in intervention, which can only support or oppose the claims of one of the parties. The parties are given opportunity to make observations on the statement in intervention.

Joinder of cases. When separate actions are lodged simultaneously and have the same subject-matter, they may be joined. The decision for a joinder of cases is made either on the General Court's own motion or on application by a party (an applicant or the defendant). Before that decision, the Court will set a time limit within which the parties may submit their observations on the proposed joinder.

Measures of organization of procedure and measures of inquiry. The Court itself, on its own initiative, decides on additional procedural steps, such as written questions to the parties, or the calling of experts or witnesses upon proposals of the judge-rapporteur. The parties may request, but the Court decides such measures on its own discretion.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Instead of lodging a defense, a defendant may submit a preliminary plea: (1) of inadmissibility, (2) of a lack of competence (jurisdiction), or (3) that the action has become devoid of purpose, in a separate submission to the General Court or the Court of Justice. It may ask the Court to rule on that request by a preliminary order without going into the substance of the case.

As soon as the preliminary plea has been submitted, the President of the Chamber will prescribe a time-limit within which the applicant in the main action may submit its written observations on the plea of inadmissibility, or lack of competence, or that the action has become devoid of purpose.

After considering the submissions of the parties, the President of Chamber decides whether to open an oral procedure. If the plea has been submitted to the Court of Justice, it issues an order after hearing the Advocate General. An order by the Court, declaring a plea of inadmissibility, of lack of competence, or an action devoid of purpose well founded, will put an end to the proceedings before the Court.

However, the Court may decide on its own initiative to reserve its ruling on a preliminary plea for a later stage, until it has heard the main claims in the case on the substance (i.e. until the full trial).

The Court of Justice or the General Court may also decide on its own initiative by a reasoned order if a case is to be declared manifestly inadmissible, or that the Court manifestly has no jurisdiction to hear the case.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

There are no procedural rules of the Court of Justice of the EU on provision of security for the defendant's costs.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

EU law sets the principle that actions brought before the Court of Justice or the General Court do not have suspensory effect. Accordingly, interim measures are an exception to that rule and are rare in practice. Proceedings for interim measures before the Court of Justice of the EU can only provide temporary legal protection in favor of an economically vulnerable applicant after proceedings begin and before the main action is decided.

The interim measures that may be adopted fall into two main categories: (1) A specific interim measure, i.e. the suspension of the enforcement of the contested act. An application to suspend the operation of any act adopted by an EU institution is admissible only if the applicant has challenged the legality of that act in a main action lodged before the Court; (2)

Other measures, which are deemed necessary by the Court. The range of possible measures is not predetermined, but the judge who imposes them may not exercise a power that is vested in another EU institution.

In order for an interim measure to be granted, it must meet three substantive requirements:

- The application for the interim measure must establish that the application in the main proceedings has *prima facie* reasonable chances of success (e.g. that the challenged act is *prima facie* unlawful);
- There must be a demonstration of urgency of the need for temporary protection (i.e. the applicant must demonstrate a risk of irreparable harm due to its economic vulnerability, including at the level of its related entities); and
- The applicant must comment on the so-called 'Balancing of interests' test', (i.e. that the applicant's interests are not outweighed by other interests at stake in the proceedings).

An application for interim measures must be made in a separate document from that of the application in the main action, and will be admissible only after the application in the main proceedings has already been lodged and registered by the Court.

An application for interim measures is reviewed under a fast (summary) procedure. The application is served on the opposing party, and the Court prescribes a short period within which the other party may submit written observations.

The decision on the application for interim measures takes the form of a reasoned order, which is served to the parties and is enforceable.

Interim measures, if granted, are valid only for a limited period of time, usually until a judgment is made in the main proceedings, and they may not prejudge the outcome in the main proceedings.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

The Court of Justice and the General Court do not have the authority to enforce their orders on interim measures. Such orders can only be enforced by the national courts according to the national laws of the Member States.

5.5 Are there other interim remedies available? How are these obtained?

The procedural rules of the Court of Justice of the EU do not provide for any other interim measures than the measures covered under the questions 5.1-5.3 above.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

In actions for annulment, the Court reviews the legality of the contested act under EU law, and if a violation of EU law is found, the successful action will result in a declaration of annulment of the contested act. The annulled act will be considered null and void since the first day of its entry into force (retroactivity of the annulment). Please see also the answer to question 24 on the implementation and enforcement of judgments.

In successful actions for damages, the Court may award compensatory (pecuniary) damages to be paid by the responsible EU institution, but EU law does not preclude also ordering in-kind reparation of damages.

In preliminary reference rulings, there are no remedies at the EU level, since the preliminary ruling of the Court of Justice is referred back to the national court.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

Where, due to matters of law or of fact relied upon by a party, it is necessary for the General Court to examine the confidentiality, vis-à-vis the opposite party, of certain information submitted to the General Court following a measure of inquiry (see below), and provided such information may be important for the General Court to rule upon the case, that information will not initially be communicated to the opposite party at that stage of the Court's examination.

If the General Court concludes in its initial examination that the information produced before it is relevant for its consideration of the case, but is confidential vis-à-vis

the opposing party, it shall weigh that confidentiality against the requirements of the adversarial principle.

After weighing the protection of confidentiality against the adversarial principle, the Court may decide to bring the confidential information to the attention of the opposite party, making such disclosure subject, if necessary, to specific protective measures.

That said, the procedural rules of the Court of Justice of the EU authorizes the Court, on its own initiative, to prescribe measures of inquiry by means of an order setting out the facts to be proved or documents to be disclosed. The Court of Justice will do so after hearing the Advocate General.

The Court may adopt one of the following measures of inquiry:

- the personal appearance of parties;
- a request for information and production of documents;
- oral testimony;
- the commissioning of an expert's report; and
- an inspection of places or objects.

The disclosure rules described above will normally apply to the request for information and production of documents, but may by analogy apply to other measures of inquiry. Please note that disclosure of documents which contain restricted EU policy data or state secrets are subject to separate rules.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

There are no procedural rules allowing a private party to refuse to disclose a confidential document requested by the Court. That said, the Court of Justice has held on various occasions that the confidentiality of written communications between lawyers and clients should be protected at the EU level. However, the protection of such legal professional privilege was made subject to two cumulative conditions. First, the exchange with the lawyer must be connected to the client's rights of defence (e.g. relating to inculpatory evidence in an antitrust investigation) and, second, the exchange must emanate from independent lawyers (i.e. lawyers who are not bound to the client by a relationship of employment, and/or are not economically dependent on the client). If an employment or economic dependence is established, and there are 'close ties ', the legal privilege will not apply even though the lawyer is admitted to the bar (see Case C-550/07 P, *Akzo Nobel Chemicals*).

A party which is an EU institution or an entity which otherwise holds state secrets may refuse to provide information or to produce documents to the EU Courts if such information or documents pertain to EU's conduct of international relations or security; similar rights are enjoyed by Member States ('state secrets'). A formal note by the Court is taken of any such refusal and this may impact the outcome of the case for the institution, Member State or entity concerned.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

The Court may, either on its own initiative or at the request of one of the parties to the proceedings, order that certain facts be proved by witnesses.

A request by a party for the examination of a witness must state precisely what facts and for which reasons the witness should be examined. Other parties may object to allowing a certain witness on the grounds that he or she is not a competent or a proper witness. The Court will rule by a reasoned order on the request, taking into account the observations of other parties.

The witness will give his evidence to the Court in the presence of the parties. After the witness has given his evidence, the witness takes the oath. The President of Chamber may, at the request of one of the parties or on his/her own initiative, ask questions. Under the supervision of the President, questions may also be asked by the representatives of the parties.

7.4 What are the rules pertaining to experts?

The Court may order that an expert's report be obtained as a measure of inquiry. Parties may object on grounds of competence or relevance of the expert. The Court's order appointing the expert shall define the expert's task and set a time-limit within which the expert must submit the report. The expert takes oath after making his/her report.

After the expert has submitted the report and that report has been served on the parties, the Court may order that the expert be examined in the presence of the parties. At the request of a party or on his/her own initiative, the President of Chamber may ask questions. Under supervision of the President, the parties' representatives may also put questions to the expert.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

Appeals of judgments and final orders by the General Court are possible by a party to the litigation at the first instance and are reviewed by the Court of Justice. The relevant time-limit for appeals is two months from the date of notification of the judgment to the parties.

Appeals are admissible only if they concern matters of law (including legal characterization or qualification of facts) but not matters of fact as such. The appeal must also address specific legal conclusions contained in the judgment and not issues of law presumed or inferred by the party. An appeal may also be rejected if the pleas in law are ineffective (i.e. cannot affect the legality of the act in the underlying dispute).

Appeals may consist only of a written procedure (appeal, cross-appeal, response(s)), and oral hearings are not always granted. The Advocate-General delivers its opinion on the appeal several months before the judgment. The Court of Justice would often, but not always, follow the conclusions in the Advocate-General's opinion.

The outcome of the appeal may be: a dismissal of the appeal; the setting aside of the judgment of the General Court and a final judgment on the matters in dispute if the stage of the procedure so permits (provided these concern only questions of law), or if that is not possible, the Court of Justice will set aside the judgment, but refer the continued review of the case back to the General Court.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Class actions are not possible before the Court of Justice of the EU. Many applicants may agree to submit the same pleas in law in a single action and a single application (one single case). Alternatively, many applicants may initiate separate (individual) actions on essentially the same subject-matter at approximately the same time, and these may become joined cases (following the Court's joinder), If joined, the cases will be reviewed as one case and will be decided in a single judgment.

There are no forms of collective redress available in litigation before the Court of Justice of the EU.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

Judgments and final orders of the Court of Justice of the EU contain an order on costs in relation to the parties, worded in general terms, without any amounts (i.e. who should bear the costs of that litigation). In most cases, the unsuccessful party is ordered to pay the costs. However, in certain cases, especially where particular circumstances allow it, the Court may order each party to bear its own costs.

While the successful party can, in principle, ask for payment of all of its costs directly relating to the case from the unsuccessful party, the prevailing practice is a voluntary out-of-court settlement on the payable amount of costs. If a dispute concerning the amount of litigation costs cannot be resolved voluntarily, the Court will accept opening a "taxation of costs" proceeding, in which the same Chamber which heard the case will determine a reasonable amount of legal costs to be paid by the party ordered to pay, taking into account all specific and objective circumstances.

8.4 How is interest on costs awarded and calculated?

The Court of Justice of the EU does not award interest. However, if the party ordered to pay the costs does not pay the voluntarily agreed/taxed costs within a reasonable time, the winning party may seek enforcement under the national rules of the relevant EU Member State (or even a third country). In such cases, the national court or enforcement officer in that Member State (or a third country) will determine, along with the enforcement procedure, the amount of late interest and the method of its calculation.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

The implementation of judgments of the Court of Justice of the EU is a binding EU law obligation of the EU institution whose act was found to have violated EU law. The choice of the means for implementation of a judgment is within that EU Institution's discretion and powers. However, the EU institutions which do not implement a judgment of the Court of Justice in good time, or do not implement it properly, can become subject to a new action before the Court of Justice against their implementing act or omission to adopt such an act. The risk of such "implementation" Court action is an

effective deterrent in most cases.

Actual enforcement procedures by private parties against EU institutions or bodies are not foreseen in EU law. Therefore, if these ever become necessary, they will be carried out in the competent local national courts at the seat of the EU institution or body according to the national law of the relevant EU Member State.

9. CROSS-BORDER LITIGATION

Please note that the issues of cross-border litigation are not decided by the Court of Justice of the EU. EU law regulates to a certain extent the cooperation between national courts of different Member States, including through the European Union's Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This Regulation does not provide the Court of Justice of the EU with powers in cross-border litigation. National courts of Member States, however, are bound by that Regulation (subject to exceptions) and are entitled to send preliminary reference questions to the Court of Justice on the interpretation of that Regulation as applied at the national level by national courts of the Member States.

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

N/A

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

N/A

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

N/A

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

N/A

9.5 How can a party enforce a foreign judgment in the local courts?

N/A

10. ALTERNATIVE DISPUTE RESOLUTION

Please note ADR is not relevant to the Court of Justice of the EU.

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

N/A

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

N/A

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

N/A

10.4 How are costs dealt with in ADR?

N/A

10.5 Which bodies offer ADR in your jurisdiction?

N/A

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

N/A

England & Wales

Liz Tout

1. OVERVIEW

1.1 Overview

Litigation: Issuing a claim at court remains the definitive method of determining a large commercial dispute between parties who are unable to agree on an alternative method of settlement. For claims with a value exceeding £200,000, the issue fee is £10,000. The court will assess the evidence produced by each party and will decide the outcome of the dispute. The process is governed by the Civil Procedure Rules 1998 (CPR) and usually takes between one and two years to reach trial. There are various schemes (currently being piloted) which provide a faster, streamlined court process so that judgment is available more quickly. These are suitable if, for example, a case can be resolved with limited disclosure and witness evidence.

Arbitration: Parties must agree to refer a dispute to arbitration and arbitrations most commonly arise through a provision in a contract between the parties. An independent arbitrator (or panel) assesses the evidence produced by each party and decides the outcome of the dispute. The decision is binding on the parties and can be enforced. The process is similar to court proceedings: it is unlikely to be less expensive or take less time than court proceedings, however, it is confidential and more flexible. The parties have the opportunity to choose an arbitrator with industry knowledge and specialist technical expertise. They can also tailor the arbitration process to their particular needs although often parties agree that the rules of an established arbitration body will apply. Arbitration is often most effectively used for international/cross-border disputes as it can overcome jurisdictional issues inherent in court proceedings.

Negotiation: Given the expense, risk and time involved in court proceedings, it is common for parties to attempt to resolve disputes through negotiation. The CPR requires compliance with specified Pre-Action Protocols designed to facilitate resolution of the dispute, or at least narrow the issues, before court proceedings are commenced (see question 8 below). Negotiation, through correspondence or commercial meetings, is a means of complying with that requirement. However, parties may attempt to negotiate a resolution at any point during court proceedings on a without prejudice basis, without sharing details of any settlement offers with the court.

Additionally, CPR Part 36 is a self-contained regime within the court rules which encourages the parties to make written settlement offers. There are strict requirements a Part 36 offer must meet but a valid and well-pitched offer can impose considerable pressure on an opponent (particularly a defendant) to settle, as a party who refuses the offer only to realise a less advantageous result at trial will have costs and/or interest sanctions imposed on it.

Mediation: This is the most commonly used method of Alternative Dispute Resolution (ADR). It is used by parties who cannot by themselves agree to a settlement. The parties meet with an independent, trained mediator (usually a barrister or expert in a particular field) who liaises between the parties to identify issues and facilitate an agreed commercial settlement, which is recorded in writing. The mediator does not determine the underlying dispute and so any agreement reached as a result of mediation lacks precedent value.

Expert determination: An independent expert is appointed by the parties to resolve the dispute. The parties' contract often makes provision for expert determination but an ad hoc agreement to use this method may be reached. Provided the parties agree, the expert's decision is legally binding. This a quicker and more informal way of resolving a dispute than court proceedings. It is of assistance where the dispute centres on a technical issue (for example, defective products / inadequate services / pricing disputes). It allows for the matter to be resolved by an expert who is familiar with the technical/ specialist issues.

Adjudication: Parties to a construction contract have a statutory right to refer a dispute to adjudication. The adjudicator's decision is binding on the parties until the dispute is finally determined by another means of resolution (usually court proceedings), though parties can choose to accept the decision. This is a quick and cost-effective way of resolving a dispute as there is a standard 28-day time period between referring the matter to an adjudicator and the adjudicator's decision. It is specifically designed to sustain the flow of cash down the supply chain in the short term, and facilitate the continuation of construction works. The speed of the process means that the level of enquiry is not as thorough as court proceedings.

2. LITIGATION

2.1 Court system

It is usual for the High Court to hear large (exceeding £100,000 in value) and/or complex commercial disputes. The High Court is split into divisions and, within those divisions, specialist courts deal with different types of commercial disputes. The courts

can order a claim to be transferred from one court to another if it considers appropriate:

Division	Court	Type of dispute
Chancery Division	Chancery	Disputes over land, mortgages, trusts, administration of estates.
	Companies Court	Company insolvency matters.
	Patents Court	Patents and unregistered designs.
Queen's Bench Division	Queen's Bench	Claims for damages in respect of: • personal injury; • negligence; • breach of contract; • libel and slander (defamation); • non-payment of debts; and • possession of land or property. Other matters will be referred to the specialist courts in the Queen's Bench Division.
	Commercial Court	Complex business and commercial disputes, including claims arising out of: • buying and selling commodities; • banking and financial services; • insurance; • the export and import of goods; • court proceedings relating to arbitrations. This court has its own rules in addition to the CPR. There is also a specialist Financial List.
	Mercantile Court	Covers claims similar to those in the Commercial Court but usually of a lower value. The Mercantile Court deals with commercial matters "in a broad sense" and therefore has a wider remit.
	Technology	Disputes that are "technically complex" and typically cover claims arising in the areas of: • construction; • engineering; • IT; and • complex accounts. This court has its own rules in addition to the CPR.
	Admiralty Court	Primarily hears claims relating to: • salvage; • ownership of ships; and • damage done by ships.
	Administrative Court	Judicial Review proceedings.

2.2 Pre-action conduct

The parties' actions prior to issue of a claim are regulated by the Practice Direction for Pre-Action Conduct. This requires a potential claimant to set out its claim, in writing, in sufficient detail to enable the other party to understand and respond to it. The Practice Direction also encourages the parties to consider settlement options and to attempt to resolve their dispute without starting proceedings, if possible. If litigation cannot be avoided, the parties must try to reduce the costs of resolving the dispute by, for example, using joint expert evidence, where appropriate.

In addition to the general Practice Direction, there are a number of Pre-Action Protocols that cover specific types of dispute. Examples of these include the Pre-Action Protocol for Construction and Engineering Disputes and the Pre-Action Protocol for Professional Negligence. These protocols follow the spirit of the Practice Direction while generally imposing additional specific obligations. For example, the Pre-Action Protocol for Construction and Engineering Disputes requires the parties to hold a pre-action meeting to discuss settlement and narrow the issues in dispute.

Should a party fail to comply with the Pre-Action Practice Direction or an applicable Protocol, the court will take that conduct into account when awarding costs of the action. For example, a claimant who fails to send a letter explaining its claim may be penalised in terms of costs even if it is later successful at trial.

2.3 Typical proceedings

The main stages in large commercial cases are:

- Issue of proceedings and statements of case (pleadings): The claimant issues a claim form at court and serves it on the defendant. Particulars of the claim (also served on the defendant and filed at court) setting out the facts of the case and the remedy claimed may be included with the claim form or alternatively must follow it. Service of the claim form must be effected within four months of issue (or six months for service outside the jurisdiction). The defendant usually files an acknowledgment of service (within 14 days) and must file a defence setting out the facts on which it relies (within 28 days unless this deadline is extended by agreement of the parties or court order). The defendant can include a counterclaim with the defence if it has a related claim against the claimant. If it does, the claimant must provide a Defence within 21 days of service of the defence and counterclaim. The claimant can choose to file/serve a reply to the defence.
- Case management: Large commercial cases are allocated to the Multi-track. This means the court takes an active approach to the management of the case with usually at least one or more case management conferences convened by the court. The parties provide information (for example on the documentary, witness, and expert evidence required) to assist the court in providing directions. These set the procedure/timetable of the litigation to trial.
- Disclosure: The parties search for and disclose documents relevant to the issues in dispute (see questions 16 and 17).
- Witness statements of fact: The parties exchange witness statements setting out the factual evidence on which they will rely at trial (see question 18).
- Expert evidence: If the claim deals with technical issues, the parties exchange expert reports covering the fields of expertise permitted by the court. Following this, the experts discuss the issues with a view to producing a joint statement explaining the issues on which they agree and disagree (see question 19).
- Pre-trial review: The parties attend a hearing at which the court reviews the progress of the litigation and makes any further orders necessary to ensure the claim is ready for trial.
- Trial preparation: The parties prepare for trial, including the production of a trial bundle of documents. Usually each side briefs counsel (a barrister who will act for it as advocate at court). Counsel prepares submissions (normally including a short, written skeleton argument which introduces the key issues and that party's evidence and argument relating to them) and cross-examination points.
- Trial: The court determines the claim after hearing relevant witnesses and experts and the parties' submission. It then issues a judgment, either at the end of trial or sometime later.
- Costs: The court determines the costs the unsuccessful party must pay to the successful party.
- Enforcement: In the event the judgment is not satisfied voluntarily, the judgment creditor takes enforcement action.

2.4 Limitation periods

Unless otherwise specified in a contract between the parties, the Limitation Act 1980 sets out the limitation periods for bringing a claim. If a claimant fails to issue a claim form at court within that timeframe, the claim will, in principle, be time-barred:

Type of Claim	Statutory limitation period	Triggering event/date
Simple contract	Six years	From the date on which the act constituting the breach of contract occurred
Tort (breach of a duty not contained in a contract) excluding personal injury and latent damage	Six years	From the date on which the damage is suffered
Deed (excluding personal injury and latent damage)	Twelve years	From the date on which the act constituting the breach of the deed occurred
A claim for the recovery of land, proceeds of sale of land or money secured by a mortgage or charge	Twelve years	From the accrual of the right/cause of action
Latent damage (i.e. damage that is not discoverable immediately)	Six years; or	From the date the damage occurred; or
	Three years from the date of knowledge (if this is outside the initial six-year period)	From the date on which the claimant had the requisite knowledge and the right to bring an action

2.5 Confidentiality

Court hearings dealing with commercial disputes are public unless there is a good reason for them to be heard in private. Examples might include, where the case raises a matter of national security, or where publicity would defeat the object of the hearing (such as an order to freeze the assets of a company/individual before it has opportunity to dissipate them).

The following documents can be obtained by third parties without the court's or the parties' permission, either: (i) after the defendant has filed an acknowledgment of service or defence; (ii) if the claim has been listed for a hearing; or (iii) if judgment has been entered:

- particulars of claim and defence (though a party can keep the contents out of the public domain by making an application to court); and
- judgments and orders made in public.

Unless the parties request otherwise and the court agrees with the need for privacy, all other documents on the court's file may be obtained, but only if the court gives permission.

2.6 Class actions

Class actions are generally not permitted in England and Wales. However, the Consumer Rights Act 2015 has created a system that allows certain designated consumer bodies to bring what effectively amount to class actions if various criteria are met.

In other contexts, the courts have wide case management powers and have created processes to allow for multiple claimants and group actions.

If claims have common or related issues of fact or law, CPR 19.10 – 19.15 allow the court to manage claims under a Group Litigation Order (GLO). Alternatively, claimants can represent other claimants with the same interest under CPR 19.6.

There are also provisions for specialist group actions, for example, investor actions (CPR 19.9) or claims relating to a deceased's estate (CPR 19.7).

In addition, if a matter can be conveniently disposed of in the same proceedings, multiple parties can join together as claimants (CPR 7.3) without the court's permission.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Barristers have full rights of audience in the High Court and typically conduct the advocacy in High Court hearings (where the solicitor has day-to-day conduct of the case generally). Solicitors of the Courts of England and Wales do not have full rights of audience in the High Court unless the Solicitors Regulatory Authority has granted them a higher courts qualification (higher rights of audience). This can be achieved by attending an assessed course in advocacy. Solicitors who have the qualification are known as 'Solicitor Advocates'.

Registered EU lawyers are entitled to apply for higher rights of audience. This may involve passing additional assessments required by the Solicitors Regulation Authority.

Non-EU lawyers have no rights of audience in England and Wales and cannot conduct cases (or appear as advocate) in these courts.

3.2 Rules of Service for Foreign Parties

CPR Part 6 sets out the rules on service in England and Wales. The usual methods are:

- first class post or other service which provides for delivery on the next business day at a permitted address;
- document exchange at a permitted address;
- delivering the document to or leaving it at a permitted address;
- fax;
- other electronic method (e.g. email); and
- personal service by a process server.

You may only serve by fax and other electronic methods with the other party's consent. You can serve by all other methods without the other party's consent. If a party seeks to avoid service, you may apply to court for an order permitting service by an alternative method (for example, by email without the other party's consent or at an alternative address).

England and Wales is party to the EU Service Regulation and Hague Service Convention. These treaties provide further procedures for overseas service into England, which the English courts recognize as valid.

3.3 Forum selection in a contract

The jurisdiction of the courts in England and Wales is governed by EU legislation and domestic law.

Where EU legislation, or the Lugano Convention, applies (for example where a jurisdiction clause names a court in, or the defendant is domiciled in, the EU or within a country signed up to the Lugano Convention) the courts of England and Wales will generally respect choice of jurisdiction clauses. The main exceptions relate to:

- matters over which other courts have exclusive jurisdiction (for example, in relation to immovable property, some questions as to company law, public registers, registered IP rights, and enforcement of judgments);
- situations where a party submits to the jurisdiction of a court other than the one specified in any clause; and
- instances where there are special rules in relation to the types of contract, such as employment, consumer, or insurance contracts.

In cases that fall within these exceptions, it is possible that the courts of England and Wales may disregard an alternative choice of jurisdiction clause and claim jurisdiction for itself.

In relation to claims arising out of contracts that have a jurisdiction clause naming a jurisdiction outside the EU or Lugano Convention countries, the courts of England and Wales will respect the chosen jurisdiction in the contract unless it is in the interests of the parties and the 'ends of justice' to claim jurisdiction over the dispute and allow it to proceed in the courts of England and Wales.

3.4 Choice of law in a contract

The courts will respect the choice of governing law in a contract subject to limited exceptions relating to:

- Unfair Contract Terms Act 1977;
- Financial Services and Markets Act 2000;
- mandatory rules of law (or provisions that cannot be derogated from by agreement) relating to employment and consumer contracts; and
- situations where applying the choice is manifestly incompatible with public policy.

3.5 Gathering evidence in a foreign jurisdiction

England and Wales is party to the EU Taking of Evidence Regulation, and The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. If a foreign court (from any territory) requests assistance with a witness, and makes an application, the High Court may make an order compelling a witness to submit to examination. The examiner must then produce a deposition. With requests from courts outside the EU, the High Court will seal the deposition for use out of England and Wales.

3.6 Enforcing a Foreign Judgement in Local Courts

England and Wales has bilateral treaties for the reciprocal enforcement of judgments with:

- EU and EFTA (European Free Trade Association) countries;
- Commonwealth countries; and
- Hague Convention countries.

The procedure for enforcing foreign judgments covered by these arrangements, varies depending on the underlying treaty. Generally, the party wishing to enforce the judgment files the paperwork specified by the relevant treaty. If this is in order, the High Court registers the foreign judgment and makes an order permitting enforcement. In the case of judgments from EU and EFTA countries, the High Court simply registers the judgment and allows enforcement as if dealing with a domestic judgment, without the need for a further order.

It may be possible to enforce judgments from the rest of the world, provided they are final and conclusive and for a sum of money (but not for taxes, a fine, or other penalty). However, this usually requires separate proceedings to be brought, based on the foreign judgment in the English court. This invariably takes longer than the registration process under relevant bilateral treaties. In such a case, the judgment debtor also has more grounds open to it to resist recognition and enforcement. For example, the court may consider the underlying merits of the original claim and may also decline registration if the judgment is contrary to fundamental principles of English law, such as the Human Rights Act 1999.

4. EVIDENCE

4.1 Fact witnesses

Witnesses of fact provide written witness statements in accordance with the court's directions order (which sets the timetable to trial). Witness statements stand as evidence in chief at the trial. The witness will normally attend trial to be cross-examined by the opposing advocate. The advocate who called the witness can then re-examine, but this is limited to questions clarifying matters coming out on cross-examination. It is not mandatory for the witness to attend trial to give evidence. If the witness does not attend, however, the court will generally attach less weight/reliance to witness evidence that has not been cross-examined in court.

4.2 Expert witnesses

The rules governing the use of experts in a dispute are set out at CPR Part 35 and the Civil Justice Council's Guidance for the Instruction of Experts in Civil Claims.

The expert's duty is to the court. The role of the expert is to assist the court on matters within his expertise. This duty overrides any obligation to the party from whom the expert receives instructions and fees.

A party must obtain the court's permission to use an expert, if the party intends to rely on the expert's evidence at trial and recover the associated costs from the losing party. In large commercial disputes, it is usual for the parties to each instruct their own respective expert(s) in those disciplines which the court accepts require technical evidence. There is usually a meeting between each party's expert in a specific field and the opponent's equivalent expert. The purpose is to allow disclosure and to narrow the issues relevant to that area of expertise. A record of the meeting informs the judge on the issues on which the experts agree and disagree. In appropriate cases, the court can appoint a single joint expert who will produce evidence for both parties. That evidence is likely to be determinative of the issue.

The usual process for a party instructing its own expert is:

- formal written instructions are issued, which will be attached to the expert's report when served. Other instruction correspondence with the expert is disclosable on request following service of the expert report;
- the expert produces a report and the parties will then exchange reports;

- the parties' respective experts will discuss the issues within their expertise;
- the experts will issue a joint statement on the areas that they agree and disagree; and
- the experts' reports and their joint statement will stand as evidence in chief at the trial.

The experts will be cross-examined on this evidence. Since April 2013, this can include "hot tubbing" where experts are asked questions concurrently. This approach, however, is still far from common.

4.3 Documentary disclosure

The most common court order is for standard disclosure. This obliges the parties to conduct a reasonable and proportionate search for, and to disclose, all documents that are relevant to the issues in dispute, regardless of whether they support or adversely affect any party's case.

Since April 2013, the courts have discretion to vary the scope of disclosure from standard disclosure. For example, a court could order a party to disclose only: (i) the documents on which it relies; and (ii) any documents specifically requested from the other parties.

The term "documents" includes electronic documents. In large disputes, the parties are expected to agree to the scope of the search for electronic documents given the large volume of electronic data that commercial clients generally hold.

Disclosure is an on-going duty, so parties are obliged to disclose any relevant document they subsequently identify after the initial deadline for disclosure.

The rules for disclosure are in CPR Part 31. Usually, each party serves a list of all relevant documents that are (or were) in its possession/control. Parties are then entitled to inspect/request copies of the documents on the list, subject to the rules of privilege (see question 17 below). Inspection is normally undertaken by providing hard copies or, in the case of large disputes, exchanging electronic versions via electronic disclosure providers.

4.4 Privileged documents

Privilege

A party must still disclose (usually in its list of documents) any items for which it claims privilege. However, assuming the claim to privilege is not challenged (or the challenge is dismissed), it does not have to allow inspection of those documents.

The most common forms of privilege are:

- Legal advice privilege, which applies to confidential information passed between solicitor and client for the purposes of providing legal advice.
- Litigation privilege, which applies when:
  - litigation has commenced or is in contemplation; and
  - the dominant purpose of the communication is either giving or obtaining legal advice, or obtaining or collecting evidence for use in the proceedings.

Litigation privilege then covers communications not only between solicitor and client but also with third parties. This would cover, for example, the client or solicitor corresponding with a potential witness.

- Without prejudice documents: normally documents created in a genuine attempt to settle an existing dispute. This would cover, for example, documents produced for the purpose of litigation.
- Common interest privilege: shared with another party who has the same interest in that litigation.

Privilege applies to both private practice and in-house solicitors.

Other rules allowing a party not to disclose a document

Parties cannot withhold information that is relevant to the issues in dispute simply on the basis that it is confidential. However, where a single document contains both information that is relevant to the dispute and irrelevant confidential information, the irrelevant confidential information can usually be redacted, particularly if it is commercially sensitive.

5. REMEDIES

5.1 Dismissal of a case before trial

A party may apply to dismiss a claim before trial if the defendant fails to respond to a claim within the applicable time limit, in which case the claimant can ask the court to enter judgment against the defendant in default of a defence.

Another procedural ground for dismissing a party's case before full trial may arise if that party has committed a serious procedural breach of a court rule, practice direction or order for which there was no good reason and where, taking all circumstances of the case into account, the party in

default should not be granted relief from sanction. Note that the sanction imposed may, however, fall short of dismissing the case/defence. For example, if the default is late service of witness statements the sanction might be an order debarring the party from relying on that evidence.

A party can also apply for summary judgment on the whole claim (or part of it). The basis of such an application is that there are no reasonable grounds for either bringing or defending the claim.

Alternatively, a party may apply to strike-out the opponent's statement of case on the basis that there is no real prospect of the claim or defence (or part of it) being successful and that there is no other reason why the case should proceed to a trial.

There is some overlap between the two types of applications mentioned in the paragraphs above. Sometimes both grounds are relied on by the applicant. In either case it is necessary to submit an application to the court with supporting evidence. The other party is given the opportunity to respond to the application. In large commercial cases, the court will likely determine the application through a hearing.

5.2 Interim or interlocutory injunction before trial The leading authority regarding interim injunctions is American Cyanamid Co v Ethicon Ltd [1975] AC 396. The court applies a three-stage test:

- Is there is a serious question to try?
- If yes, are damages an adequate remedy?
- If not, where does the balance of convenience lie?

Question one is a threshold test. The court will not consider an application for an interim injunction without evidence that there is an issue necessitating a trial. Interim injunctions are a temporary form of discretionary relief. They prevent avoidable injuries pending trial, so there must be a triable issue.

Question two is qualitative. Damages are adequate compensation for most loss suffered, however, justice may require the court to protect rights before they are breached by awarding an injunction to prevent loss (or further loss) from occurring.

If question two is finely balanced, question three arises. The court seeks to preserve the status quo by considering what outcome carries least risk of injustice to the parties. In other words, would the damage to the applicant if an injunction is not granted (but the claim is later established) outweigh the damage to the respondent of granting an injunction that is later shown to have been wrongfully awarded?

5.3 Interim attachment orders

A freezing injunction is used to preserve assets pending trial. A freezing injunction can be granted over assets anywhere in the world, though enforcement in foreign jurisdictions is not simple.

To obtain a freezing injunction, the applicant must:

- have a claim recognized by English law with a good arguable case;
- prove the existence of assets to freeze; and
- show those assets are at real risk of dissipation.

The need to show risk of dissipation is essential. This generally means showing the respondent is moving assets beyond the applicant's reach, which will make it more difficult to enforce a judgment.

An application for a freezing order is usually made without notice to the respondent. There are strict evidential rules applying to such applications. The applicant (especially if it initially makes the application without notice to the respondent) must disclose all potentially relevant matters, even if adverse to its application. Failure to meet the disclosure duties may result in the injunction being discharged, with costs against the applicant. The applicant usually also has to provide a cross-undertaking in damages to protect the respondent in the event that it suffers as a result of an injunction that is later established as having been wrongfully granted.

A freezing injunction does not create a ranking security interest over a frozen asset. It is not a charging order (which is only available after judgment and does create a ranking security interest over relevant real property and shares).

5.4 Other interim remedies

The courts have general wide-ranging powers to deal with a number of interim issues. In addition to remedies already set out (summary judgment, strike-out, judgment in default of a defence, injunctions, security for costs), other available remedies include orders for:

- specific disclosure, where the scope of a party's disclosure is challenged; and
- an interim payment, for example, a payment on account of (an undisputed part of) damages in a quantum only claim.

5.5 Remedies at trial

The court may:

- award payment of damages and interest;
- order specific performance, which is an equitable remedy requiring the losing party to perform its contractual duties;
- make final injunctions, restraining the losing party or compelling it to act; or
- make declarations (binding determinations) as to the rights and duties of the parties.

Damages under English law are generally compensatory and rarely, if ever, punitive. Most civil claims involve compensatory damages. In contract cases, the aim is to compensate the innocent party for the loss suffered as a result of the breach. The damages awarded should put the party in the position it would have enjoyed had the contract been performed. In a commercial context, a claimant will therefore normally want to claim its "loss of bargain" damages i.e. the profits it would have derived from the contract being performed. If the contract would not have been profitable the claimant may have to claim its "reliance" damages, i.e. the expenditure it has incurred in reliance on the contract.

Some claims attract higher awards known as aggravated and exemplary damages, which are punitive. These are not, however, generally available in commercial claims: they tend to flow from claims for personal injury and/or other torts like defamation, to recompense individuals in monetary ways for non-monetary harms.

Contracts can provide for liquidated (or pre-ascertained) damages for specified breaches. The court will generally enforce a straightforward liquidated damages clause when freely agreed by the parties, provided these are a genuine pre-estimate of loss. If the contract provides for a more complex remedy for breach (for example, disentitling the party in breach from deferred consideration), the court will enforce this if persuaded the claimant had a legitimate interest in performance of the relevant obligation and that the sanction for breach is not extravagant, exorbitant or disproportionate when compared with that interest. Otherwise, such a clause will be struck down as a penalty.

5.6 Security for costs

A defendant can, after a claim is issued, apply for an order that the claimant provides security for the defendant's costs in large commercial claims.

In exercising its discretion to order for security for costs, the court takes into account a number of factors, including: (i) whether the claimant is a resident outside the jurisdiction; (ii) whether there is a reason to believe the claimant will not be able to pay the defendant's costs if ordered to do so; (iii) the claimant's address and whether it has changed (suggesting that it may seek to evade consequences of the litigation); and (iv) whether a claimant has taken steps in relation to its assets that could make it difficult for the defendant to take action and recover its costs.

Where the ground relied on is that the defendant is out of the jurisdiction, any award of security is generally restricted to the seeking security for costs of enforcing a costs judgment against the claimant in that jurisdiction. The English courts will not award security on this ground alone against a claimant in another EU jurisdiction, as this would be considered discriminatory.

6. FEES AND COSTS

6.1 Legal fees

The fees a law firm charges its own client are not fixed by law.

In dispute resolution matters, law firms traditionally charge clients for the time spent on the claim on an hourly rate basis. Fixed fees becoming more common, at least for some stages of some disputes.

Other potential fee structures include:

- Conditional fee arrangements (CFAs): These are arrangements by which the solicitor will not receive its fees (or may receive less than normal) if the client loses the case. The solicitor will receive normal fees plus a "success fee" if the case is successful. The success fee is generally calculated as a percentage of the solicitor's fee as opposed to the damages/settlement sum. Certain requirements must be met for a CFA to be enforceable. Since 1 April 2013, the success fee is no longer recoverable from the losing party and, as a consequence, the use of CFAs has reduced.
- Damage based agreements (DBAs): This is another type of contingency fee agreement between a solicitor and a claimant client (though the Civil Justice Council is considering changes to allow defendants to use DBAs). The fee paid to the solicitor is based on a percentage of the compensation received by the client (this is usually a settlement sum or damages from the other party). Generally, the solicitor will not be paid if the claim is

unsuccessful. Since 1 April 2013, these agreements can be used in almost all contentious matters, however, they are rarely used in commercial disputes as they are uncertain/ risky for both solicitor and client.

The legal costs one party can recover against the other are not currently fixed by law in large commercial disputes. However, there is a fixed cost regime in low value disputes that may in future be extended to higher value disputes.

6.2 Funding and insurance for costs

Litigation is usually funded by each party paying their legal representatives' costs as the case proceeds. The expectation is that the ultimately successful party will recover from the losing party some of its legal costs (typically 60-80% of the incurred costs) after the trial. However, other funding arrangements provided by lawyers or third parties are permitted. These include:

DBAs and CFAs: See question 5 above.

- After the event (ATE) insurance: This legal expenses insurance policy, obtained after the dispute has arisen, covers a party's potential liability in the event it loses its case. The policy usually covers the party's disbursements and the other side's legal costs and disbursements. As a result, it is often combined with another form of litigation funding in respect of the party's own costs.
- Before the event (BTE) insurance: These are policies purchased prior to a dispute arising and usually cover legal fees and disbursements up to a specified limit. Examples include motor insurance and residential landlord cover.
- Third party funding: This is an arrangement where a third party agrees to pay some or all of the claimant's legal fees and disbursements in return for a fee payable from the proceeds of the claim (whether following a judgment or settlement). If the case is unsuccessful, the funder is generally unable to recover any sum.

6.3 Cost award

As a general rule, the successful party is entitled to recover its costs from the unsuccessful party.

In the majority of complex and higher value claims, the parties are required to complete cost budgets at an early stage. These are either agreed between the parties or approved by the court. When later determining costs, the court will consider the cost budgets and will not normally award the successful party more than the sum set out in their approved cost budget without good reason.

In cases where cost budgets do not apply, the court will consider a number of factors when exercising its discretion to decide on a costs award. These include:

- the damages claimed from the losing party and the damages awarded;
- the issues in dispute and the degree to which the successful party was successful on those issues;
- the complexity of the proceedings;
- the conduct of the parties during the claim;
- whether any party should have made a concession at an earlier stage; and
- whether there were any settlement offers made during the course of proceedings.

As a general rule, the successful party usually recovers 60% – 80% of its costs from the unsuccessful party.

The court will also be told about any offers made by the parties pursuant to CPR Part 36 when determining costs. If the Part 36 offer is effective, it will have a potentially significant impact on the costs position:

- If the claimant made a Part 36 offer which the defendant did not accept and achieves a better result at trial, the court can order the defendant to pay;
  - costs on an indemnity basis for the period following 21 days after the offer was made;
  - interest on those costs at a rate of up to 10% above base rate and;
  - interest on damages at a rate of up to 10% above base rate;
  - in some circumstances, an additional sum calculated by reference to the claim value (and capped at £75,000); The court will make these orders unless it considers unjust to do so.
- If the defendant made a Part 36 offer (that the claimant did not accept) and the claimant failed to achieve a more favorable result at trial than that offer, the usual order will be that the defendant will recover its costs for the period 21 days after making the offer. These will in effect be offset against any costs the claimant is awarded for the period before this. Again, the court will make such an order unless it considers it unjust to do so.

6.4 Cost interest

The court has power to award interest on costs.

Where there is a judgment for costs, interest will likely be awarded at the judgment rate (currently 8%) from the due date for payment, however, the court has power to deviate from this rule.

- Where a court has the power to award interest on costs before judgment, it will consider various factors and consequently the rate awarded can vary on a case-by-case basis. As a general rule, however, any interest awarded will be at a reasonable commercial rate. The court may order that this rate continues after judgment (rather than allowing the judgment rate following judgment).

7. APPEAL

7.1 Appeal

The general rule is that, if the first instance decision was made in one of the High Court divisions, the appeal will be heard in the Court of Appeal. A High Court judge can, however, hear appeals relating to decisions by other members of the High Court judiciary (masters and district judges). Appeals of Court of Appeal decisions are heard by the UK Supreme Court (before 30 July 2009 this was the judicial panel of the House of Lords).

Permission to appeal is required from the first instance court. If permission is refused, the party has a second opportunity to appeal by applying for permission to the appeal court.

The grounds for appeal are where the decision of the lower court is either:

- wrong, including an error of law, fact, or in the exercise of the court's discretion; or
- unjust, because of a serious procedural or other irregularity in the proceedings in the lower court. An irregularity could occur for a number of reasons including the judge giving inadequate reasons for his judgment.

The appeal must be filed at the appeal court within 21 days of the date of the lower court's decision, unless the lower court orders otherwise. The courts will strictly enforce this time limit.

8. ENFORCEMENT OF JUDGEMENT

8.1 Enforcement of judgment

The most common methods by which a judgment creditor can enforce a judgment are:

- Taking control of the judgment debtor's goods: This allows the judgment creditor, absent payment of the judgment debt, to recover and sell moveable goods to raise funds. This is a popular method when the judgment debtor has goods with obvious second-hand value (e.g. technology, vehicles, furniture).
- Third party debt order: The court orders a third party who owes money to the judgment debtor to instead pay that money to the judgment creditor. The third party's direct payment to the judgment creditor discharges both the judgment debt and the third party's debt to the judgment debtor. This is a useful remedy when the judgment creditor knows of solvent third parties who owe trade debts to the judgment debtor.
- Charging order over land or shares: The court creates security for the judgment debt over the judgment debtor's land or shares. This enables the judgment creditor to apply to court for an order for sale, allowing the judgment creditor to manage a distressed sale of the charged assets to raise funds.
- Attachment of earnings order: The court orders a judgment debtor's employer to pay part of the judgment debtor's continuing salary payments directly to the judgment creditor. Over a period, this reduces the judgment debt, but it can take time.
- Petition for personal bankruptcy or company liquidation: Insolvency is a group remedy and is usually a last resort. When the court declares a judgment debtor insolvent, it appoints a trustee in bankruptcy or company liquidator to manage the judgment debtor's affairs. The trustee or liquidator sells the judgment debtor's assets and (if sufficient funds are realised) pays a proportionate dividend to all creditors, including the judgment creditor. The dividend may, however, only be a small proportion of the actual debt. Once released from insolvency, the law relieves the judgment debtor of all previous debts, but the process causes long-lasting damage to the judgment debtor's credit history and reputation. Consequently, the threat of bankruptcy/liquidation often persuades the judgment debtor to satisfy the judgment voluntarily.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

ADR is highly successful in settling commercial disputes either: (i) without issuing a claim at court; or (ii) after issue of the claim but before trial. Court records indicate that only 3 – 4% of issued claims reach trial. Whilst this may in part be due to a number of other factors, a very large portion of claims settle through ADR undertaken before or concurrently with the court process.

Mediation (either before or after issue of a claim) is particularly successful. In 2014, the Centre for Effective Dispute Resolution (CEDR) found more than 75% of cases settled on the day of a mediation, with 11% settling shortly thereafter.

All industries use ADR as it is strongly encouraged by the court. Indeed, the court has discretion to sanction parties in costs for unreasonably refusing ADR, mediation in particular.

ADR methods are split between non-binding and binding processes:

- The non-binding processes include negotiation, mediation, conciliation and early neutral evaluation. Negotiation and mediation are by far the most popular (see question 1 above).
- The binding processes include appointing an expert to determine a technical issue (expert determination), adjudication, a dispute review board and arbitration.

9.2 Costs in ADR

Arbitration: The arbitrator is under no obligation to order that one party pays another's costs, but it often does so if the parties do not agree otherwise. If the arbitrator is to decide, this depends on the relative success or failure of the award.

Adjudication: The usual rule is that each party bears its own costs. The costs are not usually recoverable from the losing party and the adjudicator has no power to make costs orders. Costs will not be recoverable even if there is subsequent litigation between the parties on the same dispute.

Mediation or Negotiation: Costs are a matter for commercial agreement between the parties. Parties often share the mediator's fees and agree to bear their own legal fees. Legal costs can, however, be used as a tool in negotiations. If a settlement is not reached, costs will usually become part of the costs of the litigation and will be dealt with by the court in the usual way after trial (i.e. loser pays the winner's costs subject to other factors such as conduct). However, it is always open to the parties to agree otherwise.

9.3 ADR and the court rules

If a contract between the parties contains a clause requiring the parties to resolve disputes by ADR, the courts will enforce that clause provided it is sufficiently clear as the matters such as the appointment of a mediator, the process to be adopted and how the parties are to be represented at the mediation. If these matters are left uncertain, the court may decide the clause is simply an unenforceable agreement to agree. In the absence of a binding agreement to mediate, the court is not entitled to force parties to undertake ADR.

The court can, however, stay court proceedings for parties to attempt to settle and/or impose a costs sanction on a party who unreasonably refuses an offer of ADR. The court has a wide discretion in relation to costs at CPR 44.4. The court's decision to impose a costs sanction on a party will depend on, amongst other factors, the nature and merits of the dispute, the costs of ADR, and its prospects of success.

Whilst ADR is voluntary and not a compulsory part of English court procedures, it is strongly encouraged by the courts, CPR, and court guides. The Pre-Action Practice Direction requires parties to consider whether ADR is suitable and the court may require a party to evidence this consideration. Solicitors have a duty to advise their clients about mediation and ADR under the Solicitor's Code of Conduct. Consequently, ADR should be considered in every case and a party who does not attempt to resolve a dispute out of court risks the court imposing costs sanctions upon it.

9.4 Evidence in ADR

This depends on the type of ADR.

Arbitration: The form of evidence can be agreed between the arbitrator and the parties, though it generally follows similar principles to court proceedings with (usually limited) disclosure of documents, witness statements and expert reports. Arbitrations (and the documents produced for the purpose of the arbitration) are recognized as confidential and hearings generally take place in private. The scope of the confidentiality obligation may differ depending on the circumstances of the case and the obligations can be modified by agreement.

Adjudication: There is no express duty of confidentiality in adjudications under the Scheme for Construction Contracts (England and Wales) Regulations 1998, but they are generally

treated as confidential. The parties will lose confidentiality if required to enforce the adjudicator's decision at court. The parties can agree to use documents produced in the adjudication for the purpose of subsequent court proceedings.

Mediation: Confidentiality is integral to the mediation process, which is usually conducted on a without prejudice basis. Mediation agreements will usually include express provisions regarding confidentiality, for example, that neither party may disclose any information arising out of or in connection with the mediation, without consent of the other party. The court may override these provisions if it is in the interests of justice, for example, economic duress or to establish whether the parties reached a binding settlement at or following the mediation.

Negotiation: If negotiations are conducted on a without prejudice basis, written correspondence and documents produced for the purpose of negotiation/settlement are usually prevented from being put before a court provided the negotiation is a genuine attempt to settle the dispute. The court distinguishes between admitting without prejudice communications as evidence (which is not allowed) and admitting that without prejudice communications have taken place (which is allowed).

9.5 ADR reform

Since its introduction in 1998, to harmonise practice across the civil courts, the CPR has grown in complexity and civil practice has diversified in different courts. The cost of litigation has also grown substantially.

Leading judges are now calling for reform to simplify civil procedure, make better use of technology and to develop new procedural tools to limit costs. Their overriding concern is to improve access to justice and create an English civil justice system fit for the information age.

Proposals include:

- The creation of an online court for monetary claims worth less than £25,000, with simplified procedural rules and no automatic assumption that lawyers will be involved. This would include a move to inquisitorial justice and away from adversarial trials. This idea is still conceptual with no timeframe for implantation; and
- Fixed scale costs for claims worth less than £250,000 to be introduced within the next two years (this would only affect recoverable costs between the parties and would not cap solicitor/client fees).

These reforms are currently anticipated only for low value claims, though could be an indication of the approach the court will take to large commercial claims in future.

In the event the UK leaves the EU following the referendum in June 2016, this may impact the application of EU legislation on matters such as jurisdiction, service, and enforceability of foreign judgments.

9.6 ADR organizations

Most industries offer recognized ADR schemes run through the Institute of Dispute Resolution Schemes. The main bodies include:

- The Centre for Effective Dispute Resolutions (CEDR);
- London Court of International Arbitration;
- Chartered Institute of Arbitrators;
- International Court of Arbitration;
- The London Maritime Arbitrators' Association;
- The Royal Institute of Chartered Surveyors; and
- The Adjudication Society.

France

Christine Sévère

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Litigation, due to the higher costs of arbitration, is still the most used dispute resolution method in France. The procedure is mainly governed by the French Civil Procedure Code, together with some specific rules enclosed in the Commercial Code providing for specific regulations which might be applied in certain situations.

Arbitration is an important method of dispute resolution of very large or international commercial disputes in France, in particular for parties seeking a neutral forum more flexibility and familiar with their national specificities or industrial backgrounds.

More recently, due to the great burden on the Courts and the lengthiness of proceedings, the French legislator has adopted several rules aimed at trying to encourage ADR (see points 10.1 and following below).

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The French Civil Code states the limitation periods to be applied the different classes of claims; the most relevant ones being: (i) a 5-year limitation period to be applied to contractual and tort claims (with some exceptions) and between business professionals; and (ii) ten-year limitation period in cases of physical damage.

Regarding the calculation of limitation period, they vary depending on the particular circumstances of each case. However, the general principle stated in the French Civil Code is that limitation period is calculated from the day in which the action become exercisable.

Time limits are considered to be a substantive legal issue, to be resolved in the judgment to be rendered.

2.2 What is the structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

First Instance Courts ("*Tribunal de Grande Instance*") examine disputes which are not expressly attributed to another area of law. These Courts have some specialised areas of laws such as IP, Real estate, Family law, etc.

Commercial Courts are specialised Courts on dealing with commercial claims or claims which involve two business professionals. They are specialised in insolvency proceedings, transports, unfair competition, and company conflicts.

Commercial Courts do not have special divisions (each Court is managed by a single judge or three judges, assisted by a Court Clerk, who render(s) the judgments) but in large jurisdictions (such as Paris or Nanterre) they may be organised in specialised sections with judges who have extended knowledge of certain areas of the industry (such as, for example, the pharmaceutical industry). Their decisions are appealed before the Appeal Courts.

Judgments on appeals are rendered by the Appeal Courts. Decisions are rendered by either a unique judge or a college of three judges if requested.

The French Supreme Court hears appeals from the Court of Appeal, only on points of law. The Supreme Court is organised into three civil Sections and one commercial Section, in addition to a labour Section and a criminal Section.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Being a member of any of the French Bars is mandatory in order to conduct proceedings before French Civil Courts.

Before Commercial Court, it is not necessary to be a member of the French Bar. The party can be represented by any person of its choice, however, if the representative is not a member of the French Bar, he must be granted with a special power (pursuant to article 853 of the French Code of Civil Procedure).

EU Member States' lawyers applying for permanent professional practice in France must (i) be previously registered with another European Bar, (ii) request the recognition of their diplomas (pursuant to EU Directive 2005/36/CE) and (iii) pass a qualifying examination.

In the case of urgent or occasional professional practice, a lawyer will be required to (i) be registered in another European Bar, (ii) communicate to the French Bar where the legal practice will take place, and (iii) act together with a French lawyer. Qualifications will be recognized after a year of practise in France (pursuant to Decree n° 2016-576 of May 11, 2016), and

after three effective years of practise in France, registration to a French Bar can be required (EU Directive 98/5/CE).

In the case of non-EU Member States Lawyers, they will be required to (i) to be registered in a non-EU Member State Bar, (ii) pass a qualifying test, (iii) pass a Master Degree program for Access to Legal Practice and the access examination required by the Ministry of Justice (pursuant Decree n° 91-1197 of November 27, 1991), and (iv) have a reciprocity of this possibility in the said State (pursuant Law 71-1130 of December 11,1971).

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Court Agents' costs are calculated based on the rates approved by the Decree of February 26, 2016 (applicable until February 28, 2018). Lawyers' fees are set freely but are subject to the signing of a preliminary engagement letter with the client (pursuant L. n° 2015-990 of August 6, 2015).

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Each party assumes its own costs while the proceedings are pending. When a final decision is rendered the court costs (dépens) are borne by the unsuccessful party, except where the court orders that they be paid, either in part or fully, by another party.

The Court may also require that the party ordered to bear the Court costs, pay to the other party a lump sum that is supposed to compensate the sums incurred that are not included in court costs *i.e.* the irrecoverable costs (frais irrépétibles), such as legal fees (see question 22 for more information). Third-party funding or security for costs, even if not legally barred, are still unfamiliar practices in France.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings are public. However, "closed door" hearings can be agreed to on grounds of public order, national security, personal rights or liberties, children or parties' privacy.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

There is no pre-action conducts or protocols imposed by law except as explained below at question 30. In some specific areas if the claimant has adhered to a Code of conduct it is mandatory to file a prior claim before the competent supervisory body. In addition, when a pre-trial mediation clause is provided under the Agreement, it must be abided for.

4.3 How does a typical court proceeding unfold?

First Instance/Commercial Court proceedings usually take around a year until a judgment is rendered. In complexes cases and/or when several parties are implied in the case, it may take longer.

Proceedings consist of: (i) a writ of summons, containing the claim and evidence, is filed by the plaintiff, (ii) the writ is served upon the defendant by a bailiff and filed with the Court for a first procedural hearing, (iii) the case is heard regularly before the procedural chambers, (iv) statement of defence challenging the complaint is filed by the defendant, together with defendant's evidence at the procedural hearings as well as any rejoinder by claimant, (iv) incidental pre-trial hearing may take place to request lack of jurisdiction ruling, freezing orders or other incidental claims that need to be heard in advance to the trail hearing (v) final oral hearing is set for a trial to rule on the merits, and (vi) judgment usually rendered within one month from the hearing.

Before the Commercial Courts, after the writ is served on the defendant, the first procedural hearing is mentioned. Before Civil Courts, the writ does not mention any dates. The presence of a lawyer is mandatory. The defendant must inform his/her lawyer, which will contact the claimant's lawyer to instruct the Court of his/her representation for the defendant. From this date, the Court will set a procedural calendar.

In addition, there is also the possibility of filing an application for an order for payment established for incontestable debts. If the defendant does not oppose to such an application, the claimant will be granted access to an enforcement procedure.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Early dismissal of a claim is possible in cases where procedural exceptions can be raised at an early stage, such as:

- Lack of territorial or objective competence (this later to be examined also *ex officio* by the Court);
- *Res judicata* or *lis pendens;*
- Inadequacy of the procedure followed;
- Lack of representation of a party
- Claim is time-barred.

The exceptions must be opposed in the statement of defence. They will be analysed by the Court and solved first before the Civil Court.

However, before the Commercial Court, and under certain circumstances, it is not mandatory to first hear first these preliminary objections and the case may be pleaded both on the preliminary objections and on the merits at the same time. In such a case, it must be concluded that there is no possible dismissal before full trial.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

There is no such request before French court. The claimant is never required to provide security for the defendants' costs. Costs are treated as described under 6.1.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The application is filed before the competent Court of First Instance/Commercial Court (attaching all available documentary evidence). It can be requested either in a contradictory trial or "inaudita parte" (without hearing the defendant), in which case the defendant will be granted an appeal recourse.

When the Court believes that there is urgency, irreparable harm or obvious fraudulent or illegal acts, or when the payment claim lacks any serious contestation, the Court may grand an injunction relief or partial payment of the claim. The decision may be appealed before the Court of Appeal. The proceedings have to comply with the adversarial principle.

Furthermore, pursuant to Article 145 of the French Code of Civil Procedure a party may request from a judge, in specific circumstances and at the discretion of the judge that he/she enjoins another party or a third party to file or disclose a specific element of proof which is in its possession. Before proceedings are commenced, a party may also request *inaudita parte* from a judge to be authorized to empower a bailiff to seek elements of proof on which the solution of the dispute may depend.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

- Preventive seizure (seizure of bank accounts, social shares, mortgages);
- Court appointed trustee;
- Deposit;
- Asset inventory;
- Preventive annotation of the complaint in public registries; and
- Any measure assessed to be appropriate by the Court.

5.5 Are there other interim remedies available? How are these obtained?

Courts can agree to any measures deemed to be necessary to guarantee the efficacy of a future judgment. In addition to the specific measures already mentioned the French Courts can authorize any measure deemed appropriate by the judge, as for example:

- Provisional cease of an activity, conduct, or temporary prohibition, interruption or ceasing of ongoing wrongful behaviors;
- Intervention and deposit of incomes in escrow account; or
- Temporary deposit of materials, artworks or objects produced in non-compliance with IT&IP rights.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Courts can award money, establish positive or delivery obligations, make prohibitions or make a declaration about the existence, effectiveness or interpretation of a relationship or legal status.

Only damages for actual loss suffered can be compensated, and these must be proven. Direct damages are compensated, unlike indirect damages. However, direct damage has a broad meaning and is not equivalent to the definition it may have under other common law jurisdictions. Direct damage will notably include loss of profits, loss of revenues, loss of contracts, loss of opportunity to contract, etc. No punitive damages can be awarded by the Courts. Immaterial damages, such damage to the reputation, can be awarded.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

All the documents supporting the pleadings of claim or the statement of defense must be attached to them when filed before the Court.

The possibility of disclosing additional documents at a later stage of the proceedings is also possible, but under certain circumstances it may be restricted to those connected to new facts or statements made during the proceedings or dated after the filing of the briefs.

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, in relation to the claim, and proportionate.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

In France, no obligation of disclosure lies upon the parties.

Each party only produces the documents of its choice, except when asked by the judge, who can (if requested by the opponent) urge the party to disclose it, pursuant article 11 of the French Civil Procedure Code.

The only possibility to obtain documents covered by legal privilege is to request a summons from the judge.

"Attorney-client privilege" is recognized, providing protection whereby these documents can only be communicated by the protected party (this is also applicable to other professionals such as doctors and journalists, banks, and those exchanged among attorneys in the course of negotiations to settle a dispute).

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

In civil and commercial matters, witnesses are usually not required to give oral testimony. Their written testimony can be submitted and admitted by the Court.

Witnesses' written statements will be considered as documentary evidence. They must only relate to facts directly witnessed.

7.4 What are the rules pertaining to experts?

Private experts can be appointed by any party. The judge, as provided by article 232 of the French Civil Procedure Code can also appoint a judicially appointed expert. When the expert has been appointed by a party, the expert report must be attached to the pleadings of claim, or the statement of defense, as an exhibit.

There are no expert assessors who assist judges and sit with them in court. However, judges may appoint independent technicians to lead technical investigation and issue reports on technical issues, either at their own discretion or upon request of a party. Appointed experts provide a basis for opinion on matters that require technical specialization, and are therefore qualified in a very large scope of fields (such as medicine, architecture, or real estate, etc.). Judges will then take into consideration this report to render their judgment. The court-appointed expert might be required to appear at the trial hearing in order to ratify his/her report and answer questions or clarifications requested by the judges.

The fees of the court-appointed experts are part of the costs of the trial that are initially borne by the plaintiff but may be recovered against the defendant if the claim is admitted.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

An appeal in writing can be filed before the Court of Appeal against the judgment rendered by the lower courts within one month (or 15 days, in the case of fast track proceedings) after the judgment has been served, the other party having the possibility to oppose/request dismissal of the appeal. This limitation period can be extended to three months for appellants domiciled abroad.

The case is sent to the Court of Appeal, which usually takes between one year to 18 months to render a judgment (in writing). The Court of Appeal rules both on facts and on law.

The decision rendered by the Court of Appeal can be appealed before the French Supreme Court within two months as from the date of service of the decision (plus two months for appellants domiciled abroad); the other party having the possibility to opposing/requesting dismissal of the appeal. The French Supreme Court will only review issues of law.

The French Supreme Court either rejects the appeal or quashes the judgment and refers the case back to a different Court of Appeal

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

On 24 September2014, the French Government enacted a decree implementing a class action mechanism in France.

Since 1 October 2014, certain accredited consumer associations are able to bring class action claims before the court, on behalf of consumers, for French consumer and competition and distribution law infringements.

During the first phase, a group claim is filed by an authorized association before French Civil courts.

After the claim has been filed, the French Civil courts issue a declaratory ruling on liability in which judges establish liability on the basis of model cases brought by the filing association. During this phase, judges determine the scope of the defendant's liability, ensure the publicity of the case in the media at the expense of the defendant, and may determine the amount of damages awarded to each individual plaintiff.

In the second phase, the plaintiff group is constituted through judicial oversight of an opt-in system whereby individuals must step forward to be included in the plaintiff class.

In the third phase, parties who have opted-in can obtain compensation based on the amount of damages previously set by the judge.

The appeal, if any, will be tried according to the rules applicable to "short notice" judgments, usually required for urgent matters (article 905 of the French Code of Civil Procedure).

A special collective action in the area of health has been also organized by the Law of 17 December 2015 (article L. 1143-1 of the Health Code).

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

The court costs (dépens) are borne by the unsuccessful party, except where the court orders that they be paid, either in part or fully, by another party. These costs notably include the fees, taxes, government royalties or emoluments levied by the clerk of the court.

The court may also require the party ordered to bear the court costs to pay to the other party a lump sum that is supposed to compensate for the sums incurred that are not court costs *i.e.* the irrecoverable costs (frais irrépétibles), such as legal fees. However, the amount of this lump sum is in the discretion of the court, which does not have to justify its decision. The court will notably take into account the principle of equity and the financial situation of the two parties. In any case, the total amount of the court costs and the irrecoverable cost is always much lower than the actual expenses of the successful party.

8.4 How is interest on costs awarded and calculated?

The payment of interest is regulated by the provisions of the French Commercial and Civil Codes and courts cannot impose them discretionarily and they are awarded in the judgement to be rendered. The rate of legal interest is determined every semester by decree.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Domestic judgments for the payment of a sum of money are, if not voluntarily satisfied, usually enforced by the seizure of property. A final court decision is required to proceed to a seizure. A range of different forms of attachment or seizure are available, including the seizure of and sale of personal goods, the charging of land and the attachment of third party debts or earnings. If the property in question is money, it will be attributed to the judgment creditor. If the property has to be sold, the result of the sale will be attributed to the judgment creditor. Seizure of property is carried out by a bailiff on the instructions of the enforcing party.

Where specific performance is ordered, daily fines may be ordered in the event of non-compliance.

Provisional enforcement is also available if requested by a party and the judge deems that the circumstances of the case require an immediate enforcement notwithstanding any appeal.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Parties to a contract can choose the governing law and French courts will enforce it, except for mandatory provisions of French law that cannot be waived. The following areas usually contain mandatory provisions: possession and ownership of real estate properties and moveable assets; ships, aircrafts and railway trains; shares; IT&IP rights; employment contracts; donations; or legal representation; bills of exchange; consumers; cheques and promissory notes; arbitration and choice of court agreements; law of companies; trusts or dealings before a contract is signed.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

As a general principle, French courts respect the choice of jurisdiction made by the parties of a contract. However, according to French law, contractual clauses concerning choice of jurisdiction must be specifically approved and signed by parties acting in their business capacity and in international matters.

Choice of jurisdiction within EU boundaries is governed by EC Regulation no. 44/2001 (as amended by EU Regulation no. 1215/2012, which is applicable since January 2015), which allows the parties to agree upon a contractual choice of jurisdiction (see Article 25 of EU Regulation no. 1215/2012). However, under certain circumstances, said choice of jurisdiction is not allowed (see Article 24 of EU Regulation no. 1215/2012).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Notification of foreign judicial acts in France or notification of French judicial acts abroad are governed by the EU Regulation 1393/2007 that applies within EU states or by the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague Service Convention).

The document is to be transmitted with a translation into French and is to be accompanied by a request (standard form) and sent to the competent French or foreign authorities. In France, the service proceedings will be coordinated by the "*Ministère de la Justice – Direction des Affaires civiles et du Sceau, Bureau du droit de l'Union, du droit international privé et de l'entraide civil (BDIP)*" and/ or the bailiff, where the international conventions allows direct notification.

When the formalities concerning the service of the document have been completed, the authority will confirm this through a certificate of completion (standard form), to be addressed to the transmitting body.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

If a local witness is requested to appear or provide evidence in a foreign jurisdiction, the service of the court summons will follow the rules established under Question no. 9.3.

If the witness' testimony is to take place in France, to be used in foreign proceedings, the foreign court will need to follow the procedure set forth under The Hague Convention on the Taken Evidence Abroad in Civil or Commercial Matters dated 18 March 1970. A written request must be addressed from the foreign court to the French court, detailing the witness identification and contact

details, the questions to be asked, confirmation on the right to refuse testimony or the need to declare under oath or promise. The French court will follow the request if it considered it legally admissible and the taking of the evidence will be provided for under French procedural rules unless the Foreign has asked otherwise and its request is approved by the French court.

9.5 How can a party enforce a foreign judgment in the local courts?

Regarding foreign judgments rendered in the European Union, a Member State's judgment will be recognized and enforced in France (without any prior registration) pursuant the provisions of EU Regulation No. 1215/2012.

The enforcement application is filed with the required documents before the Clerk's office of the French First Instance Courts (the jurisdiction is determined by the domicile of the party against whom the enforcement is sought or where the enforcement measures will be taken).

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. However, appeal is limited to very few grounds and final enforcement will most often granted.

In the case of enforcement of foreign judgments rendered outside the EU or outside the scope of EU Regulation No. 1215/2012, and in the absence of a bilateral treaty, recognition and enforcement of foreign decisions are subject to articles 509 and subs. of the French Civil procedural code, which requires that the judgment:

- be rendered by a court having jurisdiction,
- not be contrary to French international public order (both on the merits and procedurally),
- comply with the defendant's right to be represented and heard in Court (problems might arise in the case of judgments rendered in default); and
- lack any fraud (if established, fraud is a ground for refusing to recognize a foreign decision).

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Arbitration: this occurs where 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 (resolves conflicts through legally reasoned decisions, strictly applying the legal rules applicable in any particular case to its conclusion) or equity. The type of arbitration chosen does not affect the procedure, but does affect the way the arbitrator considers issues and finally resolves the dispute.

Arbitration awards must be well-grounded, meaning that the award needs to motivate the order.

The award is enforceable in the same way as a court ruling, subject to the laws of the state of enforcement.

Mediation and Conciliation: 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) or a judge (conciliation). If the parties reach an agreement, the agreement will be binding upon the parties as a contract and may also be binding and enforceable in the same way as a court ruling, if the parties request that it be ratified by the court. If no settlement is found during mediation, the parties will remain in the same position and may go to court or arbitration to obtain a binding decision.

Expert determination: although there is no legal provision that regulates expert determination as an alternative dispute resolution method, some technical contracts state that expert determination be used as a dispute resolution method, notably in matters of price assessment and / or technical defaults or malpractice. Furthermore, according to Article 1592 of the French Civil Code, "Price may be left to the arbitration of a third person. If the third person will not or cannot set the price, there is no sale". Therefore, the parties can stipulate in their agreement that the price will be set by an expert and that his/her decision will be binding.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Courts cannot compel the use of ADR, but since the Decree of March 11, 2015 the writ of summons introducing the claim must state efforts made by the claimant to settle its dispute with the defendant. Failure to provide a description of such efforts, means that the court can propose that the parties undergo ADR.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

ADR is confidential. The evidence produced and the awards rendered are protected against disclosure.

The rules regarding evidence are established by each arbitration court, but they are usually flexible and submitted to the arbitrator's admission.

10.4 How are costs dealt with in ADR?

Main costs to be faced are Mediation/ Conciliation/ Arbitration court taxes and arbitrator's and attorney's fees.

Each party assumes its own costs and share equally the common ones while proceedings are pending.

The award to be rendered will expressly set how the costs incurred will have to be borne by the parties.

10.5 Which bodies offer ADR in your jurisdiction?

The major alternative dispute resolution institutions in France are:

- International Chamber of Commerce (ICC) with premises in Paris.
- Institut Français de la Médiation.
- Centre de médiation et d'arbitrage de Paris (CMAP)
- Groupement Européen des Magistrats pour la Médiation (GEMME)
- Mediation National du Crédit aux entreprises
- Mediation des Marchés Publics
- Comité de la mediation bancaire
- Mediation interentreprises

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

No.

Germany

Prof. Dr. Friedrich Toepel

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Litigation

Litigation before the civil courts is the most important method of dispute resolution.

Although Germany is a federal system, with a central federal government and individual governments for each of the sixteen states, there is one centralized system of civil courts based on the Code of Civil Procedure (*Zivilprozessordnung*) and the Judicial System Act (*Gerichtsverfassungsgesetz*).

There are four levels of civil courts: Local courts hear claims with a value up to EUR 5,000.00. Regional courts are civil courts of first instance for lawsuits with an amount in issue higher than EUR 5,000.00. Higher regional courts hear the appeals of lawsuits commenced at the level of the regional courts and the German Federal Court, which only decides questions of law and issues of fundamental importance.

Arbitration

Arbitration is becoming more and more important in Germany although it has not yet reached the same significance as in, for example, England, Switzerland, or France. Most German arbitral proceedings are conducted according to the rules of the German Institution of Arbitration (DIS) or the International Chamber of Commerce (ICC).

Mediation

In exceptional cases, also mediation proceedings are becoming increasingly popular. However, regarding commercial disputes, the majority of German clients have still not accepted mediation as a reliable method of dispute resolution.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The general rule, pursuant to Section 195 of the German Civil Code, is that claims become time-barred after 3 years. However, there are specific limitation periods in the following paragraphs for different categories of claims.

Limitation periods generally commence at the end of the year in which the claim arises and in which the plaintiff becomes aware of all circumstances justifying the claim.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The regional courts hear large commercial disputes above the amount of EUR 5.000,00, that fall within their jurisdiction. There are specific chambers for commercial matters, for example, where the underlying contractual relationship is a commercial transaction for both parties. The higher regional courts and ultimately the German Federal Court for civil law matters hear the appeals.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Generally, lawyers are admitted or may apply to be admitted into the courts if they have passed the German bar exam and received their lawyer license from the German Bar Association.

In order to litigate before the German Federal Court for civil law matters, a special and exclusive admission is required.

Generally, foreign lawyers cannot practice law in Germany if they are not admitted to the bar. Directive 98/5/EG and the Law on EU Lawyers' Activity in Germany (EuRAG), as well as Directive 2005/36/EG, regulate the conditions of facilitated access to the German bar for EU lawyers. According to these legal regulations, there are three possibilities open to lawyers from another EU Member State practicing in Germany:

The lawyer may set up his practice in Germany by just applying for an entry in the relevant register in Germany according to Art. 2 Directive 98/5/EG. He may then represent clients before German courts, but according to Art. 28 EuRAG, only together with a regularly licensed German lawyer;

The lawyer may obtain a regular lawyers' license in Germany after practicing in Germany for at least three years according to Art. 10 (1) Directive 98/5/EG. He is then able to represent clients before German courts like regularly a licensed German lawyer; or

The Lawyer may obtain a regular lawyers' license in Germany without prior practice if he passes an aptitude examination according to Directive 2005/36/EG. At that point, he is also able to represent clients before German courts like a regularly licensed German lawyer.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Statutory fees (attorney and court fees) are fixed by law for court procedures.

However, law firms are bound by the statutory fees only insofar as these are the minimum fees that may be charged. In commercial matters, law firms charge clients on an hourly rate basis.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Commercial litigation is generally funded by the parties although occasionally third parties may fund the costs of litigation.

Legal expenses insurance (Rechtsschutzversicherungen) are popular in Germany. Such insurances cover the costs of the insured person's own attorney, court fees, and witnesses, costs of the opposing party if the insured person loses the case, and bail outside Germany. In principle, there is a waiting period of several months between the conclusion of the contract and insurance coverage. Moreover, there are specialized directors-and-officers' policies available for senior management positions.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Generally, all court proceedings are open to the public. However, in certain exceptional cases, the court can limit access to proceedings.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

German courts do not generally impose any rules in relation to pre-action conduct.

4.3 How does a typical court proceeding unfold?

The main stages of a court litigation are:

- commencement of proceedings and pleadings for civil actions. A claim is typically initiated by filing a written complaint. This would be forwarded to the defendant by the court. The defendant will then file an answer, which may include a counterclaim;
- a first hearing in which the judge will discuss possibilities of a settlement with the parties;
- if the settlement attempt fails, the taking of evidence often follows immediately (or in separate hearings); and
- judgment.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

A party may move to dismiss a case based on the allegations in the initial pleading, or other procedural defects, including: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) failure to state with sufficient precision a claim upon which relief can be granted; and (4) objection of lis pendens; and (5) objection of res judicata. The list is non-exhaustive.

Even if the court considers dismissing a claim based on the pleadings, the constitutional right to be heard will regularly demand that the court point out to the unsuccessful party that it needs to amend its claim before the dismissal.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

A claimant can be ordered to provide security for the defendant's costs in exceptional circumstances, such as, where the claimant does not reside within the EU. Moreover, judgments of first instance are usually declared as only preliminarily enforceable against providing a security until these judgments have become res judicata.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

There are two types of injunctions available before trial (or before determination of the issues on their merits):

- Preliminary attachment of moveable or immovable property for securing the enforcement of a payment claim. This is generally only granted if there are compelling reasons which justify the assumption that, without the attachment order, the enforcement of the judgment would be frustrated or be significantly more difficult; and

Preliminary injunction. This is intended to preserve the status quo or to enjoin certain conduct until the court determines the parties' rights.

In general, the party seeking the injunction may be required to pay any damages suffered by the other party if that party ultimately succeeds in having the injunction set aside.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

As mentioned above, a party has to move for a preliminary injunction or preliminary attachment to preserve assets pending final resolution of a dispute.

The moving party must ask itself: Is it necessary to preserve the assets due to a payment claim or a claim that may evolve into a payment claim? If so, the preliminary attachment pursuant to Sections 916-934 German Code of Civil procedure is the right remedy. Second, is it necessary to preserve the assets because of a claim other than a payment claim, e. g. a claim for restitution? If so, then a preliminary injunction pursuant to Section 935-941 German code of Civil Procedure is the right remedy.

If the **preliminary attachment** is the right remedy, the party must show:

- "**attachment claim**" (***Arrestanspruch***): The moving party must adduce credible evidence for the underlying payment claim; and
- "**reason for the attachment**" (***Arrestgrund***): The moving party must adduce credible evidence that there is a risk that, without the attachment, the enforcement of the judgment would be frustrated or be significantly more difficult.

If the **preliminary injunction** is the right remedy, the party must show:

- "**injunction claim**" (***Verfügungsanspruch***): The moving party must adduce credible evidence for the underlying claim that must not be a payment claim; and
- "**reason for the injunction**" (***Verfügungsgrund***): The moving party must adduce credible evidence that there is a risk that, without the attachment, the enforcement of the judgment would be frustrated or be significantly more difficult.

In both cases the court has discretion whether to grant the interim remedy immediately without an oral hearing (however the opposing party is entitled to voice its objections afterwards) or only after an oral hearing in which the opposing party may voice its objections.

5.5 Are there other interim remedies available? How are these obtained?

Payment order

A party may move for a payment order. In Germany, certain local courts have jurisdiction to make payment orders concerning all claims. If the opposing party does not object, the party may then proceed to obtain an enforcement order. If the opposing part still does not object to the enforcement order, the moving party may instruct the bailiff to enforce the claim without having had to file a complaint.

Enforcement of a provisionally enforceable judgment

Further, if a claim is awarded in a judgment before a court of first instance and the judgment has not already become res judicata, but is only provisionally enforceable, then the plaintiff has the following options:

- Enforcement of the awarded claim against providing a security, e. g. a bank guarantee, or
- A "precautionary attachment" (*Sicherungsvollstreckung*) according to Section 720a German Code of Civil Procedure which can be obtained without providing security. This latter possibility enables the plaintiff to only, for example, instruct a bailiff to attach a bank account. However, the money will not be paid out to the plaintiff until the judgment becomes res judicata.

Protective brief

A party which expects that a preliminary attachment or preliminary injunction is on its way against this party, may file a protective brief (*Schutzschrift*) with the court as a precautionary measure. The court must then take the protective brief into account when it receives the application for the preliminary attachment or injunction.

German courts have only very limited powers to order disclosure of documents

German courts do not have the wide-ranging powers of Anglo-American courts to deal with interim issues. In particular, German courts have only very limited powers to order disclosure of specific documents, and only in very exceptional circumstances.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

The courts have jurisdiction to order the following remedies:

- Damages. These can include the following types of damages: compensatory, aggravated, specific performance;
- Declaration (a formal statement by the court on the rights of interested parties or the construction of a document);
- Rearrangement of a legal position (only where this remedy is specifically provided by law); Permanent injunctions.
- Foreclosure. In general, damages are compensatory, not punitive in German law.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

As already mentioned above, German courts have limited power to order disclosure of specific documents, and only in very exceptional circumstances. The most important situation is where a party has referred to documents in its statements which are not known to the opposing party. The opposing party may then demand disclosure of the documents pursuant to Section 134 German Code of Civil Procedure. If the documents are not produced, the court may disregard reference to them.

Another example where disclosure can be demanded is the case of an infringement of intellectual property rights. A person who has a right to claim damages has a claim against the infringer to request disclosure of information on the infringing acts, provided that he is in doubt about the existence or the extent of his claims.

A person also has a claim to disclose the content of specific documents according to Section 810 of the German Civil Code if the documents were drawn up in his interests, if a legal relationship between himself and another person is certified in these documents, or if the document contains negotiations of a legal transaction between the applicant and another person.

German courts may grant a right to disclosure in further situations by an analogous application of the restricted existing rights, but are reluctant to do so.

In addition, the court may order the party to ex officio produce records and documents or other objects in its possession pursuant to Sections 142, 144 of the German Code of Civil Procedure. However, there is no sanction for non-compliance with such an order, except that the court may take the non-compliance into account as circumstantial evidence when deciding whether the relevant issues have been proved beyond reasonable doubt (standard of proof in civil cases in Germany).

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

In principle, a party does not have to disclose any documents. The court may take non-compliance with an order to produce documents only into account as circumstantial evidence (see the answer to the previous question). When weighing the evidence, the court also has to take into consideration the confidentiality interests of the party ordered to produce documents. Apart from this duty to take into consideration the relevant interests, there is no rule protecting specific interests.

Thus, the issue of privilege does not arise.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses of fact generally give oral evidence and are only examined by the court. Written evidence is possible under exceptional circumstances, yet quite uncommon and has a much lower evidential value.

The German Code of Civil Procedure does not provide the opportunity for cross-examination. The court has discretion to let the parties' lawyers directly ask the witnesses. However, this is usually only granted after the judge has finished his questioning.

In contrast to the German state courts proceedings, cross-examination can be agreed upon by the parties in arbitral proceedings, and the parties frequently avail themselves of this opportunity.

7.4 What are the rules pertaining to experts?

The German Code of Civil Procedure regulates expert evidence in Sections 402-413, which define the court-appointed expert as the regular manner of receiving expert evidence.

Either party may also retain an "expert". However, the party-appointed expert will not be treated according to the rules of expert evidence by the court, but only as statements by the party itself.

Experts serve to provide opinion on matters that require scientific, technical, or other specialized knowledge. Whether retained by a party or appointed by the court, an expert's role is to assist the court in reaching its determination.

A court-appointed expert may be rejected by either party for the same reasons for which a party is entitled to challenge a judge. In practice, experts are rarely retained by parties in German state court proceedings because they are regarded with suspicion by the court, and the court will regularly not rely on a party-appointed expert alone when deciding the case, but appoint its own expert instead.

However, in German arbitral proceedings, party-appointed experts have become more and more common.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

A judgment of first instance in large commercial disputes will be issued by regional courts. Appeals of such first instance judgments are made to the competent higher regional court and must be filed within one month after the judgment of first instance has been served on the appealing party.

The higher regional court will review the judgment of first instance regarding questions of fact and questions of law, insofar as the judgment has been appealed. The appealing party may restrict the appeal to certain issues. The possibility of providing new facts is limited to exceptional circumstances.

Appellate judgments may be appealed only if the higher regional court has admitted the filing of a further appeal with the German Federal Court regarding questions of law, insofar as they are issues of fundamental importance.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Class/collective actions are not permitted in Germany. However, in certain specific situations, German law provides for restricted mechanisms of collective redress.

Cease and desist actions regarding consumer rights (*UKlaG*)
Under the UKlaG, consumer protections associations have the right to raise injunctive actions on behalf of consumers and may require defendants to cease and desist from certain behavior (e. g. making use of inadmissible general terms and conditions).

Act on Exemplary Proceedings in Capital Market Disputes (*KapMuG*)

Under the KapMuG, the parties of lawsuits concerning inaccurate capital market information and pending before the same court may apply for the publication of certain questions of fact or law in a register of the Federal Gazette. If at least nine similar applications are published within six months, the competent appellate court will take over and start model proceedings.

Act on Appraisal Proceedings (*SpruchG*)
The SpruchG provides for judicial review of compensations payable to minority shareholders. Here, the same court will usually be competent for many parallel actions because the courts at the company's seat will have exclusive jurisdiction. All of the individual actions will be joined together. If the court decides that the compensation was too low, all minority shareholders will be bound by the decision, even those who have not challenged the original compensation.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

In Germany, the unsuccessful party has to pay the costs of the successful party. Cost awards do include attorneys' fees. However, the unsuccessful party only has to pay the statutory attorneys' fees of the successful party, not the higher hourly rate basis charged by the successful party's lawyer. When

awarding costs, the court has to consider the amount in issue, the number of plaintiffs and defendants as well as the legal outcome of the case.

8.4 How is interest on costs awarded and calculated?

Generally, if awarded, post-judgment interest on costs would be awarded at a rate prescribed by statute (Section 104 (1) German Code of Civil Procedure), calculated from the date that the application for the cost order was received by the court.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

The successful party usually has to file for the enforcement of the judgment by filling out a particular form which must be handed over to the bailiff. If the judgment has not already become res judicata, and has been declared provisionally enforceable by the court, the successful party must also pay a certain amount as a security deposit.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Parties are generally free to agree on the applicable substantive law. There is a so-called public order *(ordre public)* which does not allow the enforcement of law that is incompatible with basic or fundamental notions or values of German law.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

German courts do respect the choice of jurisdiction in a contract as long as the requirements of Section 38 of the German Code of Civil Procedure are fulfilled (i. e. the parties are not restricted at all in their choice of jurisdiction if both of them are merchants, legal persons under public law, or special assets (*Sondervermögen*) under public law).

However, if one party is not a merchant, then the German courts will respect the choice of jurisdiction only:

- if it is agreed upon after the commencement of the specific dispute; or
- if one of the parties involved has no domicile in Germany. In this case, if one of the parties has no domicile in Germany and is no merchant, the choice of jurisdiction must be laid down in written form. Such an agreement must correspond to the rules of the German Code of Procedure insofar as a German place of jurisdiction is stipulated. (A person domiciled in Munich who is not a merchant, for example, cannot choose Frankfurt a. M. as place of jurisdiction in an agreement with a Serbian merchant if there is no connection with Frankfurt a. M. recognized by the German Code of Civil Procedure. Such an agreement will rather be valid regarding the waiver of the jurisdiction of Serbian courts and the agreement on the jurisdiction of German courts, but invalid concerning the choice of courts within Germany. As a result, the Serbian merchant could file a complaint against the Munich person with the Regional Court Munich because the German Code of Civil Procedure recognizes the court of the debtor's domicile as a place of jurisdiction.)

German courts do claim jurisdiction over a dispute in some cases, despite the choice of law, the choice of jurisdiction does not fulfill the requirements of Section 38 of the German Code of Civil Procedure (i. e. if one of the parties is not a merchant and if no cross-border dispute is involved or if the choice of jurisdiction between non-merchants is not in writing). In such cases, the German courts will just apply the general rules.

If, however, the parties are domiciled in two different member states of the EU, then the Regulation (EU) 1215/2012 (particularly its Art. 25) counts as the more specific law which has to be applied instead of Section 38 of the Code of Civil Procedure (according to the rule *lex specialis derogat legi generali*).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Regulation (EC) no. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 regulates service between persons domiciled in different Member States.

According to Section 1068 of the German Code of Civil Procedure, a record or document regarding which a German

receiving agency is to obtain or initiate service in the context of Article 7 (1) of Regulation (EC) no. 1393/2007 may be served by registered mail, return receipt requested. Please note that a German draft bill BT-Drs. 653/16 of 4 November 2016 intends to clarify that the receiving agency shall itself serve the document or have it served by the particular method requested by the transmitting agency. Such a clarification is deemed to be necessary as the current Section 1068 of the German Code of Civil Procedure is unclear in this respect. Draft bill BT-Drs. 653/16 of 4 November 2016 is expected to become law soon.

According to Section 1069 of the German Civil Procedure Code, the local court (*Amtsgericht*) of the district in which the record or document is to be served, is responsible as the German receiving agency in the sense as defined by Article 2 (2) of Regulation (EC) No 1393/2007.

Apart from that, Germany is a party to The Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used particularly by parties from non-EU countries to effect service in Germany.

9.4 However, The Hague Service Convention process is cumbersome, and more direct means of service are usually available. The most practical way of serving foreign documents in Germany is to retain local counsel to ensure that local requirements are followed. What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

Regulation (EC) no. 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the taking of Evidence in Civil or commercial matters of 22 October 2008, regulates the procedure of taking of evidence in legal proceedings in civil and commercial matters between Member States.

According to Section 1074 of the German Code of Civil Procedure, for evidence to be taken in Germany, the local court (*Amtsgericht*) of the district in which the procedural action is to be taken is responsible as the requested court within the meaning of Article 2 (1) of Regulation (EC) No 1206/2001. Section 1074 of the German Code of Civil Procedure sets out that requests for the taking of evidence submitted from a foreign counterpart, as well as communications pursuant to Regulation (EC) No 1206/2001, must be written in German, or must be accompanied by a translation into German.

Apart from that, Germany is a party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), which contains a procedure that can be used to have witnesses from non-EU countries interviewed.

9.5 How can a party enforce a foreign judgment in the local courts?

The party which has been awarded a claim in a foreign judgment must regularly file an enforcement claim with a German court of first instance pursuant to Sections 722, 723 of the German Code of Civil Procedure, to declare the judgment enforceable in Germany.

The court will declare the foreign judgment enforceable if:

- it has become res judicata; and
- no objection against the recognition of the judgment In Germany pursuant to Section 328 German Code of Civil Procedure can be raised, for example, where:
  - The courts of the state to which the foreign court belongs did have jurisdiction according to German law;
  - The defendant has been duly served the document by which the proceedings were initiated and in such time as to allow him to defend himself;
  - The judgment is compatible with other judgments recognized in Germany;
  - The judgment is compatible with the German ordre public; and
  - reciprocity of recognition is guaranteed between Germany and the foreign state concerning decisions of their courts.
- There are no objections against enforcement which could not be raised during previous court proceedings in the foreign state and which have to be taken into account according to Section 767 (2) Code of Civil Procedure.

The German court does not check whether the claim awarded in the judgment had merit. There are no separate recognition proceedings. If the party has obtained such a judgment and the foreign judgment has been declared enforceable, then the party may proceed to commence enforcement proceedings based on the German judgment.

There are special rules facilitating the recognition and enforcement of a judgment from another EU Member State in Germany. If the proceedings were initiated in the foreign member state before 10 January 2015, the judgment must be declared enforceable by a German court according to Art. 32 ff. Regulation (EG) 44/2001. The German court will declare enforceability if the party seeking to enforce the judgment will submit a copy of the judgment according to Art. 53 of Regulation 44/2001 and a certificate according to Art 54 of Regulation 44/2001.

If the proceedings were initiated after 10 January 2015 in another EU Member State, no separate declaration of enforceability is necessary any longer. The party seeking enforcement may commence with the enforcement proceedings in Germany immediately and only has to provide the bailiff with a copy of the foreign judgment pursuant to Art. 42 (1) (a) Regulation (EU) 1215/2012 and a certificate pursuant to Art. 42 (1) (b) Regulation (EU) 1215/2012.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

The most commonly used ADR procedures are arbitral proceedings.

Mediation is becoming increasingly popular in some areas, particularly in some parts of the public sector. Parties are still reluctant to avail themselves of mediation in commercial disputes.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

It is common for parties to make an effort to engage in pre-trial settlement conferences. As already mentioned, mediations are not yet popular with German parties concerning commercial disputes.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

In arbitral proceedings, usually the parties do not agree on rules for the taking of evidence. Therefore, the arbitral tribunal determines the procedures to be followed, including the rules of evidence.

German parliament has also enacted a Mediation Law. However, it contains no rules regarding evidence or details of the proceedings.

10.4 How are costs dealt with in ADR?

In the case of arbitration, in the absence of agreement, the arbitral tribunal will enforce the cost rules applicable to the arbitration organization (i. e. Section 35 of the DIS Arbitration Rules for arbitral proceedings conducted according to the rules of the German Institution of Arbitration, or Art. 37 of the ICC Arbitration Rules for arbitral proceedings conducted according to the rules of the International Chamber of Commerce).

The German Mediation Law does not provide any rules for the distribution of costs in mediation proceedings.

10.5 Which bodies offer ADR in your jurisdiction?

The main arbitration body within Germany that handles large commercial arbitrations is the German Institution of Arbitration DIS. However, parties also commonly use the processes of international institutional arbitration bodies, such as the:

ICC.

ICDR.

European Court of Arbitration (CEA).

Vienna International Arbitral Centre.

London Court of International Arbitration (LCIA).

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

There are no substantial pending proposals for dispute resolution reform at this time.

Hungary

Milán Kohlrusz

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

The two main methods of resolving large commercial disputes are civil procedure before ordinary courts and arbitration before various arbitration bodies.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

As a general rule the limitation period is five years, however, parties may agree upon a different limitation period in writing. Any agreement excluding a limitation period is null and void. Legal regulation may prescribe specific limitation periods for certain claims, e.g. ownership claims are not time-barred and as such they cannot be subject to a limitation period.

The limitation period commences when the claim is due or when the damage is done.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

Large commercial disputes – if they are not brought before arbitral courts – are heard by ordinary civil courts. There is no special court or special division of the ordinary courts to hear large commercial disputes. However, there are specific procedural rules within Act III of 1952 on Civil Procedure that aim to speed up procedures concerning so called "High profile actions" (claiming a sum which exceeds 400 million forints).

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

European Community lawyer

A European Community lawyer is a citizen of a Member State of the European Economic Area who is entitled to pursue the activity of a lawyer advocate in a Member State of the European Economic Area under a professional name determined by separate law. The dispositions of Act XI of 1998 on Attorneys at law are applied to the legal activity pursued on the territory of Hungary by such a person with the following differences.

A European Community lawyer who wishes to permanently pursue the activity of a lawyer advocate in Hungary must register in the Bar Register as a European Community lawyer. Persons who only wish to serve occasionally as a lawyer advocate service provider in the territory of Hungary must make an announcement to the Hungarian Bar Association. Upon application, the Bar must register, as a European Community lawyer, anyone who:

- certifies – with a document issued by the organization that keeps the register of lawyer advocates of his or her Member State – that he or she is entitled to pursue the activity of a lawyer advocate in that State;
- certifies that he or she has lawyer's liability insurance, and agrees in writing that he or she will provide that information upon the Bar's request to the Liability Insurance Society; and
- agrees in a written declaration that the Bar can release such information as necessary to the European Community lawyers' clients regarding data, conditions and method for enforcing a claim against the Liability Insurance Society.

The Bar must register the European Community lawyer as a lawyer if he or she:

- meets the conditions listed above;
- certifies with documents or during a personal hearing that he or she has pursued the activity of a lawyer advocate on the territory of Hungary in relation to Hungarian law (including the application of the law of the European Union in Hungary) for three years; and
- certifies during the personal hearing that he or she possesses the necessary Hungarian language skills to pursue the activity of a lawyer advocate.

Registered European Community lawyers may also be registered as lawyers if they have pursued lawyer advocate activities in the territory of Hungary for three years but the duration of legal activity relating to the Hungarian law (including the activity relating to the application of the law of the European Union in Hungary) is less than three years. A European Community lawyer registered as a lawyer becomes a Bar member with full powers, and is entitled to use the name lawyer advocate (ügyvéd) and the professional name of his or her own Member State.

A European Community lawyer may perform the same activities as a lawyer advocate. However, if the legal assistance is compulsory, he or she may only represent clients if he or she has entered into a cooperation agreement with a lawyer or a law firm for this purpose. In such cases, the European Community lawyer is obliged to present the cooperation agreement the first time he or she acts on behalf of his or her client before every court or authority.

A European Community lawyer permanently pursuing activities of a lawyer advocate on the territory of Hungary, is obliged to respect the dispositions of Act XI of 1998 and the regulations of the Hungarian Bar Associations. A European Community lawyer, acting occasionally in cases of legal representation for dispositions under Act XI of 1998 and other activities as a lawyer advocate and service provider in the territory of Hungary, is under the authority of the regulations of the Hungarian Bar Associations and the rules of his or her own Member State regulating such legal activity.

A European Community lawyer is entitled to act as an employed European Community lawyer. In such cases, he or she is registered by the Bar as an employed European Community lawyer. The conditions of registration do not apply in this case.

Foreign legal advisor

A foreign legal adviser may advise clients regarding laws relating to his or her country of original registration as a lawyer, international law and the practice related to them. Apart from these, he or she must not provide any other legal services. He or she must practice under a cooperation agreement with a Hungarian sole practitioner or law firm. The foreign legal adviser may perform his or her activity exclusively under a power of attorney granted to him or her by the sole practitioner or law firm with whom he or she has a cooperation agreement. A foreign legal adviser may also accept the power of attorney for himself or herself in the scope of his or her activity if it is stipulated by a cooperation agreement. A foreign legal adviser is not a member of the Bar but is registered there.

Those registered by the Bar as foreign legal advisers may perform the activities of a foreign legal adviser. The Bar must register, at their request, those who:

- meet certain conditions (e.g. the applicant is a citizen of a Member State of the European Economic Area; the applicant possesses a university law degree; the applicant has a passing grade on the Hungarian Bar examination; etc.);
- have concluded a cooperation agreement as mentioned above;
- certified their license for practicing law abroad;
- certified that they have a good reputation, have no criminal record, nor are they undergoing a disciplinary procedure in the country of their primary registration;
- perform their activities as part of a Hungarian law firm or together with a Hungarian sole practitioner.

A foreign legal adviser whose foreign law firm has established a commercial representative office in Hungary must not be registered by the Bar.

Hungarian lawyers may join foreign law firms as partners without the approval of the Bar.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Professional fees are subject to free agreement, and are determined according to the service agreement signed with the lawyer. They include reasonable expenses which may be claimed from the opposite party in the course of civil proceedings pursuant to a Decree of the Minister of Justice. The court decides on the legal fees at its sole discretion based on the documents submitted by the party (e.g. legal engagement agreement, and other documents substantiating its reasonable expenses). The court may base its calculation of legal fees on fee amounts different from those set out in the submitted documents if the fees are not in accordance with the value of the case or the real work of the lawyer.

If there is no agreement relating to professional fees and expenses between the party and the lawyer or if the party requests, a lawyer's legal costs are determined by the court on the basis of the amounts in dispute as set out in a Decree of the Minister of Justice. In the case that the sum in dispute cannot be determined, the fee following every commenced hour in court, or the fee for the legal work performed prior to the lawsuit or outside of court shall, be at least HUF 5000/hour, but maximum HUF 10000/hour. The Decree also sets out different rules regarding the costs of non-contentious proceedings, review proceedings, second instance proceedings.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

The costs of the litigation are funded by the parties. However, persons of limited means may obtain financial assistance from the state in initiating or defending a civil action.

Third-party funding or insurance for litigation costs are not known in Hungary.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

All court hearings are held publicly, unless an exception is made by the law.

The court may exclude the public from a part or the whole hearing if it considers it necessary for the protection of qualified data, business secrets or other secrets as prescribed by law, as well as in defense of public morals or those of minors. A party may also apply for the exclusion of the public in order to protect the personal rights of such party.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

In actions initiated between legal person enterprises, prior to submitting the statement of claim the parties must endeavor to settle their dispute amicably. Such reconciliation may be set aside if the parties draw joint minutes regarding their dissent. If the parties do not settle their dispute amicably, the written statements made by the plaintiff and the defendant (correspondence, minutes) or the documents that evidence that the plaintiff endeavored the conciliation, must be attached to the statement of claim. Such rules are not applicable in cases where the obligatory time limit for the commencement of the action is less than sixty days; in the extraordinary procedures; in the procedure following the payment warrant procedure; in non-litigious procedures, and; in high profile actions.

If the parties fail to attach the documents testifying their intention to settle their dispute amicably, the statement of claim may be dismissed without issuing a summons.

4.3 How does a typical court proceeding unfold?

Submission of statement of claim and attachments

All civil legal actions must be started by submitting a statement of claim. The claim must contain:

- the name of the court, the name, address and status of the parties and their representatives in the case;
- the cause of action and all the facts and evidence supporting them;
- details and, if necessary, the original documents, which may be relevant for the court to determine if it has jurisdiction in the case; and
- the specific remedy claimed.

A power of attorney must be attached by the party's legal representative to the statement of claim submitted on behalf of a party, and the plaintiff must pay the stamp duty for the proceedings. If mediation was carried out between the parties, the plaintiff shall indicate that fact in the statement of claim. The plaintiff should also indicate its phone number, facsimile number and email address.

Action to be taken upon submission of a statement of claim

Upon receipt of a statement of claim, the president of the tribunal must examine it to decide whether it should be returned to the plaintiff for amendment, whether the case should be transferred to another court, or whether the statement of claim should be dismissed without issuing a summons. The necessary measures must be taken by the president within thirty days.

If the statement of claim is determined to be appropriate, a trial date can be set. The tribunal president should endeavour to ensure that the case is prepared properly so that it can be determined in one hearing. To achieve this, the court may obtain documents from other authorities or organizations, may set down the preliminary taking of evidence, may take any other interlocutory measures, or may order hearing the parties out of trial.

Counterclaim

Prior to the closure of the first hearing (or until the given date), the defendant may submit a counterclaim, provided that his or her counterclaim originates from the same or a related legal relationship to that or the plaintiff's claim, or if the counterclaim is suitable for setting off against the plaintiff's claim. A case is commenced when the opposing party is served with a claim or a counterclaim.

Setting the date of the hearing
The date of the first court hearing must be set within thirty days of the receipt of the statement of claim and held within four months of the receipt of the statement of claim by the court unless the law provides otherwise. The first hearing cannot be set later than nine months after receipt of the statement of claim by the court.

The trial may be fixed for a date at least fifteen days after the service of the statement of claim on the defendant, except for employment matters and cases relating to bills of exchange, where such period may be shortened to eight and three days respectively.

Summons to appear in court
The court summons the parties to appear in court, after the court decides on the date of the commencement of the trial. The court also notifies the parties of the facts that must be evidenced and the burden of proof. Oral evidence is produced in hearings and written evidence can be submitted at any time until the evidencing phase is over. Parties must act in good faith and produce evidence in a timely manner (evidencing phase).

Hearing
A trial is conducted by the tribunal president in accordance with the law. The president has the discretion to decide on the sequence of the procedural steps to be taken. In addition to questions from tribunal members, parties or other persons heard during the trial may be examined by the parties and their representatives. The president must ensure that the trial does not involve matters irrelevant to the case and shall prohibit questions unrelated to the case or improperly influencing the person being examined.

To establish the veracity of alleged facts, a court may order evidence to be produced or taken. The burden of proof lies with the party in whose interest it is that the court accepts the evidence as being true. The general rule is that the court may not, ex officio, order evidence to be given unless the law provides otherwise. The methods of proving evidence include, but are not limited to, witness statements, expert opinions, inspections of evidence out of court, documentary evidence, and other real evidence.

Judgment
The court decides on the merits of a case in a judgment. A judgment decision must cover all claims made within a case or cases joined together. All other matters occurring in a case, including the dismissal of a case, are contained in an order.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

The court may dismiss the statement of claim (a) before the first trial ex officio, or; (b) any time in course of the litigation proceeding ex officio or upon the request of the parties. Should a party request the dismissal of the case, the court should first decide on the party's request before deciding on the merits of the case.

The court may dismiss the statement of claim before the first trial ex officio a without the issue of any summonses where:

- Hungarian court jurisdiction is excluded from the case on the basis of a rule of law or an international treaty;
- the claim falls within the jurisdiction or competence of some other court or authority, but there is insufficient information to transfer it to that particular court or authority;
- the case may proceed only subsequent to the outcome of some other proceedings;
- proceedings are already pending between the same parties relating to the same claim based on the same facts, or there has been a legally binding final determination of the same case;
- A party does not have legal capacity;
- The claim of the plaintiff is premature or it may not be pursued in a legal action (except the case of prescription);
- The case is lodged by a person not authorized by law; or the case may only be lodged against specific persons, or involves the compulsory joinder of other parties but the plaintiff has, in spite of been having warned by the court to do so, failed to join them;
- A legal rule has set a time limit for the commencement of the action, but the plaintiff has failed to meet that time limit and has not submitted an application for justification of his or her failure, or the court has rejected the application;
- The statement of claim filed by the legal representative of the plaintiff does not contain any of the following – the name of the court; the name, address, and status of the parties and their representatives in the case; the cause of action; the facts and evidence supporting them; the original documents, which may be relevant for the court

to determine if it has jurisdiction in the case; the specific remedy claimed; indicating the reconciliation procedure (if any); the plaintiff's phone number, facsimile number and e-mail address, written statements made by the plaintiff and the defendant (correspondence, minutes); the documents that evidence that the plaintiff endeavored the conciliation; or, if the legal representative fails to attach the power of attorney; or the stamp duty for the proceedings has not been paid;

- The plaintiff failed to resubmit the statement of claim that was returned for remedying discrepancies (such as the plaintiff failed to indicate the court of competence, the names and addresses of the parties and their counsels, and their status in the action, the cause of action, including a description of the circumstances invoked as the basis of the claim and a description of the evidence supporting the claim, the grounds for competence and jurisdiction of the court, a plea for court decision (pleading), the plaintiff failed to attach the document invoked as evidence underlying the claim in due time, or the resubmitted statement of claim was still incomplete, thereby effectively preventing the evaluation of the statement of claim.

An order for dismissal of a statement of claim must be served on the parties. The defendant must also be served with a copy of the statement of claim.

If the claim is dismissed without issue of summons, the legal consequences stemming from the submission of the statement of claim shall remain in effect if the plaintiff resubmits the statement of claim within thirty days from the effective date of the decision on dismissal in accordance with the relevant regulations, or if the plaintiff seeks enforcement of his or her claim by other legitimate ways.

The court shall dismiss the case ex officio or upon the request of a party in course of the litigation proceeding:

- if the statement of claim should have been rejected without issuing any summons;
- if legal representative of the party was excluded from the procedure (due to reasons like partiality), and this situation is not remedied within the deadline given by the court, or before the time when the hearing immediately preceding the expiry of the deadline is adjourned;
- if the court has ordered - at the defendant's motion – that the nonresident plaintiff under Section 89 to provide security for covering the costs arising out of the litigation, however, the plaintiff did not provide any security within the original or the extended deadline, nor before the time when the hearing immediately preceding the expiry of the deadline is adjourned;
- if the plaintiff failed to show at the first hearing;
- if the plaintiff has withdrawn his action;
- if parties jointly file for dismissal of the action;
- upon the party's death or termination, if the nature of the relationship precludes succession;
- at the party's request, if the terminated counterparty has no successor. In this case, a court-appointed *guardian ad litem* will act in place of the terminated party, but only for the purpose of the termination of the case and not as its legal representative.
- if the plaintiff is required to have legal counsel, and failed to provide for a replacement if legal representation has been terminated in spite of being notified to do so.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Only foreign plaintiff may be ordered to provide security payment for the procedural costs upon the request of the defendant, except in the following cases:

- when an international agreement reached with Hungary directs to the contrary or a reciprocal practice exists with the country of the foreign plaintiff;
- when the amount in the claim of the plaintiff which has been accepted by the defendant, is sufficient to cover the likely costs; or
- when the plaintiff has received full legal assistance.

The amount of the costs to be deposited by a foreign plaintiff is determined by the court after taking into account the likely costs of the action and the amount of the claim accepted by the defendant. Such estimated costs must be deposited in cash, unless the parties agree otherwise. Should the grounds for security for costs cease during the proceedings, then the amount deposited will be returned to the plaintiff upon his or her request and after a hearing with the defendant. No appeal against the amount of security for costs can be directed by a court. A legal entity registered in a Member State of the European Union shall not be ordered to deposit a security payment for the costs.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The court, upon request, may implement provisional measures ordering satisfaction of the claim (counterclaim), or compliance with the application requesting provisional measures, where this is deemed necessary to prevent any imminent threat of damage, to preserve the status quo giving rise to the dispute, or with a view to the requirement for the special protection of the applicant's rights, where the advantages to be gained must always supersede the disadvantage obtained by the measure. The court may render the implementation of provisional measures subject to the provision of security.

Applications for interlocutory measures may not be filed before a statement of claim has been filed. However, the court may decide on the provisional measures before setting the time for the first hearing.

The court has power to modify the ruling ordering the protective measure upon request, or shall do so ex officio if the plaintiff has decided to reduce his claim.

The court must hear the parties before deciding on interlocutory measures. The court may order interlocutory measures without hearing the parties in cases of great importance or urgency.

Facts serving as a basis for an application must be supported by evidence.

An application for an interlocutory measure must be decided by the court without delay. Such an order may be appealed but the order may be temporarily enforced pending the outcome of such appeal. Such an order is effective until it is annulled by a subsequent court order on the request of any party and on hearing the opposing party, or until the court makes a final determination in the case.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

Upon the creditor's request, the court may order the following protective measures to preserve assets if the enforcement order cannot yet be issued for the enforcement of a claim, but the creditor has substantiated that any delay in the enforcement of such claim is in jeopardy:

- pledge of security for money claims; or
- sequestration of specific things.

A protective measure may be ordered if the claim is based on a resolution on the basis of which a certificate of enforcement could otherwise be issued, however it cannot be issued, because:

- the resolution is not yet definitive or not subject to preliminary enforcement; or
- the resolution is already definitive, but the deadline for performance has not yet expired.

A protective measure shall be ordered by the court with jurisdiction to issue the certificate of enforcement on the basis of the decision and if the required conditions are satisfied.

Protective measures may be ordered in connection with claims awarded by judgments that are to be recognized in Hungary in accordance with Council Regulation (EC) No. 44/2001, Council Regulation (EC) No. 4/2009, Regulation (EU) No. 1215/2012 or Regulation (EU) No. 650/2012 of the European Parliament and of the Council. Protective measures shall be ordered by the court referred to in Paragraph c) of Section 16.

A protective measure may be ordered for the enforcement of a claim for which:

- an action for matrimonial property right has been filed;
- an action for infringement of intellectual property rights, or for infringement of the provisions contained in Section 4 or Section 6 of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, has been filed in a Hungarian court under the conditions laid down in the relevant laws; or
- another action has been filed in a Hungarian court with public documents or private documents with full probative force attached in proof of the inception, volume and expiration of the claim.

Such protective measure shall be ordered by the court at which the action has been filed. Where protective measures are requested, a hearing shall be held if necessary.

These protective measures may also be ordered if the action has been lodged under Council Regulation (EC) No. 44/2001, Council Regulation (EC) No. 4/2009 or Regulation (EU) No. 1215/2012 at the court in another Member State of the European Union. Protective measures shall be ordered by the competent court.

A protective measure may be ordered for security of a claim for which an action has been filed before a Hungarian arbitration tribunal, if the judgment creditor:

- has attached the certificate of the arbitration tribunal stating that the arbitration procedure has commenced; and
- has evidenced the inception, volume and expiration of his claim by an authentic document or by a private document with full probative force.

The protective measure shall be ordered by the court having jurisdiction.

The court shall expedite its decisions concerning protective measures and shall issue a ruling thereof within no more than eight days, and shall send a copy of such to the bailiff without delay.

The effect of a protective measure shall last until the enforcement for satisfaction is ordered in the interest of the performance of the claim to be secured, or until the court has terminated the protective measure.

If the procedure for enforcing a claim ends with the injunction of debtor, but the creditor did not file a petition for the enforcement of such claim within three months from the date when all of the general conditions of enforcement are satisfied, the debtor shall be entitled to file a petition with the court following this deadline for the termination of the protective measure.

The court shall terminate the protective measure if the procedure regarding the claim of the debtor was concluded without the obligation of the debtor. In such case the creditor shall bear the costs incurred by such protective measure.

5.5 Are there other interim remedies available? How are these obtained?

A special type of interim remedy is when the court declares the preliminary enforceability of a judgment not yet final and binding. The court may declare preliminary enforceability for example in the following cases:

f. (a) the fulfilment of a claim acknowledged by the defendant;

g. (b) a cash payment based on an obligation assumed in a notarial document or a private document with full probative force if all its conditions, provided its grounds have been proved by such documents; or

h. (c) payment in kind if a plaintiff suffered unreasonably great damage, or damage which is difficult to assess, provided that the plaintiff gives an adequate guarantee.

The court may disregard the declaration of preliminary enforceability if it means a disproportionately more serious burden on the defendant than on the plaintiff. Exceptionally, if well-grounded, the court may disregard the declaration of preliminary enforceability of a judgment with respect to partial fulfilments that expired before the passing of the judgment.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Available remedies are not specified by legal regulations. The court is free to decide on the remedies with the condition that the court cannot apply a remedy that the claimant did not specify in the statement of claim. Punitive damages are not available in Hungary.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

The court may, at the request of the party bearing the burden of proof, order the opposing party to disclose a document in his or her possession which he or she is liable to disclose in accordance with civil law. Such a party must hand over the document in question, especially when it was issued in favor of the party bearing the burden of proof or it attests to a legal relationship involving such party.

Should a required document be in the possession of a third party, that person must be heard as a witness and he or she must be ordered to produce the document during the course of the hearing.

The production of a certified copy or a simple copy of the original document is sufficient if the opposing party does not object and the court does not find it necessary to see the original.

The court may order the original document, a copy or a summary of it to be attached to the papers of the case. Should an original document be of great significance or value, the court must provide for its appropriate safekeeping. The president of the chamber decides when the original documents are returned, if necessary, after a personal hearing. The return of the original may be subject to the submission

of a certified copy of the original document (in case of a sale, purchase agreement or will, this is inevitable). Upon request of the party, the court may arrange for a certified copy with pre-determined charges. The court may also order that a party bearing the burden of proof attach a certified or simple Hungarian language translation of the original document.

A document held by a court, notary public or other authority must be obtained upon the request of the party by the court, if the party is unable to ask the authority holding a document to produce it.

The court may set aside any other proof of evidence which may be proved by documents.

Should it be impossible or cause unreasonable difficulties to bring a document into court, the court (or the president) may inspect it at the location at which it is kept.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

A person or authority may refuse to hand over a document to the court only when it contains qualified data, unless the person or authority has been relieved from keeping the secret.

If, in the opinion of the court, the document sent to it shall be considered to contain business or professional secrets, the court shall ask the person or entity entitled to relieve the obligee from his or her confidentiality obligation, allowing the recognition of such secrets. Such procedure shall not be carried out if the content of the document is not necessarily a business secret or the subject matter of the case is to determine whether the content of the document shall be regarded as public interest data.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses are summoned by the tribunal president to provide an oral evidence. The summons may set out the circumstances which make the hearing of the witness necessary. The witness may be asked to bring with him or her, his or her notes and documents relating to the facts of the case and any other real evidence suitable for proving relevant facts.

The witness may not be present during the trial prior to giving evidence and may only leave after having given evidence with the permission of the court. The witness is examined by the president, but other tribunal members and parties may question the witness as well. The president may permit the parties to question the witness directly.

7.4 What are the rules pertaining to experts?

In general, the court appoints a single expert. The appointment of more than one expert is allowed only where questions relating to different specialist areas arise.

Expert witnesses must be appointed from the register of forensic experts, a business association or institution registered in the register of forensic experts, or a government body, institution or organization so authorized in specific other legislation. Other experts may be appointed only in the absence of the above, and under exceptional circumstances.

Should the parties fail to agree on the expert, the court shall appoint the expert at its own decision. In such cases, the parties must be heard, when necessary, in relation to the appointment of an expert witness.

The court puts questions to the expert, to which the expert must respond. The parties may also initiate questions.

An expert must be provided with all the details necessary to perform his or her duty. For that purpose, he or she may inspect the case documents, be present at the trial, and may put questions to the parties, witnesses and other experts. The expert may also initiate a request to further prove the evidence that should be necessary for the performance of his or her duty.

The court may order an expert to carry out any examination that is required for the preparation of his or her opinion in the absence of the court or the parties.

Should the expert be unable to present his or her opinion immediately, the court may either fix a date for the presentation of his or her evidence or order the expert to submit his or her opinion in writing within a set time period. When the opinion is received by the court, the parties must be informed and the court may call on the expert in person to supplement or explain the written opinion in detail.

An expert may be questioned about his or her opinion subsequent to its presentation. Should any statement or opinion be unclear, incomplete, contradict the findings of another expert on the proved facts, or be otherwise doubtful, the expert must then provide an appropriate explanation at the court's request. Should that prove unsatisfactory, upon the request of either party, the court must call another expert for an opinion. If the court appointed the expert *ex officio*, it may call another expert *ex officio*.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

There are no special regulations regarding the appeal procedure in large commercial disputes. An appeal should be filed with the competent court 15 days within the delivery of the first instance decision.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

In Hungarian law, there are several ways of legal action that are similar to class actions. Their common characteristic is that the Hungarian legislature preferred the *actio popularis* model to the class action type of collective redress, which means that there are no special procedural rules for collecting and aggregating similar individual claims and for choosing the representative plaintiff, but instead a third party, typically state organs and/or civil organizations are authorized by legislative acts to bring actions on behalf of certain group of persons.

These forms of collective redress are separately and differently regulated, each of them is applicable only to a certain type of claims and is attached to a special field of law (e.g. consumer protection) so there is no one common set of procedural rules with horizontal scope that would apply regardless of the rights litigated. (With the amendment of the Code of Civil Procedure, which is in force, the regulation of class action will be materially changed.)

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

The court usually makes a costs' order at the final determination of the case. However, when an expert, witness or other person involved in the process of the litigation "wastes" money (i.e. generates costs without due cause), then, as a punitive measure, he or she may be ordered to pay those costs forthwith. There are cases when a participant to the lawsuit (e.g. a witness or an appointed expert) shall bear certain costs of the procedure independently from the outcome of the lawsuit. In these cases, it is not a precondition of the court's decision on the costs that the participant who shall bear such cost be the winner or the loser of the lawsuit. In these cases, the court decides on the cost at the time of its occurrence, i.e. before the termination of the lawsuit and the adoption of the court's judgment / final and binding decision. For example, the court shall order:

- any witness or expert who failed to appear in court as required despite of a writ of summons (appointment), and failed to show cause beforehand, or if absent without official leave;
- any witness who refused to testify or cooperate, as well as any expert who refused to present an opinion without proper cause or in violation of the court's binding decision, upon being advised of the consequences; and
- any expert who is in delay in expressing an opinion without just cause, or if failing to notify the court in advance of any anticipated delay in the completion of his assessment within the prescribed time limit; to cover the costs incurred in consequence, and may impose a procedural fine as well.

Similarly, when a party shall bear a cost independently from the outcome of the case, such party may also be ordered to pay that cost forthwith. The court decides on the costs *ex officio*, except in the case of the winning party's opposite request. In the case of a settlement between the parties, the court decides on the costs only at request of the parties.

The general rule is that the unsuccessful party is liable to pay his or her own costs in addition to those of the other party. Exceptions are made in cases where a defendant readily acknowledged the plaintiff's claim at the first hearing or had not served cause for filing a legal action. In such cases, the plaintiff may be liable for the costs of the defendant.

Where a party caused unreasonable or unnecessary costs, he or she may be liable for those costs without regard to the outcome of the case. Where a party fails to carry out certain acts in the course of the procedure, falls in delay with certain acts without justification, fails to meet a deadline or time limit, or causes unnecessary expenses in any other way, such party may not claim any reimbursement for the expenses resulting therefrom, even if he succeeds in the litigation, or may be ordered to cover the costs of the opposing party.

Where a party has succeeded in establishing only a part of his or her case, the court apportions the liability for costs in proportion to the percentage of success attained by a party. If the ratio of success is approximately balanced between the parties after considering deposited costs, then each party will be ordered to bear their respective costs.

As a general rule, joint litigants bear the costs awarded against them in equal proportions. When the relationship of interest between joint litigants is substantially unbalanced, costs are apportioned to reflect their interest. Any costs emanating solely from the interest of one group of litigants, may not burden the other litigants.

When an action is initiated by a public prosecutor or other organization, for example, an insurance company, one is entitled by law to proceed in pursuit of the legal interest of a litigant. Costs awarded to the winning litigant are payable to the party who directly incurred the costs. In the event that the case is lost, liability to pay the costs will fall on the party that initiated the action. If there was no consensus between the parties relating to the conduct of the case, liability for the costs is borne by the party that caused the costs to be incurred.

Additional detailed regulations apply to full and partial cost exemption (*költségmentesség*), duty exemption (*illetékmentesség*), right of prenotation of duty (*illetékfeljegyzési jog*), right of prenotation of cost (*költségfeljegyzési jog*), burden of costs by the state and requests for exemption.

8.4 How is interest on costs awarded and calculated?

In general, interest is not awarded on procedural costs. However, in case of a default on the payment of the procedural costs, interest may be requested. Interest levied on delayed payments should correspond to the official interest rate of the Hungarian National Bank.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

The enforcement of judgments is regulated by Act LIII of 1994 on Judicial Enforcement. Judicial enforcement, in general, should be ordered by the issue of an enforcement order. The court will issue an enforcement order upon the request of the creditor. The types of enforcement orders are regulated in the Act (e.g. certificate of enforcement issued by the court or a notary public; document with an enforcement clause issued by the court or a notary public and a request made to the central Hungarian authority designated under Council Regulation (EC) No. 4/2009 for obtaining information concerning an individual who owes, or who is alleged to owe, maintenance).

The enforcement order may be issued if the resolution that needs to be executed:

- contains an obligation (ruling against the judgment debtor);
- is definitive or is subject to preliminary enforcement; and
- the deadline of performance has expired.

The enforcement is executed by a bailiff. The bailiff may apply coercive measures that limit debtors' property rights and their personal rights. The most important coercive measures applied during the enforcement are the following:

- assignment of wages or other earnings;
- attachment and sales of personal assets;
- deprivation of sums handled by financial institutions, blocking bank accounts;
- attachment of debtor's claim against third parties; and
- attachment and sale of real estate.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

With regards to cross border transactions, parties are free to agree on the applicable law of the contract. However, the application of foreign law shall be disregarded if it conflicts with the Hungarian public order, or if a foreign law is attached to a foreign component created by the parties artificially, or through pretense for the purpose of avoiding the law otherwise applicable (fraudulent attachment).

In addition, many areas of law have mandatory rules that override the chosen foreign law clause, such as company law, securities law, and consumer protection law.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Parties, in general, are free to choose the jurisdiction of a specific court (with minor exceptions) or the courts of a specific country. However, exclusive jurisdiction of Hungarian courts is provided in several cases (e.g. civil actions against the state, actions in connection with IP rights granted in Hungary, actions relating to real property located in Hungary, etc.).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Hungary is a party to The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which contains a procedure that can be used to effect service in Hungarian jurisdictions. Where the proceedings are to be served under this convention, the party seeking service can submit a request to the Ministry of Justice or the appropriate Central Authority. The Central Authority transmits the request to competent authorities who serve the documents.

Regulation (EC) 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters applies between Hungary and other EU Member States.

All means of transmission provided in the EU Service Regulation are applicable. In practice, direct postal service and transmission with the assistance of receiving authorities are used most often. Application for and certificate of service is facilitated by standard forms. The designated receiving agency in Hungary is the Ministry of Justice. If the addressee does not understand the language of the document, he can refuse to accept it.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

Taking of evidence in non-EU countries

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters sets out a procedure that can be used to take evidence from a Hungarian witness, with the derogation that second section of Article 4 and Article 16 of the Convention are excluded by Hungary (further reservation is given to Article 18). The designated Central Authority in Hungary for the taking of evidence is the Ministry of Justice.

Taking of evidence in EU countries

Council Regulation (EC) No. 1206/2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters regulates the procedure of taking of evidence in legal proceedings in civil and commercial matters between Member States. The foreign court before which the procedure is taking place can directly contact the court of the Member State where the witness is to be heard. Jurisdiction is based on the domicile of the witness. The Annexes of the Regulation provides for forms that should be used for submitting a request. Requests are executed in accordance with the law of the requested Member State. The Central Authority responsible for facilitating the procedure is the Ministry of Justice.

9.5 How can a party enforce a foreign judgment in the local courts?

The enforcement of foreign judgments is, similarly to domestic judgments, regulated by Act LIII of 1994 on Judicial Enforcement. According to the Act, the resolutions of foreign courts and foreign arbitration tribunals may only be executed if it is expressly provided for by an international convention or reciprocity (in the absence of which the Law Decree on International Private Law applies). Also, other preconditions of enforcement are that the decision of a foreign court should contain an obligation (ruling against the judgment debtor); it should be definitive or subject to preliminary enforcement, and; the deadline of performance should have been expired. In respect of a foreign judgment that may be executed, the competent court will adopt a ruling of confirmation of enforcement for such foreign decision to confirm that it may be executed in accordance with Hungarian law the same way as a decision of a Hungarian court (arbitration court). In some cases, besides the confirmation order, the enforcement of a foreign resolution requires the recognition of the foreign resolution as well.

The enforcement of foreign judgments is also regulated by (i) Regulation (EU) 1215/2012 regarding legal proceedings instituted, authentic instruments formally drawn up or registered and court settlements approved or concluded on or after 10 January 2015; and (ii) Regulation (EC) 44/2001 Regarding Legal Proceedings Instituted, Authentic Instruments Formally Drawn Up or Registered and Court Settlements Approved or Concluded before 10 January 2015.

As a general rule, in accordance with Regulation (EU) 1215/2012 and Regulation (EC) 44/2001, a judgment given in a Member State shall be recognized in other Member States without any special procedure being required. Pursuant to Regulation (EC) 44/2001, a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. While under the effect of Regulation (EU)

1215/2012, Regarding Legal Proceedings Instituted, Authentic Instruments Formally Drawn Up or Registered and Court Settlements Approved or Concluded on or after 10 January 2015, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. Therefore, the enforcement procedure has become easier, faster and more efficient.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

The most commonly used ADR procedure is arbitration. Although mediation is also possible, it has not yet become as popular for large commercial disputes. Arbitration is regulated by Act LXXI of 1994 on Arbitration, which closely follows the UNCITRAL Model Law on International Commercial Arbitration 1985 and is used in several industries.

In 2012, the Arbitration Act was amended in order to introduce a statutory prohibition on arbitration concerning national assets. Accordingly, as of 2012 the Arbitration Act stipulates that no arbitration is permitted if the subject thereof is a national asset as defined by Act CXCVI of 2011 on National Assets, or any right or claim relating to such asset.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Arbitration and mediation procedures only apply if the parties agree to it, which means that the court cannot compel the parties to use of arbitration.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

With regards to arbitration proceedings, the parties are free to establish their own procedures with respect to how evidence will be given. Should the parties fail to agree on the relevant procedure, the arbitral tribunal will determine the procedures to be followed, including the rules of evidence (in general, they apply the rules provided by the applicable arbitration rules).

Confidentiality is one of the key characteristics of arbitration, and it is supported by the Arbitration Act and the procedural rules of arbitration courts. Parties may specifically agree on confidentiality with respect to the specific procedure.

10.4 How are costs dealt with in ADR?

Parties are free to agree on the legal fees and costs of arbitration and mediation. In arbitration, the parties often refer to the costs rules provided by the applicable arbitration procedural rules.

10.5 Which bodies offer ADR in your jurisdiction?

The main arbitration organizations are the:

- Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (ACHCCI) (http://www.mkik.hu)
- Arbitration Court of the Money and Capital Market (AMCM) (http://www.valasztottbirosag.hu)
- Arbitration Court attached to the Hungarian Agricultural Chamber (AAC) (http://ww.nak.hu)
- Arbitration Court of Energy (ACE) (http://www.eavb.hu/)
- Permanent Sport Arbitration Court (http://olimpia.hu/sport-allando-valasztottbirosag-)

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

The conception of the new Code of Civil Procedure was adopted by the Hungarian Government on 14 January 2015. According to its conception, the new Act will make litigation faster and will reshape the whole procedural system.

According to the government's plan, the Act comes into force on January 1, 2018.

Italy

Sara Biglieri

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Arbitration is the central method of dispute resolution of large commercial disputes in Italy, in particular by parties seeking more flexibility of procedure, a more reasonable time-span, as well as highly skilled arbitrators.

Due to the higher costs of arbitration, litigation is still the most used dispute resolution method in Italy, especially for medium/low amount disputes. The procedure is mainly governed by the Italian Civil Procedure Code, together with several laws providing for specific regulations which might be applied in certain situations.

However, due to the great burden on the ordinary courts, and the consequent long time usually required by ordinary proceedings, quite recently the Italian legislature adopted several rules aimed at trying to enact ADR (see points 10.1 and following below).

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The Italian Civil Code provides for two different main limitation periods:

Article 2946 provides for a general 10-year statutory limitation period, save for the exceptions found in specific rules (for example, a 20-year limitation period is provided for certain actions concerning real estate rights).

Article 2947 provides for a general 5-year limitation period for tort/non-contractual liability rights, starting from the day when the tort occurred. Also, for torts, there are special limitation periods concerning specific rights (for example, the limitation period is limited to 2 years with regards to compensation arising from vehicles and watercrafts circulation). In the event that the action which entitles the party to request compensation for a tort is also qualified as crime and criminal law provides for a longer limitation period, the criminal limitation period will apply instead of the general one.

Article 2949 provides for a special 5-year limitation period for (i) corporate rights concerning companies enrolled with the Entrepreneurships' Register, and (ii) an action which the company's creditors may bring against the company's directors in cases provided for by the law.

Other limitation periods are provided for additional specific situations.

Article 2935 of the Italian Civil Code provides that "*the limitation period starts to run from the day that the right can be asserted*". Therefore, as also recently affirmed by the Italian Supreme Court, the limitation period starts to run from the day that the contractual right may be exercised or the day that the tort, and any subsequent damage, becomes objectively noticeable and recognizable.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The Italian system provides 139 Tribunals of first instance with general criminal and civil jurisdiction; 285 Justices of the Peace have jurisdiction over civil law cases concerning lower-amount disputes.

Specialized sections of the main Tribunals are also available for specific subject matters, such as business/intellectual property law, labor law, family law, etc. The judges composing these specialized sections are chosen due to their special skills and judge as a board (i.e. not individually).

In Italy, there are also special jurisdictions concerning administrative (i.e. public administration law), tax and military criminal proceedings.

For further information, please see the website of the Ministry of Justice (https://www.giustizia.it, in Italian).

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Under the EC Directive no. 249/1977 – as enacted by Law no. 31/1982 – every lawyer of a Member State is entitled to temporarily provide services in another Member State without being restricted by his/her citizenship and/or residence.

For the purposes of the aforesaid law, the UE professionals who have the following titles are considered to be lawyers: ovact-advocaat (Belgium); advokat (Denmark); rechtsanwalt (Germany); avocat (France); barrister-solicitor (Ireland); avocat-

avoué (Luxembourg); advocaat (Netherlands); advocate-barrister-solicitor (UK); Avbokat (Bulgaria); avocat (Romania).

The aforesaid lawyers must meet the requirements set forth by Law no. 31/1982. Specifically, they must indicate their professional title in their language and state the professional organization/jurisdictional authority which authorized them to provide their services, they comply with the rules of law, as well as of professional ethics applicable to Italian lawyers, etc.

Note that there are several incompatibilities with the conduct of the profession of lawyer (e.g. the professions of notary public, trader, journalist, employee of a private or public company/entity, with the exception of the lawyers belonging to the legal department of same private/public company/entity for the lawsuits concerning same company/entity).

Court activities may be provided jointly with an Italian lawyer only, on the condition that the undertaking of the appointment is also promptly communicated to the local Authority involved as well as to the chairman of the local Bar Association, who may request that the lawyer provide documentation concerning the professional title and his or her activity in the state of origin.

Moreover, a lawyer of a different Member State may permanently work in Italy provided that:

he/she obtains the recognition of the professional title obtained in another Member State, subject to the passing of a specific qualification exam in Italy; or, alternatively

actually and regularly exercises the legal profession in Italy, in an Italian firm, for at least three years (during which the foreign lawyer is enrolled with the special section of the Italian Bar Association called "established lawyers", i.e. *avvocato stabilito*). Following this period, he/she may request an exemption from undergoing the aforesaid qualification exam and be enrolled with the Italian Bar Association. Note that an *avvocato stabilito* who wishes to represent a client in Court before completion of the aforesaid process must act in accordance with the expectations of a lawyer regularly qualified in Italy.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

In Italy, lawyers may freely decide how to quantify legal fees to be charged on their own clients (Article 13, paragraph 3 of the Law no. 247/2012, so called Forensic Professional Law, states that parties are free to agree on the amount of legal fees).

However, it is expressly prohibited for a lawyer and client to agree that the lawyer's fee consists of the acquisition, by that same lawyer of the property or asset which is the object of a litigation.

A lawyer's/law firm's fee for the provision of professional services is normally agreed upon in writing at the moment of appointment by the client. However, in the event that no written agreement has been entered into by the lawyer and the client, the professional fees may be quantified according to the Ministry Decree no. 55/2014, which provides the guidelines applicable in these cases (type of activity carried out, claim, competent court, etc.).

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Litigation is usually funded by each party paying their own costs.

Third party funding for litigation costs is not used in Italy.

On the contrary, insurance for litigation costs are available in Italy.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Pursuant to Article 128 of the Italian Civil Procedure Code, court proceedings are open to the public, unless the judge in charge of the proceedings mandates that the hearing be private due to reasons of State security, public policy or morality.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

The Italian system does not provide for a specific pre-trial procedure.

However, as it will be explained under question 10.2, the Italian legal system, under certain circumstances, mandates that the parties carry out a mediation or an "assisted negotiation" procedure before bringing a lawsuit.

4.3 How does a typical court proceeding unfold?

The service of the plaintiff's writ of summons on the defendant must be carried out in compliance with the provisions of

Article no. 163 and pursuant to the Italian Civil Procedure Code. In the writ of summons, the plaintiff must state the reasons in fact and at law supporting his/her claim, as well as state the measures/orders that he requests that the judge grant. After service, the writ of summons must be filed in Court together with the documents and the requests on evidence that the plaintiff deems necessary to justify his/her requests.

The date of the first hearing is chosen by the plaintiff and there must be at least 90 days (150 days in case of service of the summons abroad) between the service of the summons and the first hearing, so as to allow sufficient time for the defendant to prepare and file his/her statement of defence.

The statement of defence must be filed in court by the defendant at least 20 days before the first hearing, together with the documents which the defendant decides to file. This is also the moment that the defendant may extend the lawsuit against third parties, and/or file a counterclaim against the plaintiff and/or such third parties. The contents of the statement of defence are analogous to those of the writ of summons.

During the first hearing, the judge verifies that the procedure was correctly followed and allows, where requested, an extension of the lawsuit against third parties. Upon request by the parties, the judge may allow the parties to exchange three subsequent written defences (pursuant to Article 183, paragraph 6 of the Italian Civil Procedure Code) with the following deadlines:

- First written defence: This is due 30 days after the date of the first hearing. With this defence, the parties may amend or specify their original requests and conclusions;
- Second written defence: This is due 30 days after the deadline for filing the first written defence. With this defense, the parties may reply to the new/amended conclusions filed by the other parties, must file their documents and their requests on evidence; and
- Third written defence: This is due 20 days after the deadline for filing the second written defence. This written defence may only be used for filing documents/requests on evidence to reply to the counterparts' documents/evidence.

Typically, a hearing for the discussion of the evidence requested by the parties follows. In this venue, the parties discuss their respective requests on evidence and the judge decides what investigation may be necessary and relevant to decide the lawsuit (e.g. hearing witness evidence, appointment of an expert witness where a technical issue must be investigated and so on). The judge also decides whether a new hearing may be necessary, after carrying out the requested investigations, and discusses their outcome, and/or whether the investigative phase of the proceedings may be declared formally ended.

At the end of the investigative phase, the judge schedules a final hearing for the statement of the parties' final conclusions.

At any time before the hearing for the statement of final conclusions, the judge may schedule a hearing for carrying out an attempt of conciliation of the respective claims.

Thereafter, the parties are usually allowed to exchange their final papers and relevant replies, after which the issue of the court's judgment follows.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

The Italian legal system does not allow a party to have a case dismissed before a full trial, since any interim measure, also granted before trial, must be followed by full trial on the merits of the case.

Only in the event that an injunction of payment (see point 5.3 below) is not challenged by the debtor within the deadline of 40 days as from service of the injunction, the injunction becomes definitive and may be enforced by the creditor.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

No, the Italian Civil Procedure Code does not provide this kind of measure.

However, under certain circumstances, the judge in charge of the proceedings may order the party requesting certain measures to be charged with a security. The most relevant cases are:

- in the case of an appeal, where the appellant requests that the enforcement of the first-degree judgment be suspended for serious and justified reasons, the judge may order such suspensions and provide that the requesting party be charged with a security (see Article 283 of the Italian Civil Procedure Code); or
- under certain circumstances, any debtor has the right to challenge the creditor's right to carry on an enforcement

procedure. In such a case, the Judge may suspend the enforcement procedure that and request the opposing debtor provide for a security (see Article 624 of the Italian Civil Procedure Code)

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Injunction of payment: pursuant to Article 633 of the Italian Civil Procedure Code, a party which is creditor of a liquid amount of money, a determined amount of interchangeable goods, or the delivery of an identified good may request that the judge issue an injunction of payment (or of delivery). The party served with such order is entitled to challenge it by serving a writ of summons within 40 days from service of the order. In the event that the order is not challenged within the stated deadline, it will become definitive and no longer challengeable (see point 5.1 above).

Interim measures: pursuant to Article 669*bis* and Article 700 of the Italian Civil Procedure Code, a party can file a request for interim measures of varied nature. Said party is required to prove the existence of the *periculum in mora* (i.e. the danger in delay) and *the fumus boni iuris* (i.e. the likelihood of success on the merit of the case) in order to obtain such measures.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

Freezing injunctions are set forth in Articles 670, 671 and 687 of the Italian Civil Procedure Code.

Article 670: judge may authorize the freezing of certain goods or properties whose title is under dispute. In addition to the above, the court may also authorize freezing with regard to anything useful as evidence and the exhibition of said things under dispute.

Article 671: Such an injunction may be granted by the court when the prospective creditor has actual grounds to fear for the loss of the debtor's patrimonial guarantee of the credit under dispute. In such cases, the court may authorize the freezing of goods or properties.

Article 687: The last case of injunction occurs in the event that the debtor has already offered certain goods or certain amounts of money as payment of his/her debt but, for example, the suitability of the good offered is subject of dispute.

5.5 Are there other interim remedies available? How are these obtained?

In addition to the proceedings already explained above, the Legislative Decree no. 30/2005 (the so called Industrial Property Code) provides for interim remedies concerning IP law.

Article 129 of the Decree grants the owner of an industrial property right interim measures in case of infringement of his/her property right.

In particular, the owner may request and obtain, under certain circumstances: (i) the "description of goods"; and (ii) "seizure of goods".

Article 131 of the Decree also provides that "The owner of an industrial property right may ask that an injunction be issued against any imminent infringement of his right and the continuance or repetition of any infringements under way". In such cases, the relevant provisions of the Italian Civil Procedure Code shall apply.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

As a conclusion to the proceedings, the court may rule on all the queries formulated by the parties in order to fully define the merits of the case, or issue a judgment limited to the definition of procedural issues.

The court may therefore condemn the losing party to pay patrimonial/non-patrimonial damage or to specific performance of certain behaviors (e.g. to deliver certain goods, see Article 2930 of the Italian Civil Code).

According to Article 2931 of the Italian Civil Code, in case of breach of an obligation of specific performance, the creditor may obtain the execution of the same to be done at the losing party's expenses.

According to Article 2932 of the Italian Civil Code, in case of breach of an obligation to enter into an agreement, the other contractual party, under certain circumstances, may obtain a decision which reproduces the effects of the agreement not executed by the other party.

In the Italian legal system, damages are only compensatory and therefore punitive damages are not allowed (the Italian Supreme Court with judgment no. 1183 of 2007, affirming

the inadmissibility of the enforcement of a foreign judgment which condemns the losing party to make payment of punitive damages, stated that such damages are against the Country's public policy).

However, a recent judgment of the Italian Supreme Court (no.7613/2015) seems to be more open on the possibility or admitting punitive damages, and therefore we cannot exclude that this matter will be subject to review.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

The plaintiff, in his/her writ of summons, and the defendant, in his/her statement of defence, have the duty to specifically indicate the documents they deem relevant and useful for the proceedings. The last moment that, in the course of the proceedings, the parties may file documents (also as a reply to the counterparty's requests) are the deadlines for written defences no. 2 and 3, pursuant to Article 183, paragraph 6 of the Italian Civil Procedure Code (see point 4.3 above in this regard).

Moreover, pursuant to Article 210 of the Italian Civil Procedure Code, the court, upon request of a party to the proceedings, or a third party, may order the other party, or a third party, to provide certain identified evidence which is in its possession and for which acquisition is deemed necessary for the proceedings. The judge shall also consider the behavior of the party meeting or disregarding the order for the purpose of forming his/her judgment on the case.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

As a general principle, each party has the burden of disclosing the documents required to prove his/her case.

However, Articles 28 and 48 of the Deontological Forensic Code state that lawyers must keep confidential, and cannot file as evidence in the proceedings, the communications exchanged between lawyers and qualified as confidential, and/or concerning settlement proposals and relevant replies. In case of breach of these provisions, the lawyer may be subject to sanctions by the Bar Association.

In the event of mediation, Articles 9-10 of the Legislative Decree no. 28/2010 shall also apply. In particular, Article 10 of said Decree states that "the statements rendered or the information acquired during the mediation proceedings cannot be used in a lawsuit concerning - even partially - the same claims, which is brought, reinstated or continued after the negative outcome of the mediation proceedings, save in the event of consent of the party who rendered said statements/information."

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

As a general principle, in the Italian legal system, witnesses provide facts to the court through oral evidence, during a hearing specifically held for that purpose.

However, Article 257*bis* of the Italian Civil Procedure Code provides that written evidence is admissible upon the parties' agreement only, having considered the nature of the case at issue and any other relevant circumstance.

7.4 What are the rules pertaining to experts?

Rules pertaining to experts are provided for by Articles 61 – 65 and 191 – 201 of the Italian Civil Procedure Code.

A technical expert is the *alter ego* of the judge, with specific skills in certain technical fields unknown to the judge himself/herself and, in order to provide services in court, must be enrolled in special lists.

The expert appointed by the court must provide his/her services *super partes* and must be independent from the interests at issue in the lawsuit and/or of the parties involved. Lacking this independency, the parties may challenge the appointment and request the judge appoint a different expert.

The expert has the duty to carry out all the activities appointed to him/her by the judge, to answer to all the queries posed by same, and, where authorized by the judge, to request clarifications and documents from the parties to the litigation. If the activities are carried out without the assistance of the judge, the expert must draw a report of the activities carried out. This report must be sent to the experts appointed by parties who, in compliance with the deadline provided, may file their notes and comments on the court-appointed expert's report.

Thereafter, the court-appointed expert shall file his/her final report with the judge, also answering to the comments/objections raised by the parties' experts.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

For large commercial disputes, rules regulating the appeal of ordinary judgment also apply.

If the judgment was issued by a first instance Tribunal (*Tribunale*), the losing party is entitled to file an appeal before the Court of Appeal. The party has 30 days, starting from the service of the first-degree judgement subject to appeal, in order to appeal said judgment. Alternatively (i.e. in the event that the first-degree judgment was not served on the other party) the deadline is 6 months as from publication (i.e. filing with the court registry) of the first-degree judgment, complete with the statement of reasons.

In the event that several losing parties appeal the judgment separately, all the appeals must be consolidated into a sole proceeding. However, the party served with the appeal is also entitled to counter-appeal the judgment with its statement of defence.

With regard to the appeal of judgments issued by a Court of Appeal, in certain specific cases, the losing party has a further route of appeal to the Italian Supreme Court (*Corte di Cassazione*), which will basically verify compliance of the appealed judgment with the rules of law applicable to the case at issue. The deadline for a Supreme Court is equal to 60 days starting from the service of the second-degree judgment or, lacking such service, 6 months as from publication of the second-degree judgement.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

The Legislative Decree no. 206/2005, also known as the Consumers' Code, provides the possibility of class action with regard to the ascertainment of liabilities, and subsequent compensation of damages suffered by consumers with regard to (i) contractual liability (for example, agreements entered into by consumers containing vexatious clauses); (ii) product liability, regardless of the existence of a contractual relationship; and (iii) damages suffered by consumers due to unfair or anti-competitive commercial practices.

The Legislative Decree no. 198/2009 provides for an additional type of class action concerning the efficiency of Public Administration and other entities which supply public services. Such class actions are aimed at protecting legitimate interests (*interessi legittimi*, i.e. the right to challenge the Public Administration's activities). The affected party may bring a claim pursuant to the provisions of said Decree in order to restore the efficiency of the Public Administration/suppliers of services, if:

- legitimate interests are "juridically relevant and homogeneous to a group of users and consumers"; and
- the failed/delayed issuance of certain administrative measures or the un-fulfilment of certain standards to be provided by suppliers of public services, causes a direct, actual and present damage.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

As a general rule, the judge, issuing the judgment, orders the losing party to refund the legal costs in favor of the other party and quantifies said costs. However, the judge may exclude from the calculation, those costs deemed excessive or unjustified, and may set-off, in whole or in part, legal costs in the event that he/she deems that a party acted not entirely in good faith, or for other reasons, at the judge's discretion.

Moreover, if the judge grants award to one party in an amount that is equal or lower than the counterparty's settlement proposal, the Judge shall order the winning party - who turned down the aforesaid settlement proposal without a justified reason - to pay to the other party the expenses incurred after the settlement proposal.

Legal costs in litigation shall usually be quantified by the Court on a fixed basis, based on the amounts provided for by the Ministry Decree no. 55/2014.

8.4 How is interest on costs awarded and calculated?

There are no specific rules on this issue, hence ordinary legal interest rates shall apply to costs awarded by the Judge.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

The enforcement procedure may only take place based upon certain enforceable titles (*titolo esecutivo*) which are expressly listed by law (e.g. court's judgments, private deeds executed before a Notary Public, etc.) and only after service on the debtor of

the relevant writ of execution, which grants the latter a period of time (minimum 10 days) to fulfil its obligations prior to enforcement.

Costs, allocation:
The enforcement procedure – in the same way as any proceedings in the merits – requires the payment of a fixed Court tax (*contributo unificato*), which is due in a fixed amount (presently varying between €43.00 and 278.00) depending on the type of enforcement required (e.g. on real estate, on movables, etc.) and/or on the value of the enforced credit.

Other costs may be assumed depending on the type of enforcement concerned (e.g. costs for searches on the assets to be seized, registration of the procedure in the Public Registers, appointment of a Notary Public for selling real estate, etc.).

All costs assumed by the enforcement procedure should be borne by the debtor.

Duration of procedure
The enforcement procedure takes quite a long time to complete: For example, enforcement concerning real estate lasts about three years; the seizure of bank accounts takes up to one year; the seizure of movables takes up to a year and a half.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Yes, local courts enforce the parties' choice of the law applicable to the contract and therefore the court has to rule in accordance with the provisions of the applicable foreign law.

However, such choice of law cannot conflict with certain mandatory rules of the Italian legal system (for example, public policy principles/rules) and, in particular, when all other elements relevant to the situation at the time of the choice are located in Italy, the choice of the parties shall not prejudice the application of the law of Italy (in accordance with the provisions of the EC Regulation no. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)).

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

As a general principle, Italian courts respect the choice of jurisdiction made by the parties of a contract. However, according to Italian law, contractual clauses concerning choice of jurisdiction must be specifically approved and signed by the parties, as they are considered vexatious clauses.

However, pursuant to Article 4, par. 2 of the Law no. 218/1995 (Italian Law on Private International Law), the parties to a contract may waive the Italian jurisdiction only if; (a) a written proof of said waiver is provided, and (b) said waiver concerns available rights. Therefore, Italian courts may claim jurisdiction over a dispute in cases where the parties' waiver of jurisdiction is lacking in said requirements.

Choice of jurisdiction within EU boundaries is governed by EC Regulation no. 44/2001 (as amended by EU Regulation no. 1215/2012, which is applicable since January 2015), which allows the parties to agree upon a contractual waiver of jurisdiction (see Article 25 of EU Regulation no. 1215/2012). However, under certain circumstances, said waiver of jurisdiction is not allowed (see Article 24 of EU Regulation no. 1215/2012).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

The rules concerning service of with in Italy are set forth by the Italian Civil Procedure Code.

As a general rule, bailiffs carry out the services of the Public Prosecutor, or of the clerk of the court, upon request of the party

Where authorized by the Bar association, lawyers are also entitled to carry out service via post and certified email.

The EC Regulation no.1393/2007 is applicable with regard to service of deeds in civil or commercial matters within the EU.

Service within other countries is ruled by The Hague Conventions of 01 March 1954 and 15 November 1965, and by several bilateral conventions (for further information, see the website of the Ministry of Foreign Affairs at http://www.esteri.it/mae/approfondimenti/2014/2014guida_notifiche.pdf, in Italian).

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

Italy ratified The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and the procedure set forth in said convention is applicable when a foreign contracting state requests an Italian witness in a foreign jurisdiction.

Moreover, the provisions of the EC Regulation no. 1206/2001 are applicable when the process of taking evidence takes place within the EU boundaries.

9.5 How can a party enforce a foreign judgment in the local courts?

A foreign judgment is recognized:

- with automatic affect, if the judgment is issued in an EU Member State (pursuant to EC Regulation no. 44/2001 as modified by UE Regulation no. 1215/2012), provided that an Italian translation (sworn before the Tribunal by a professional translator) is duly attached; or
- subject to a formal judicial review of its compliance with certain mandatory principles under Italian law (*delibazione*), in the event that the foreign judgment (i) is rendered in a State other than an EU Member State, and (ii) is challenged before an Italian Court.

As far as awards rendered by Arbitration Courts are concerned, their recognition is subject to the provisions of the New York Convention signed on 10 June 1958 (however limited to the contracting states).

The Italian Civil Procedure Code, enacting the Convention, provides for a mere formal judicial review of the award in order to be recognized.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

The most commonly used ADR procedures available in Italy are arbitration and mediation. Arbitration is usually the ADR procedure of choice for large commercial disputes. This is due to the fact that arbitration provides for a tailor-made procedure, lasts a shorter duration than ordinary court proceedings and, generally speaking, has a higher level of confidentiality and flexibility.

Data provided by the Ministry of Justice in 2015 also reports a positive trend in mediation procedures, with a 22% increase in the request for mediation proceedings since 2014. The 2015 data also noted that 26% of the 57,000 new mediation procedures started in 2015 concern banking agreements. The average value of disputes subject to mediation is equal to Euro 175,675.00, although 35% of the successful mediations concerns lower value disputes (between Euro 1,000 and 5,000).

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

As general principle, arbitration can never be mandatory, thus the parties or an agreement, or the parties of a dispute, are required to agree upon the transfer of their dispute to arbitration.

On the mediation side, Legislative Decree no. 98/2013 provides for a list of matters (e.g. lease, lease of business branch, insurance/banking/financial contracts, slander perpetrated in the press or in other media, damages consequent to medical liability, etc.) which mandatorily require the parties to undertake mediation before starting a lawsuit before a court.

In the event that a lawsuit is started without previously carrying out the mandatory mediation, at the first hearing, the judge shall suspend the ordinary proceedings and order that parties carry out the mediation by a certain deadline. Should the parties fail to comply with such order, the litigation shall be terminated.

Moreover, a summoned party who does not participate in the abovementioned mandatory mediation without providing for a justified reason is required to pay to the Government Budget a sum equal to the fixed Court tax (*contributo unificato*), in order to start a lawsuit.

In all cases where mediation is not mandatory, parties are free to resort to mediation proceedings as ADR method and, in the case of subsequent litigation, the judge may consider the behavior of the party who did not provide a justified reason not to participate in the mediation, as a piece of evidence in the ordinary lawsuit.

Finally, Law no. 162/2014 sets forth the mandatory assisted negotiation proceedings, which are applicable to disputes where a party requests the payment of a sum lower than €50,000.00 (as well as in cases of disputes regarding the circulation of vehicles and watercrafts).

Any party who refuses to participate in assisted negotiation entitles the other party to file a complaint before the court. However, contrary to the mandatory mediation procedure, the party who does not participate is not charged any fee.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

As stated above, arbitration is a tailor-made procedure and therefore the parties are free to establish the rules which best suit their needs. The above is also true also with regards to the rules concerning evidence.

The arbitrator/arbitral tribunal begins the case by taking all the relevant and admissible evidence in the manner it deems appropriate.

Confidentiality is a core value of ADR procedures and therefore the parties often start ADR procedures with the sole purpose of safeguarding the confidentiality of the information with which the dispute is concerned.

10.4 How are costs dealt with in ADR?

Arbitration: The costs of arbitration depend upon the value of the dispute, which is the sum of the claims filed by all parties. Such costs are usually awarded by the arbitrators with the final award. The losing party is usually ordered to refund the costs of the procedure.

With respect to arbitration "managed" by specialized bodies (see point 10.5 below), the arbitration bodies usually provide for tables which allow the parties to know in advance the extent of the costs to be incurred. In addition, when the request for arbitration and the statement of defence have been filed by the parties, the secretariat of the arbitration body will usually direct the parties to pay an advance on the costs of arbitration. The balance of arbitration costs shall be made based on the final determination of the arbitral tribunal and issued before the award is filed.

Arbitration specialized bodies' regulations also typically provide for joint liability of the parties, with respect to paying the costs of the proceedings.

10.5 Which bodies offer ADR in your jurisdiction?

Mediation: Article 16 of the Legislative Decree no. 28/2010 states that public and private entities which provide the highest levels of reliability and efficiency are authorized to create mediation bodies which may settle disputes upon request of the parties. Such bodies must comply with the professional requirements set forth by the law and must be enrolled with a special Registry of mediation bodies kept by the Ministry of Justice in accordance with the Ministry of Economic Development.

Arbitration: With regards to arbitration, several Italian Chambers of Commerce have created Arbitration Chambers, which assist the parties in the organization and management of the whole procedure, with special attention to the applicable rules and the appointment of arbitrators most suitable for the parties' needs. Said "managed" procedures also allow a clearer individualization of the costs to be incurred by the parties.

See, e.g., the regulation of the Arbitration Chamber of Milan at the following website: http://www.camera-arbitrale.it/it/Arbitrato/Regolamento.php?id=64.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

On 8 March 2016, the Ministry of Justice created a Commission to develop a project for reform of the ADR procedures (with specific attention to mediation, assisted negotiation, and arbitration). The goal is to harmonize the current situation, which is currently the outcome of several years of reforms. The Ministry of Justice set the 30 September 2016 as the deadline to file a proposal for reform.

Kazakhstan

Kanat Skakov, Nazym Bekturova, Saltanat Mukash

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

The primary dispute resolution method in Kazakhstan for resolving commercial disputes is litigation. Arbitration is the second most popular method in specific sectors, such as subsoil use and investment disputes.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

In general, the limitation period in Kazakhstan is three years, unless specific legislation establishes a different limitation period.

In particular, there are shortened or prolonged periods established for certain specific cases.

There are also claims with regard to which limitation period is not applied. These include, in particular, claims regarding compensation of moral damage, tort claims, and claims of a depositor to a bank on the issuance of holdings.

It is important to point out that, where the limitation period has been missed without justifiable reason, a decision on the denial of claim is issued by a judge without additional investigation of other facts of the case. The fact that this period has expired is established on the basis of a motion filed by a defendant.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

In general, Kazakhstan's court system consists of the following tiers:

- Court of first instance (including a system of Specialized Inter-District Economic Courts in each region, mainly dealing with commercial disputes);
- Courts of appellate instance (regional courts and Astana City Court, which usually acts as the appellate court, but in respect of certain investment disputes not involving large investors acting as a first instance court)); and
- Supreme Court (usually acting as the cassation court but also as the court of first instance in respect of certain investment disputes involving large investors and as the appellate court for cases considered by the Astana City Court as a first instance court).

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

The ability of foreign lawyers to conduct cases in local courts is not clearly regulated in Kazakhstan. In practice, there have been cases where foreign lawyers have represented their clients in Kazakhstan courts. Foreign lawyers should arguably comply with the minimal standards for representing parties in court cases, which include provision of documents confirming their authority (for instance, a power of attorney issued in accordance with the requirements of the Civil Procedure Code) and the Diploma on the Higher Education in Law.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

The amount of legal fees is usually agreed to in a commercial arrangement between a lawyer and a client.

It is necessary to point out that in cases specifically provided for by the law, payment of fees to advocates (i.e. procedural lawyers) may be provided from the state budget. In such cases, the amount of fees is established by the Kazakhstan Government and the order of payment is regulated by the Rules of payment of legal fees established by the Ministry of Justice. In accordance with these rules, in case there is an agreement made by the advocate with respect to the provision of legal assistance guaranteed by the state, the payment of legal fees is made by the territorial body of the Ministry of Justice. Payment is made based on special application made by the College of Advocates.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Basically, the costs of litigation are borne by the parties themselves. Each party usually bears its own costs by himself/

herself which, in particular, consists of state duty, court surpluses, and other corresponding expenses.

However, on the basis of the motion of one of the parties, the court has the right to oblige the defeated party to compensate the other party for legal expenses insofar as such expenses do not constitute more than 10% of the claimed amount for monetary claims and 300 MCIs for non-monetary claims.

However, there are cases provided by the Tax Code wherein claimants can be exempt from paying state fees. For instance, cases on recovery of alimony, compensation of damage to health, cases dealing with protection of copyright and related rights, etc.

It is also important to note that third parties submitting individual claims with regard to the case at issue also have obligation to pay state duty.

Insurance for litigation costs is not a common practice in Kazakhstan.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Based on the principle of transparency of court proceedings, all proceedings in Kazakhstan are open to the public. Judicial decisions issued as result of the proceedings are also openly declared to the public.

However, there are certain limitations to this principle. In particular, all cases connected with state secrets are considered in closed judicial sessions. Furthermore, on the basis of a motion of any party to the case, closed judicial sessions can be held with regard to cases dealing with the protection of inviolability of private life, adoption secrets, personal, family, commercial and other secrets and also in other cases preventing public hearings.

Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

In general, there are no specific rules imposed on parties at the pre-litigation stage. However, in cases established by law or contract, the claimant should address the defendant before filling the claim in order to comply with mandatory pre-trial procedure. A document proving compliance with such procedure should be attached to a written claim filed by the plaintiff.

4.2 How does a typical court proceeding unfold?

The court proceedings in Kazakhstan consist, in general, of following stages:

- The filing of a statement of claim compliant with the necessary requirements established by law;
- The issuance of a ruling by the judge accepting the claim or refusing to accept the claim, in case where there are grounds for such refusal (for instance, if the claim is not subject to consideration within civil proceedings or there is a decision terminating proceedings issued on disputes involving the same parties, the same subject, and based on the same grounds). Furthermore, a judge can also issue a ruling returning the claim for rectification of certain defects, after which the claimant can apply again within the established timeline;
- The granting of interim measures – an optional stage which could be requested from the stage of filing the claim.
- The preparatory stage – conducted for the purpose of guaranteeing the timely and effective resolution of the case. In order to initiate this stage, the judge issues a ruling on the conduct of preparation for the main proceedings where he/she indicates the particular actions necessary to be exercised. This preparatory stage should be completed within 15 working days from the date of acceptance of the claim, but may be prolonged in complex cases. The court may schedule preliminary hearings to resolve any outstanding procedural, jurisdictional issues, etc.
- A consideration of the case on the merits;
- Where all evidences has been fully investigated during consideration of the case on its merits, the main proceedings are declared completed and the judicial pleadings are initiated, wherein parties are allowed to deliver their final speeches; and
- The judgment is rendered and announced.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Before main proceedings are initiated, it is possible to dismiss a case based on following grounds:

- Grounds on which the court may leave the case without consideration (e.g. violation of an order of pre - trial dispute resolution provided by law, lack of deed capacity of the plaintiff, signing of written claim by the non-authorised person, failing to pay a state fee, etc.). It is important to point out that after the circumstances serving as the ground for leaving the claim without consideration are removed, the claim can be filed again following the standard procedure; and
- Grounds on which the court may refuse acceptance of the claim (e.g. where the claim is not subject to consideration by the civil court, the existence of an arbitration tribunal's decision issued with regard to a dispute between the same parties, on the same subject and based on the same grounds, etc.)

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Based on the Civil Procedure Code, the court may request that a claim from security for the possible losses of a defendant, within the procedure of granting the injunctions (Article 162). This security is provided by depositing the necessary amount of money indicated by resolution of the court, in the account of an authorised state body.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

In accordance with the Civil Procedure Code, there are different types of injunctions that can be granted by the court. These injunctions are granted on the basis of an application filed by a respective party to the case, or those participating in the arbitration proceedings. Specifically, they are granted in all cases where failure to grant such an injunction could make the enforcement of court judgment impossible. It is important to note that the chosen injunction should be proportionate to the claim and should not violate the public interest or those of third parties.

There are, in particular, the following types of injunction measures:

- Imposition of arrest on the property of the defendant. There are certain limitations on use of this injunction, provided by the Civil Procedure Code;
- Prohibition on the defendant conducting certain actions; and
- Suspension of the realization of the property, in the event a claim for release of the property from arrest is filed, etc.

If necessary, the court can apply other injunctions that are not provided by the law. Furthermore, it is possible to simultaneously apply several injunctions. The corresponding injunction might be cancelled on the basis of an application of a party to the case or on the court's own initiative.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

In Kazakhstan, attachment orders are issued as a type of injunction granted by the court. In particular, attachment is applied with respect to property owned or possessed by the defendant, or being in possession of other persons.

It is important to note that attachment cannot be applied with respect to money located in the corresponding bank account or those located in bank accounts where salary is transferred. Furthermore, attachment with regard to obligatory pension and social payments is not allowed.

5.5 Are there other interim remedies available? How are these obtained?

See question 5.3 above.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Depending on the type of claim (monetary or not), and the type of infringement for which relief is sought, the Civil Code provides for the following main remedies: damages, declaratory judgment (e.g. declaration of invalidity of contract) and rescission (e.g. unwinding avoidable transaction to bring the parties back to the position in which they were before they entered into a contract), specific performance of an obligation, and compensation of moral harm.

The most popular relief sought in monetary claims is compensatory damages. There is no concept of punitive damages, as such. However, in specific circumstances, the court may award a fine or penalty established by law (statutory penalty) or by contract and charged on the basis of non-performance or improper/delayed performance of an obligation.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

The parties involved in so-called corporate disputes may request documents relevant to the case without the need to specify each particular document. However, the parties are not allowed to request the documents containing state secrets or other secrets protected by law. If a document is known to be in a party's possession, the other party may file a motion for disclosure of this document (e.g. financial information from the debtor).

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

Parties are not required to disclose the documents containing the state secrets (as determined by special legislation) and other secrets protected by law.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

In accordance with the Civil Procedure Code, one of the types of the procedural evidence is witness testimony. This is received during the interrogation of witnesses. These testimonies are provided in oral form.

However, witnesses are allowed to use written materials in case testimonies that are connected to digital or other records. These documents are provided by witnesses to the court, or the parties to the case, and they can be attached to the case with the provision of the corresponding note in protocol.

Cross-examination of witnesses is not specifically regulated by the Civil Procedure Code. It is simply provided that, in necessary cases, the judge has the right to re-examine the witness during the same or in following proceedings. An adverse party is normally allowed to ask the witness any questions he or she might have.

7.4 What are the rules pertaining to experts?

Experts with relevant special knowledge are engaged in order to help the court establish the circumstances of the case.

The court can order an expert evaluation upon a motion of the parties or on its own initiative.

An expert evaluation may be conducted by the following persons: 1) employees of the Court Expertise Body; 2) individuals licensed to exercise expert activity; 3) other persons with the requisite special knowledge on a one-off basis. Persons specified in the points 1 and 2 above must be qualified as a court expert, certified by a qualification certificate confirming their right to conduct a particular type of court expert evaluation. They must also pass a corresponding attestation conducted by committees of the Ministry of Justice, and they must be included in the State registry of court experts.

An expert has an obligation to appear before the court at the court's request, as specified by Article 91.3 of the Civil Procedure Code. If an expert fails to so appear without any reasonable justification (as assessed by the court), he or she may be subject to administrative liability for contempt of court.

After conducting his or her expert evaluation, the expert issues, in writing, his or her evaluation report, certified by his/her signature and personal stamp. The expert's conclusion must be provided, within three days from the moment of its issuance, to the person who has ordered the evaluation. It is important to point out that such conclusions are not mandatory for the court to follow. However, any disagreement with the conclusions must be justified.

The opinion contained in such a conclusion is based on investigation of objects of the evaluation using special knowledge. In particular, it must be based on statements that could be checked for their relevance and credibility by application of common scientific and operational facts (Article 10 of the Law on Court-Expertise Activity).

After disclosure of the expert's conclusion, the expert may be interrogated in case any points of the conclusion have to be clarified. Expert testimonies given in the course of such interrogation must be considered as evidence only for the purpose of interpretation, supplementation or clarification of the conclusion provided by the expert earlier on. An expert interrogation can be conducted only with regard to the circumstances related to the conclusion of the expert.

Experts are entitled to compensation for expenses incurred by them as a result of appearance in court (for instance, travel and accommodation expenses). Experts are also compensated for the amount of consumable materials (for instance, chemicals) which were spent as a result of conducting an evaluation. Compensation must be provided by the party who filed the respective motion.

However, costs of conducting an evaluation by the Court Expertise Body are paid to the budget of this Body in the form of a preliminary payment by a party who filed a respective motion.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

Where a commercial dispute is considered by a Specialized Inter-District Economic Court, its judgment, that has not yet entered into force, can be appealed by the parties to an appellate court, following the common procedure prescribed by the Civil Procedure Code. In particular, parties may file an appeal through the court that rendered the judgment within one month from the moment of the final rendering of judgment.

The appellate court's decision on the appeal enters into force immediately and can be appealed further under cassation proceedings to the Supreme Court within six months after the decision has entered into force.

Certain disputes involving investors can be considered by the Astana City Court, and the Supreme Court as the courts of first instance. A court decision issued by the Astana City Court as the court of first instance on investment disputes can be appealed to the Specialised Board on Investment Disputes of the Supreme Court.

Court decisions rendered by the Supreme Court's Specialised Board on Investment Disputes as the first instance court enter into force from the moment of their announcement and can be appealed under cassation procedure within the Supreme Court.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

The Civil Procedure Code provides for the possibility of the filing of claims by several plaintiffs, against several defendants. In such cases each plaintiff or defendant acts with regard to the other party in the proceedings independently. Participation of several plaintiffs and defendants is allowed in the following cases: common rights and obligations of several plaintiffs and defendants serve as the subject of the dispute; rights and obligations of several plaintiffs and defendants are based on the same grounds; or; homogeneous rights and obligations of several plaintiffs and defendants serve as subject of the claim.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

In Kazakhstan, the distribution of costs between the parties is established by the Civil Procedure Code and its calculation is regulated by the Tax Code. In particular, the court has right to order the losing party to reimburse the winning party the costs and expenses borne as a result of the case, insofar as such expenses do not constitute more than 10% of the claimed amount for monetary claims and 300 MCIs for non-monetary claims. However, where a party abuses procedural rights or fails to perform procedural obligations, that party may be ordered to compensate all of the court expenses. Furthermore, where a party violates the mandatory pre-trial order of resolution of dispute, he/she must compensate all costs irrespective of the consequence of the case.

In accordance with Tax Code, the calculation of judicial costs depends on the subject of the claim and the category of person submitting the claim (e.g. whether a legal entity or natural person). In particular, different rates are applied in relation to different types of claims.

It is necessary to point out that plaintiffs may be exempt from the payment of state duty in cases directly prescribed by law and, in such cases, there is no need for the issuance of special resolutions concerning costs.

8.4 How is interest on costs awarded and calculated?

After a court decision enters into force, the claimant has the right to ask the court to adjust the awarded amount based on the official refinancing rate of the National Bank, as of the date of enforcement of the court decision. The court must consider such request by the claimant, within ten working days after receipt.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Judgments in Kazakhstan are, in general, subject to enforcement after they enter into legal force, except for cases of immediate enforcement (for instance, certain judgments regarding the award of alimony, reinstatement to a job, etc.).

After the judgment enters into force it can either be fulfilled voluntarily by a defendant, or enforced against him or her by an enforcement officer based on an enforcement writ issued by the court.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Choice of law clauses are generally recognized by Kazakhstan law and courts.

Courts, when applying foreign law, should establish the content of its provisions in accordance with its official interpretation, practice and doctrine in the respective foreign jurisdiction. Courts may ask the Ministry of Justice, and other relevant authorities, for assistance and may also involve experts on foreign law. Parties have the right to provide documents confirming the content of applicable provisions of foreign law.

If the content of applicable provisions under foreign law cannot be established with reasonable period of time, the court can apply Kazakhstan law.

In practice, there are often cases wherein the courts refer to Kazakhstan law, despite choice of law clauses (presumably because establishing the content of applicable foreign law is a lengthy and expensive process), or in addition to the norms of foreign law.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

In accordance with the Civil Procedure Code, parties are allowed to choose foreign courts to consider their disputes. In such cases the courts usually respect the choice of jurisdiction in a contract.

However, with respect to certain cases involving foreign parties, Kazakhstan courts may enjoy exclusive competence. This means that, in such cases, only Kazakhstan courts will have jurisdiction, regardless of any contractual agreement. In particular, Kazakhstan courts have exclusive competence with regard to the following cases:

- Claims connected with immovable property located on the territory of Kazakhstan;
- Claims against carriers based on transportation contracts regarding case carriers with residence in the territory of Kazakhstan;
- Claims respecting the dissolution of marriage by a Kazakhstan citizen with a foreigner, where both spouses have permanent residence in Kazakhstan; and
- Cases considered within special judicial proceedings.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

There are no specific rules of service for foreign parties serving local parties provided by the Civil Procedure Code.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

There are no specific procedures, except where local witnesses are participating in proceedings in a foreign jurisdiction through the mechanisms of the provision of legal assistance by the Kazakhstan courts, under special provisions in Kazakhstan laws or in international treaties ratified by Kazakhstan.

International treaties ratified by Kazakhstan that govern the provision of legal assistance by the courts include, in particular, the Kishinev Convention on the Legal Assistance and the Legal Relations in Civil, Family, and Criminal Matters and the Kiev Agreement on the Order of Resolution of Business Disputes and the Moscow Agreement involving former Soviet states. Furthermore, there are also bilateral agreements between Kazakhstan and such countries as China, Turkey, Vietnam, India, Mongolia, Pakistan, Saudi Arabia, Lithuania and others.

9.5 How can a party enforce a foreign judgment in the local courts?

According to the Civil Procedure Code, foreign judgments can be enforced by local courts where the possibility for enforcement of such judgments is specifically provided for by local legislation or in international treaties ratified by the RK, or on the basis of the principle of reciprocity.

The principle of reciprocity has always been a vague concept and it seems that it is now as a separate ground for recognition and enforcement of judgments by the recently adopted Civil

Procedure Code. In the past, in the absence of a relevant international treaty, a judgment could not be enforced on the principle of reciprocity alone.

After the enactment of the new Civil Procedure Code the views of commentators as regards to this principle have been divergent. However, a conservative reading would suggest that it is not a sufficient ground for applying to the local courts for recognition and enforcement of a foreign judgment and that an international treaty continues to be relied upon as the sole ground for recognition and enforcement of a foreign judgment.

The aforementioned judgments can be subject to the compulsory enforcement within three years from the moment of its entry into force.

Specifically, parties have the right to file an application for the enforcement of foreign judgments with the local court. This application is considered by the court within 15 working days from the moment of its receipt.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Available ADR procedures include negotiation, arbitration and mediation. Foreign parties often prefer foreign arbitration, particularly in investment and subsoil use disputes, whereas local parties often try to avoid foreign arbitration due to unfamiliarity with the arbitration procedure and the costs it entails, especially if the seat of arbitration is outside of Kazakhstan.

Most foreign investors consider international arbitration to be one of the main mechanisms of protection of their investments in Kazakhstan.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Parties can choose to settle the dispute via an out-of-court ADR procedure, such as arbitration, or choose recourse to litigation and later, within the framework of the court proceedings, choose one of the ADR methods provided in the Civil Procedure Code in order to come to settlement. If settlement is reached within the court process, it must be approved by the court to become effective and enforceable.

The courts cannot compel the use of ADR. However, if the dispute involves a subject-matter between parties that have previously executed a valid arbitration agreement regarding disputes over that subject matter, the court will rule to leave the claim without consideration and order the parties to respect their arbitration agreement.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

There are different rules concerning evidence applied for different ADR procedures. In particular, with respect to mediation, the confidentiality of the proceedings is guaranteed by the Statute on Mediation, pursuant to which, one of the essential conditions of the mediation contract is confidentiality. According to the Civil Procedure Code, participatory procedures, involving an advocate as a middle-man, are conducted without a judge also guaranteeing its confidentiality.

As for arbitration, the rules are established by the chosen arbitration regulations. With respect to out-of-court negotiations, there are no specific rules regulating the provision and protection of evidence.

10.4 How are costs dealt with in ADR?

As for arbitration, the type of costs and the order for their compensation is determined based on the corresponding arbitration rules of procedure that contain the rules on the adjudication of the borne costs.

Where parties choose mediation as an ADR procedure, they must bear following costs: the cost of the professional mediator (cost is established by the agreement between the parties and the mediator before the conduct of mediation); and compensation of expenses borne by mediator connected with the conduct of the mediation (including transportation expenses, accommodation and expenses for meals). These expenses connected with the conduct of the mediation shall be compensated by the parties in equal proportion.

It is necessary to point out that professional mediators may act on a gratuitous basis.

10.5 Which bodies offer ADR in your jurisdiction?

With respect to arbitration, there are numerous arbitration institutions functioning on permanent basis.

Mediation is conducted by an independent and impartial mediator chosen by mutual agreement of the parties. Such mediator should be included in the registry of mediators and he/she shall give consent for the performance of his/her functions as a mediator.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

The new Law on Arbitration adopted in April 2016 contains many contradictory provisions and there is an active ongoing discussion into the possibility of further amendments to it.

Luxembourg

Gérard Maîtrejean, Vincent Alleno, Morgan Mével

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Positioned at the heart of Europe, the Grand Duchy of Luxembourg shares a common historical background with its neighboring countries, namely Germany, France and Belgium.

The Luxembourg legal system is a civil law system based on written law tradition.

Civil Luxembourg law and legal proceedings arise from the French Civil Code and Civil Procedure Code (NCPC). Commercial law, and more particularly corporate law, have been strongly influenced by Belgian law. Similarly, Luxembourg tax law has been inspired by German and EU laws.

The leading dispute resolution method is court litigation. In civil and commercial matters, the Luxembourg judiciary system is broadly adversarial. The parties, especially the claimant, have a control over the extent and the progress of the trial. However, courts also play an active role as they are responsible for making sure that the trial proceeds correctly (including within appropriate time-frames) and for trying the claims according to the applicable legal rule.

Arbitration and mediation methods are becoming more useful in commercial matters, particularly for cross-border disputes.

Arbitration is generally faster (since a decision must be made within six months), more professional (the arbitrators are chosen in accordance with the matter) and can ensure improved confidentiality (the proceedings are not public, unlike judicial proceedings).

Luxembourg recently adopted a domestic legislative framework regarding civil and commercial mediation and, in 2013, created the Centre for Civil and Commercial Mediation, which should extend the use of this method of settling disputes.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

There are various limitation periods applicable to bringing a claim before a court.

The common limitation period is 30 years, which applies to all claims, unless they are subject to a shorter limitation period (article 2262 of the Civil Code).

Article 189 of the Commercial Code applies a special time limit of 10 years to obligations derived from trade, between merchants and between merchants and non-merchants, unless they are subject to a shorter time limit.

Limitation periods run from the date that the obligation fell due (in contracts), or when the damage occurred (in tort), and start from the end of the last day of the relevant period. However, these limitation periods can be suspended or interrupted (articles 2242 to 2259 of the Civil Code).

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

First instance Courts:

The competence of Luxembourg Courts depends on the legal subject-matter and the amount involved in the dispute.

There are three Lower Courts (*justice de paix*) in the Grand Duchy of Luxembourg, which deal with small civil and commercial cases, where the claim at stake is lower than €10,000. They also have exclusive jurisdiction with respect to specific legal disputes, notably leaseholds, regardless the amount of the dispute. Some Lower Court decisions can then be appealed to the District Court (*tribunal d'arrondissement*), e.g. civil and commercial claims exceeding €2,000 and rulings concerning leaseholds.

Should the civil or commercial claim at issue exceed €10,000 or should the dispute not be subject to the jurisdiction of another court or be weighed in cash terms, the case shall be dealt by one of the two District Courts. It must be pointed out that there is no specific commercial court in Luxembourg, as a matter of fact, commercial disputes are handled by specific chambers of the District Courts. Furthermore, the District Courts have exclusive jurisdiction in actions relating to the exequatur of foreign judgments.

Superior Court of Justice (*Cour supérieure de justice*):

- The Superior Court of Justice comprises the Luxembourg Court of Appeal (*Cour d'appel*) and the Court of Cassation.
- In the case of an error of law (e.g. a violation or misinterpretation of the law), a litigant can challenge a decision on appeal, or a first instance court's decision when no appeal is conferred by law, by submitting it to the Court

of Cassation. The Supreme Court will not analyze the facts of the case, but solely the submitted decision on pure legal issues, and will decide either to confirm the submitted decision or to quash and return it to the Court of Appeal or a Lower Court.

Constitutional Court (*Cour constitutionnelle*):

- When, in the course of civil, commercial or administrative proceedings, a party raises the issue of the compatibility of a legal provision within the Luxembourg Constitution, any court can decide to refer the relevant issue to the Constitutional Court for a preliminary ruling.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Generally, only *Avocats à la Cour* (i.e. List I and V of the Luxembourgish Bar) can conduct cases before Luxembourgish Courts.

Some courts proceeding however don't require the appointment of a lawyer, such as the District Court sitting in commercial matters.

As a consequence, foreign lawyers can conduct commercial cases before the District Court if they:

- prove their admission to a foreign bar association;
- are assisted by a local lawyer; and
- deliver to the President of the Court seized a certificate of introduction to the President of the Luxembourgish Bar (Article 17.1.2 of the international regulation of the Luxembourgish Bar).

In addition, EU lawyers can be registered to practice law in Luxembourg with the Luxembourg Bar on the List IV under their home country professional title. However, they can't represent the interests of their clients in all courts. After three years of practicing law in Luxembourg, they can be admitted on List I of the Luxembourgish Bar and therefore become an *Avocat à la Cour*.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

The fees a law firm charges its own client are not fixed by law.

In dispute resolution matters, law firms traditionally charge clients for the time spent on the claim on an hourly rate basis.

Pursuant to the rules of the Luxembourg Bar, lawyers are prohibited from entering into *quota litis* agreements, which make their fees entirely contingent on the outcome of a case. However, an agreement that fixes part of the fees by reference to the service rendered, but also referring to the results in the case, would be permissible.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Litigation is usually funded by each party paying their legal representatives' costs as the case proceeds.

Nothing speaks against the financing of a litigation proceeding by a third party as long as the contractual relationship between the client and the financer does not impinge the solicitor-client relationship. Third-party funding cannot be a means of circumventing the lawyer's deontological or legal duties such as its professional independence (Article 8.1 of the internal regulation of the Luxembourgish Bar).

A person can also enter into a private insurance contract covering lawyer fees, bailiff fees and legal expenses (*protection juridique*).

In addition, persons with low income may be granted legal aid by the state (*assistance judiciaire*).

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings in Luxembourg are usually public as the principle of publicity is a general principle of law. However, the court can order closed hearings in certain matters, such as criminal matters and matters involving children.

When proceedings are public, everyone can be present, but documents disclosed during the procedure, including the Courts' decisions are not accessible to the public.

Any person can require the case law but it will not mention the parties' names.

When the proceedings are not public, only the parties and their lawyers can be present during the pleadings.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

Luxembourg does not impose any rule on parties for pre-action conduct.

4.3 How does a typical court proceeding unfold?

First of all, the rules that govern proceedings before the courts depend on the nature of the claim. As a matter of fact, significant differences exist between civil and commercial disputes, which are the two main types of proceedings.

Proceedings before the District Court:
Civil disputes brought before the District Court are introduced by a writ of summons (*assignation*) served on the defendant by a bailiff. The defendant is given notice to instruct an *avocat à la Cour* within 15 days (extended on account of distance, if applicable) from the service of the writ of summons. The defendant's lawyer must inform the claimant's lawyer of his appointment. The parties will then exchange written submissions (*conclusions*) and evidence supporting their arguments and discuss the opposing party's arguments under the supervision of an appointed judge (*juge de la mise en état*). After the completion of this process, the file is ready to be judged and the instruction of the file will be closed. Oral hearings will be scheduled and after the pleadings, the court will consider the case and hand down a judgment.

Commercial disputes before the District Court are introduced through a writ of summons as well. Nevertheless, the parties will not exchange written submissions and the case will be pleaded orally. However, in large and complex commercial litigations, the claimant may decide to opt for the civil procedure (article 547 of the NCPC).

Proceedings before the Lower Court:
The civil and commercial procedures before the Lower Courts, labor disputes, and leasehold matters are subject to a petition drafted by the claimant's lawyer (not necessarily an *avocat à la Cour*) and are notified by the court's clerk or served by a bailiff on the counterparty. The service of the petition mentions the date of the hearing of appearance, at which the court schedules a further hearing for oral pleadings. When an appeal is admissible, it shall be lodged within 40 days (extended on account of distance under article 167 NCPC) from the notification or service of the targeted judgment. Except in labor matters, it must be filed before the District Court.

Defense:
The defendant can raise a counterclaim against the claimant, in order to obtain damages or to challenge the right of the claimant to introduce the case. It should also be noted that the court handling the case is competent to examine such counterclaim regardless of the value of the claimant's initial claim.

The defendant can also initiate another legal action against the claimant that can be then attached to the initial proceedings.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Regardless of the initiated procedure, the involved parties may put forward several pleas in a specific order to challenge the case, such as *exceptio judicatum solvi*, the jurisdiction of the court, the vagueness and obscurity of the language of the claim, the deadline's expiry for processing, the existence of an arbitration or mediation clause, the existence of a previous settlement agreement, the value and the subject-matter of the claim or regard to the competence of the court.

To invoke the invalidity of proceedings, article 264 of the NCPC provides two cumulative conditions that have to be fulfilled:

- This statement of defense must be raised in *limine litis* (i.e. before all other defense based on substantive issues); and
- Is likely to cause damage to the defendant.

Assuming a written proceeding is engaged, the matter proceeds through the designated pre-trial judge, who controls the fair handling of the procedure and lays down the timetable in which statements of defense have to be served. It is always possible to ask the judge for an additional period to finalize and serve the statement of defense.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

In principle, there is no rule pertaining to security for costs except for certain plaintiffs domiciled abroad on request of the defendant (articles 257 and 258 of the NCPC).

In such cases, the courts shall have a sovereign right to determine the amount of the legal deposit, which shall be transferred to the Luxembourg Treasury or the third-party bank account of the person or entity's lawyer. However, they must ensure that it is not disproportionate with respect to the value of the case.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The general purpose of interim remedies is to lead to a provisional decision in order to preserve the *status quo* or the rights of a party by preventing the potential harm of a situation until the outcome of a full trial.

Specific proceedings before the judge of the Lower Court or, more often, before the President of the District Court sitting in summary proceedings (*juge des référés*) are crucially important in practice although they take place before the litigation on the merits is commenced.

Special interim remedies proceedings are submitted to adversarial hearings and may only be brought in the following situations:

- In urgent cases, the summary judge may order all measures that give rise to any serious challenges or of which the existence of the dispute justifies (article 932 § 1 of the NCPC). For instance, the judge may appoint an *ad hoc* administrator with the specific mission to convene a shareholders' meeting instead of the directors of a company.
- In order to avoid an imminent damage or to abate a manifest illegal nuisance, by ordering protective measures or measures to restore the parties to their previous state as required (article 933 § 1 of the NCPC). For example, the judge may order a building company to realize works to avoid the landslide on the neighboring land.
- Furthermore, if there is a legitimate reason to preserve, or to establish before any legal process, the evidence of the facts upon which the resolution of the dispute depends, any interested party may request the President of the District Court sitting in summary proceedings to order all required measures (article 350 of the NCPC). For instance, the judge may order a medical evaluation or an audit of the annual accounts.
- When the existence of the obligation is not seriously challenged, by awarding an interim payment to the creditor (article 932 § 2 of the NCPC). In addition, a payment order may be granted without calling the defendant to an adversarial hearing provided that the latter is domiciled within Luxembourg. Nevertheless, the defendant is entitled to challenge the provisory court order within a time limit of 15 days (article 919 and seq. of the NCPC).

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

Attachment by garnishment (*saisie-arrêt*):
One of the most coercive measures to deal with the inaction and non-payment of a debtor consists of an attachment and freezing order. By means of an attachment, the creditor (*saisissant*) shall not try to obtain payment directly from the debtor itself (the distrainee, *débiteur saisi*) but from a third party (the seized party, *tiers saisi*) which owes a debt to the distrainee. Such a procedure is of particular interest in order to target assets in the bank account of the debtor or shares and securities owned in a company.

A freezing order is a twofold proceeding. Firstly, depending on the claimed amount, the claimant shall seek a court order either from the President of the District Court or the Judge of the Lower Court authorizing the third-party seizure of amounts and assets belonging to the debtor (i.e. the bank account of the debtor, shares of a company belonging to the debtor).

It is worthwhile to mention that at this stage of the proceeding, the claimant's request is made without the debtor's intervention or knowledge. In other words, this first step is made unilaterally by the claimant and may be made before being in possession of an enforcement title and even before litigation on the merits is commenced. Therefore, the claimant may seek freezing the assets of the debtor by surprise and prevent them from being transferred or dilapidated.

- The authorization shall only be granted if the claimant's claim *vis-à-vis* the debtor is certain, due and payable. Such claim may result either from a previous court order handed down either by a local or foreign jurisdiction, or from a private title or instrument acknowledging the claim.
- As a consequence of the freezing order, the claimant shall notify, through a bailiff, the seized party, and then

the debtor, within a time limit of 8 days, that the targeted assets are frozen and blocked until the court has handed down a final decision on the validity of the proceeding.

- The court will decide on the validity and enforcement of the freezing order. The court will therefore check that the judgment justifying the freezing order mentions an order to pay an amount which is certain, due and payable to the claimant, is enforceable and has been notified to the debtor.
- Should the claimant obtain a freezing order on the basis of a private title, two situations may arise. First, the court shall have jurisdiction to review the merits of the claim and to ascertain that the claim is certain, due and payable and will consequently validate the freezing order. Second, another court, including a foreign court, shall have jurisdiction to ascertain the claim before validation of the freezing order.

5.5 Are there other interim remedies available? How are these obtained?

In Luxembourg, a party to litigation does not have access to information and documents as easily as set out under the principles of English disclosure or US pre-action discovery. As a consequence, before any legal proceedings, a litigant can seek to preserve or establish the evidence of the facts upon which the resolution of a potential litigation depends.

Luxembourg "pre-action discovery" is based on article 350 of the NCPC. The application of this procedure requires the fulfilment of four conditions:

- The resolution of the dispute shall depend on the evidence of the facts that the claimant wants to preserve or establish;
- There shall be a legitimate reason to establish or preserve the given evidence;
- The preliminary inquiry shall be legally permissible; and
- The preliminary inquiry shall be requested before any legal proceedings on the merits.

Furthermore, case law has identified two additional conditions that shall be fulfilled in order to obtain documents on such legal basis:

- The claimant is obliged to determine precisely which document is requested; and
- The claimant must prove the existence of the document at the defendant's premises.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

In principle, the tort suffered by the claimant shall be fully compensated. Where remedies in kind are possible, the courts will award specific performance first, such as an injunction to comply with contractual obligation or to repair in nature.

Otherwise, the courts will order compensation for damages to the claimant, which consist of an amount of money equivalent to the harm suffered.

Punitive damages do not exist under Luxembourg law.

Parties may provide for a pre-determined penalty in the case of breach of contract, within the provisions of an agreement. Luxembourg contract law allows the parties to consent beforehand to a penalty clause in case of the non-performance of any contractual obligation. Nevertheless, a court may reduce or increase the agreed-upon penalty if it is manifestly excessive or ridiculously derisory. Any provision to the contrary is deemed null and void.

Limitations of damages may be provided for in the contract as well. Damages foreseen shall be borne by the obligor, so long as the breach of contract is not due to his fraud or gross negligence.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

In the course of judicial proceedings, each party invoking factual points must prove them before the court. Moreover, each party shall disclose to the other party and to the court, spontaneously and in due time, all the documents on which they ground their claim or defense. Thus, all evidence submitted to the court can be analyzed by the opposing parties in order to prepare their defense.

The court will disregard a piece of evidence that has not been exchanged between parties and the judicial decision shall be grounded solely on evidence produced under this so-called "adversarial principle".

Written evidence is the most common evidence disclosed by parties to support their arguments. It should be noted that written evidence is mandatory in the course of civil proceedings where the value at stake is over EUR 2,500. However, in commercial matters, evidence is freely provided, meaning that the involved parties are entitled to provide any evidence they may possess.

Following a request by one party, or *ex officio*, the court can decide to order a party or a third party to produce a specific document for the instruction of the case.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

The correspondence between a client and his lawyer, and the correspondence between opposing lawyers, unless stated otherwise, is deemed confidential and Nevertheless, this rule does not apply to in-house lawyers. Professional secrecy and banking secrecy rules might also prevent information from being revealed, except if the party protected by the secrecy formerly accepts, in its interest, to disclose secret information.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Regarding witnesses, a party can provide written testimony from a third party, or ask for the calling of witnesses before the court through an "evidence offer". If such offer is granted, the witness is called by a judge. The parties are not allowed to directly cross-examine the witness, but solely to ask the judge to question the witness on the specific facts laid down in the evidence offer.

7.4 What are the rules pertaining to experts?

Third party experts can be appointed by the court on its own initiative or at the request of a party. If a party wants an expert to be named to assess a situation, it must make an evidence offer by expert. This must set out the specific remit of the expert and propose a named expert. The other party can refuse the proposed expert and propose another one. The parties may apply for the appointment of an expert at any stage during the litigation.

The role of the expert is to provide a technical explanation or clarification about the case to the court. Because of this, the expert must be independent and impartial, to give as neutral an opinion as possible.

Strictly speaking, there is no cross-examination of an expert. However, the expertise procedure has to respect the adversarial principle (i.e. the parties are heard by the expert).

Usually, the judge orders that one party (usually the one who asked for the expert), or both parties pay an advance towards the expert's fees. At the end of the proceedings, the expert fees are normally paid by the unsuccessful party, as these fees are considered legal fees.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

An appeal can be lodged within 40 days (extended on account of distance, if applicable) from the service of the District Court judgment to the party in question. The procedure before the Court of Appeal is similar to the above for civil proceedings (see Question 4.3).

The appeal deed must contain the grounds for appeal, which must be based on fact or law. An appeal can only be made if the first decision causes damage to the appellant.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Luxembourg law does not contain any provisions about class actions. However, where a representative association can provide evidence of its direct, certain and personal interest, it may bring an action before Luxembourg courts.

Joint actions are open to claimants who have an interest pertaining to the same claim (shareholders in the same company, co-owners of a building, insurers and their insured, etc.). Joint actions are also provided for by specific laws, such as the law on unfair competition practices.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

In principle, the legal costs are borne by the losing party unless

the court has decided that both parties shall bear a part of the legal costs. The legal costs, called *frais et dépens*, do not include lawyers' fees, which are borne by their clients.

Article 240 of the Civil Procedural Code provides that the court may condemn one of the parties to pay to the other one an indemnity, called *indemnité de procédure*, if the court considers that it would be unfair for the party to bear costs that are not included in the legal costs. Usually, the judge will set an indemnity between €500 and €2,000 on the losing party depending on the importance of the case.

8.4 How is interest on costs awarded and calculated?

No interest is awarded on legal costs.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

A judgment ordering a party to pay a debt or damages or to perform a specific obligation may not be sufficient. At times, the debtor bluntly refuses to enforce a court order. Should a court order be disobeyed, the compulsory enforcement of the judicial decision through different legal procedures can be sought.

The court order to be enforced shall be qualified as an *"enforcement title"*. In fact, a Luxembourg judgment usually becomes enforceable only once it can no longer be overturned by means of an opposition and/or an appeal or appeal in cassation. The claimant shall then request an enforcement title from the court. In some specific matters or depending on the circumstances, the court order may be immediately and provisionally enforceable, regardless the rights of the parties to challenge the decision.

The court order shall be served on the debtor. This step is performed by a bailiff upon the claimant's request, except in the case of particular proceedings (e.g. proceedings before the Labor Courts or in leaseholds matters) where it is served directly by the court's clerk.

The claimant will seek compulsory enforcement of the judgment. Regarding the payment of debts or damages, the legal procedure to be considered will depend on the type of the debtor's assets to be seized. For instance, an attachment of moveable or immoveable assets, attachment of the debtor's wages in the hands of an employer, or the attachment of a third party's debt due to the debtor.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

The Article 3 of the Regulation (EC) No 593/2008 on the applicable law to contractual obligations (Rome I) provides that parties are free to agree on the applicable substantive law.

The chosen law by the parties do not have to have any link with the contract. The parties are thus free to choose a neutral applicable law. It may be applied to only a part or the whole of the contract. The applicable law can be changed at any time, as long as parties agree.

Local courts enforce choice of law clauses in contract, as long as the selected law is not contrary to overriding mandatory rules of the *lex fori* (i.e. to the international public policy).

The Rome I Regulation also sets out the options for choice of law in certain types of contracts, such as:

- contracts for the carriage of goods and passengers;
- B2C contracts;
- insurance contracts; or
- individual employment contracts.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Parties can agree that a foreign court will have jurisdiction to settle any disputes in connection with their contractual relationship.

The Article 25 of the Regulation (EU) No 1215/2012 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I (recast) provides that such an agreement must be in one of the following forms:

- in writing;
- in a form which the parties have established between themselves; or
- in international trade, in a form widely known by the community (commercial custom).

However, in relation to insurance contracts, consumer contracts, and employment contracts, the "weaker party" is protected. The autonomy of the parties to determine the courts with jurisdiction is therefore limited.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

This matter is regulated by Regulation (EC) 1393/2007 on the Service in the Member States of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (Service Regulation). If a foreign party obtains permission from its local courts to serve proceedings on a party in Luxembourg, it must give the permission to a local bailiff. The local bailiff sends it to a bailiff in Luxembourg, together with an EU service form, which must be completed in one of the official languages of Luxembourg (French, German or Luxembourgish). The document must be sent by appropriate means to ensure that the content of the document received is true and faithful, and that the information is easily understandable.

The Luxembourg bailiff then serves the document on the party residing in Luxembourg and sends back the EU service form to the local bailiff, with confirmation that service has been made.

The bailiff should accomplish all the necessary formalities within one month of receipt. If he cannot, he must inform the transmitting bailiff that this is not possible.

Luxembourg is also a party to The Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used to effect service in Luxembourg.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

Luxembourg is party to the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention).

The Hague Evidence Convention provides methods of co-operation for the taking of evidence abroad by letters of request, and by diplomatic or consular agents. The executing authority must take appropriate measures to obtain evidence by using compulsory means, to the same extent as required by its internal law (article 10 of The Hague Evidence Convention).

Regulation (EC) 1206/2001 on Co-operation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters allows each EU Member State to take evidence, or investigate directly, in another member state. Usually, when a foreign jurisdiction needs to take evidence from a witness in Luxembourg, the foreign jurisdiction sends a request to the competent court in Luxembourg in one of its official languages (French, German or Luxembourgish), which takes the necessary action within 90 days after receipt of the request.

9.5 How can a party enforce a foreign judgment in the local courts?

Luxembourg is part of the Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I recast). Thus, judicial decisions in civil and commercial matters rendered in a Member State of the European Union which are enforceable in that member state and fulfill the requirements of the Brussels I recast Regulation are to be acknowledged and enforced in Luxembourg. They are enforceable without any Luxembourg declaration of enforceability being required. The same principle applies to domestic judgments abroad.

In the absence of any instrument of international law, recognition and enforcement of foreign judgments, or domestic judgments abroad, have to be requested to the court having jurisdiction (i.e. the President of the District court for Luxembourg). Assuming all the conditions set by law are met, the court will grant the exequatur.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Although a majority of litigation is settled before the courts, alternative dispute resolution methods, such as arbitration and mediation, are deemed particularly interesting to settle disputes as they generally offer faster, confidential and good term solutions.

Arbitration:
Arbitration is a major mechanism for the resolution of disputes outside the courts. The parties hereby commit themselves to submit their dispute to one, or several, arbitrators that will return a final and binding decision (an arbitral award) to the parties.

The decisions of the arbitrators can only be challenged before the District Court by a request of nullification, which is only possible on limited grounds (article 1244 of the NCPC).

The arbitration award is binding on the parties and, if the award is definitive, it is enforceable under the NCPC. Arbitration awards are made enforceable by the President of the District Court in which the arbitration award was made (article 1241 of the NCPC). A foreign arbitration award can also be enforceable in Luxembourg, but only after proceedings before the District Court making the foreign arbitration award enforceable (*exequatur*).

Mediation:
Mediation differs from both arbitration and litigation. Firstly, as for arbitration, a third person is appointed to resolve the dispute but the mediator has no power to issue a binding decision. Secondly, the role of the mediator is limited to open or improve communication between parties which negotiate their own settlement measures. A mediator is not vested with the role of actively encouraging the parties to reach a resolution by initiating proposals to settle the dispute.

Mediation has been regulated by the law of 24 February 2012 on the introduction of mediation in civil and commercial matters and, at that time, became a new official tool to settle disputes.

The measures agreed upon by means of the mediation will be subsequently ratified by the judge in order to become binding towards the parties.

Customer complaints in the financial sector:
Article 58 of the amended law on the financial sector provides that the Commission for the Surveillance of the Financial Sector (CSSF) shall be competent to handle complaints by clients of professionals subject to its supervision (banks, credit institutions, professional of the financial sector and accredited auditors) and to approach these persons with a view to achieving an amicable settlement of such complaints.

The intervention of the CSSF aims to find an amicable settlement to the customer complaint *vis-à-vis* a financial professional. In this respect, the CSSF does not act as a judge, but as an ombudsman. The CSSF will intervene with the professional by providing him with a copy of the customer complaint and requesting that he or she take a position. Therefore, the professional is required to co-operate with the CSSF and to reply upon its request.

The CSSF will issue an opinion. On the one hand, if the CSSF concludes that the customer complaint is unfounded, it will inform the parties thereof. On the other hand, if it concludes that the complaint is justified, it will transmit its opinion to the professional and inform the customer thereof. Simultaneously, the parties will be invited to contact each other to settle the dispute in light of the CSSF's opinion.

It is important to note that the CSSF has no power to settle disputes by providing a binding decision towards the parties. The sole outcome remains an amicable settlement duly negotiated between the parties.

In spite of the above, various particular mechanisms have been promoted to develop alternative dispute resolutions in particular fields of the Luxembourg economy. Thus, special mediation processes have been intended to foster better relationships between parties and achieve more convenient dispute resolutions, for instance, with respect to consumer or insurance matters.

10.2 How do parties come to use ADR? Is ADR a part of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

The ADR methods under Luxembourg law are only applied if the parties agree to them, except in criminal matters in which the court can decide to apply one of the methods.

In certain matters, the court can suggest that the parties try ADR before a full trial, but they cannot compel the parties to do so.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Parties to ADR proceedings must agree on the procedures relating to the giving of evidence. This may be set out in the arbitration rules or procedures designated by the arbitration agreement.

ADR is normally considered confidential. Unless otherwise agreed by the parties, no party can publish, disclose or communicate any information in relation to arbitral proceedings and awards.

10.4 How are costs dealt with in ADR?

Generally, parties agree in advance on the disposition of costs in ADR, failing which each side bears its own costs.

In the case of arbitration, in the absence of agreement, the arbitral tribunal must enforce the costs rules applicable to the arbitration organization.

The arbitration rules of the Arbitration Centre of the Chamber of Commerce state that the arbitration award includes a decision relating to the costs of the arbitration and which party will bear them. These costs must include the arbitrator fees and expenses, administrative costs, expert fees and normal legal costs.

10.5 Which bodies offer ADR in your jurisdiction?

The main ADR bodies in Luxembourg are as follows:

- Arbitration Center of the Luxembourg Chamber of Commerce, created in 1987, which allows arbitrating parties to use its secretariat;
- Commission for the Surveillance of the Financial Sector (CSSF) (see Question 29);
- Center for Civil and Commercial Mediation (CMCC), which helps parties to reach an agreement to resolve any civil, commercial or social dispute;
- Insurance Mediator, which deals with all kinds of insurance and issues non-binding opinions;
- Consumer Mediator, which was created by the law of 17 February 2016 introducing ADR for consumer disputes);
- Luxembourg Commission for Travel Disputes, which deals with fixed sum travel.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

There are no substantial pending proposals for dispute resolution reform at this time.

Poland

Wojciech Kozłowski, Dr. Radosław Góral

1. MAIN DISPUTE RESOLUTION METHODS

1.1 What are the central dispute resolution methods for settling large commercial disputes in your jurisdiction?

In Poland, the most popular dispute resolution method remains the courts.

However, alternative dispute resolution methods are gaining popularity, especially in light of the cost and uncertainty of litigation.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

In general, if there is no specific provision the limitation period is ten years. For periodical payment claims and claims regarding conducting business activity, the limitation period is three years.

However, there are many specific provisions regarding limitation periods and how to apply them. For instance, contractual claims are subject to a two-year limitation period. Claims in tort are subject to a double-trigger period: ten years from the date of the harmful event or three years from the time that the plaintiff learned about the harm and the person liable, whichever date occurs first.

It should be noted that the argument that a claim has expired due to its limitation period is, in most cases, a defence mechanism available to defendants in court. However, this defense is not applied by the courts themselves without a corresponding motion being submitted.

In response, a claimant may argue in some circumstances, for example where the limitation period lapsed due to the defendant's actions, that such a defence constitutes an abuse of process and should not be upheld by the court.

The above rules, together with the uncertainty as to how the limitation period should be applied in various situations, create difficulties in predicting the prospects of court cases in which problems with limitation periods arise.

2.2 What is the structure of the court where large commercial disputes are heard? Does this court have special divisions to hear particular types of disputes?

Generally, the Polish court system consists of the following:

- court of first instance;
- court of second instance (appellate court); and
- the Supreme Court (which deals with appeals in cassation, decides on complaints against some categories of decisions of the appellate courts, addresses legal issues which poses serious doubts).

With respect to larger commercial disputes, (in terms of the monetary value of the claim, rather than the complexity of the case) the courts of first instance are the Commercial Divisions of the Regional Courts, and finally the Civil Divisions of the appellate courts and followed by the Supreme Court. Most courts also have separate divisions for bankruptcy and employment cases.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

There is a regulation dealing with on foreign lawyers practicing in Poland. This includes European Union lawyers and non-European Union lawyers.

Subject to reciprocity and unless otherwise provided for in international agreements ratified by the Republic of Poland or in the rules of international organizations of which the Republic of Poland is a member, foreign lawyers are authorized to practice their profession on the terms set out in the provisions of the Act of 5 July 2002 (O.J.2014.134), upon registration by enrolment on a list of foreign lawyers maintained by regional bar councils (*okręgowe rady adwokackie)* for barristers *(adwokat)* or regional councils of legal advisors' chambers (*rady okręgowych izb radców prawnych)*.

The registration application must be accompanied by:

- a certificate, issued by a competent authority of the home country, that the applicant is registered in that country as an authorized legal practitioner; and
- a document proving the applicant's nationality.

A European Union lawyer registered on the list maintained by the regional bar councils is authorized to practice as a barrister (*adwokat)*, while one registered on the list maintained by the regional council of legal advisors is authorized to practice as a legal advisor (*radca prawny)*.

However, when the law requires that a client be represented in proceedings by barristers or legal advisors, a European Union

lawyer must work in conjunction with a Polish-registered person pursuing one of these professions.

A non-European Union lawyer registered on the list maintained by the regional bar council is authorized to practice only to the extent of giving legal advice or opinions on the law of his home country or on international law and which corresponds to the professional activities of a barrister. Similarly, a non-European Union lawyer registered on the list maintained by a regional council of legal advisers is authorized to practice only to the extent of offering legal advice or opinions on the law of his/her home country or on international law and corresponds to the professional activities of a legal adviser.

The Act of 5 July 2002 also regulates cross-border services. This is defined as a single act or temporary activity in the nature of legal assistance which is carried out in Poland by a foreign lawyer in regular practice in another country.

A European Union lawyer is authorized to provide cross-border services under his home-country professional title expressed in the official language of his home Member State, indicating the professional body he belongs to in his home Member State or the court before which he is entitled to practice pursuant to the laws of that Member State.

The authority referred to above empowers a European Union lawyer to carry out all activities that are within the authority of a barrister or the legal advisor.

When providing cross-border services involving the representation of a client in proceedings before Polish courts or other public authorities, a European Union lawyer shall be subject to the same conditions governing the pursuit of his profession as those applicable to a barrister or legal advisor in Poland, except for the conditions of residence and registration on the list as a barrister or legal advisor.

When providing a cross-border service involving the representation of a client in proceedings where the applicable law requires a party to be represented by a barrister or legal advisor, a European Union lawyer must work in conjunction with a Polish-registered person pursuing the applicable profession.

Subject to reciprocity and unless otherwise provided for in international agreements ratified by Poland, or in the rules of an international organisation of which Poland is a member, when providing cross-border services, a non-European Union lawyer is authorized solely to provide representation in civil proceedings involving an entity from the country in which the lawyer is authorized to practice.

Regulations regarding European Union lawyers shall apply as appropriate to non-European Union lawyers providing services.

In practice, foreign lawyers rarely appear before Polish courts.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Fees, if paid by clients to their lawyers, are negotiated in a contract and not fixed by law.

Remuneration can be calculated on an hourly basis. A cap on the sum total of legal fees can be agreed. It is also possible to agree a fixed fee.

The rules of professional conduct binding qualified lawyers in Poland exclude the possibility of contingency fees, but allow a mixed model in which some part of remuneration is paid regardless of the outcome and another part is payable only if the client wins.

There are certain regulations on fees applicable to mandatory pro-bono representation ordered by courts; these are settled by the State Treasury.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Typically, the costs of litigation in Poland are borne by the parties involved.

However, in many types of cases (such as employment or personal-injury lawsuits) plaintiffs are routinely exempt from filing fees and other court costs, or the court may order that the plaintiff be represented by pro-bono counsel. In that sense, the State Treasury is the primary source of third-party funding for litigation.

The practice of third-party financing is at its nascent stage, although it is slowly gaining traction, both in commercial and consumer litigation.

Litigation insurance is not popular, in part because of the fee exemptions and pro-bono counsel system described above. Furthermore, the risk of the award of sizable costs in the case of the adverse resolution of a dispute is limited: attorney's fees are subject to a relatively low statutory cap and, should equity require it, courts may order that the losing party not be burdened with costs.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Under the Polish constitution, every court hearing is open to the public unless they involve sensitive issues such as: morality, state security, public order or the protection of an individual's right to privacy, or some other important private interest. Judgments are announced publicly.

Specific provisions to implement the above are set out in various regulations. In disputes involving businesses, in order to protect company secrets, courts may order the whole or part of a hearing be held *in camera* at the request of one of the parties to the proceedings. As such, the public would not be admitted to attend the hearing(s), but judgments are always announced publicly.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

Generally, there are no duties imposed on parties at the pre-litigation stage. However, there are numerous specific provisions that require some activity to open the way to court litigation.

For instance, if a shareholder of a company is against a proposed shareholders' resolution and wants the resolution revoked, he or she must vote against that resolution and have his/her objection recorded in the minutes of the meeting. Failure to comply with this formal requirement would forfeit the shareholder's right to file a statement of claim to the court against the resolution.

Another example is when misleading or untrue information is published in the press and the aggrieved party wants a retraction to be published by court order. In such cases, it is not possible to obtain an order before a formal request is first sent to the editor-in-chief of the offending publication requesting a retraction within a set period of time.

Although mediation/negotiation in Poland is always voluntary, there is a Code of Civil Proceedings rule that a statement of claim must contain information as to whether the parties have tried mediation or any other out-of-court settlement method, and if no such attempts have been made, to give the reason why.

4.3 How does a typical court proceeding unfold?

The model of court proceedings in Poland is as follows:

- filing a statement of claim;
- formal check by the court with respect to whether a statement of claim has been correctly filed. If all requirements are fulfilled, then the judge orders that the statement of claim be delivered to the defendant, who is then obliged to file a statement of defence within a fixed period (such as two weeks to a month; depending on the complexity of the case, the period can be extended at the request of the defendant);
- once a statement of defence is served on the plaintiff, the court, with or without the request of the parties concerned, may order a reply and rejoinder to be filed;
- after the exchange of the court briefs between the parties, there is a hearing If there are motions for witnesses or for the appointment of a court expert, there will be further hearings to collect evidence;
- additional briefs are exchanged if need be;
- closing hearings to allow parties to deliver their final speeches; and
- the judgment is announced.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must a claim be brought? What is the applicable procedure?

There are two types of obstacles to a case being heard on its merits by the common court:

- those taken into consideration by the court *ex officio* during the whole proceedings, even if not pointed out by a defendant, such as:
- no jurisdiction of the common courts (if a matter is in the competence of a different authority);
- no legal capacity or capacity to act in a dispute (e.g., when a company does not have directors or managers able to act on its behalf or when an attorney lacks the proper power to represent the party);
- no standing;

- *lis pendens*;
- *res judicata*; or
- in actions for declaratory judgment, no legal interest in determining the existence or non-existence of a legal relationship or right.
- deficiencies of the plaintiff's suit that may bar the resolution of the case on the merits, that are only considered by the court on the motion of the opponent (affirmative defences), like:
- no personal jurisdiction of the court to which the case was brought (i.e. the case must be transferred to the appropriate court);
- no jurisdiction of the common court due to the existence of an arbitration clause, a forum selection clause or an agreement on pre-litigation mediation; or
- statute of limitation.

In practice, it is advisable for a defendant to raise all objections that may be applicable immediately at the first stage of the proceedings (in the first submissions to the court).

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Under the Code of Civil Procedure, a claimant without a place of residence, usual stay, or registered office in Poland or another EU Member State can be obliged, at a defendant's request, to pay bail to secure the costs of proceedings.

A claimant is released from this obligation, if:

- he/she has sufficient property in Poland to pay the costs;
- he/she is entitled to be granted exemption from court costs;
- in non-property matrimonial cases, in cases arising from counter-claims, in payment order procedures and procedures by writ of payment and in simplified procedures;
- in cases which were jointly subjected by parties to the jurisdiction of Polish courts; or
- the ruling of a Polish court awarding the costs of legal proceedings from the claimant to the defendant is enforceable in the state where the claimant has his place of residence, usual stay or registered office.

These rules may be modified by Poland's agreements with other state(s).

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

In any civil matter, before an action is commenced or in its course, a party may make a motion for preliminary injunctive relief. There is a separate procedure to obtain an injunction before a full trial.

The court will issue an injunction if the party demonstrates that (a) its claim or interest to be protected by the injunction, is *prima facie* justified (i.e., success on the merits is likely); and (b) in the absence of the injunction, the party will suffer an irreparable harm, in particular because it would be impossible or impracticable to enforce a future judgment in the case or the purpose of the ongoing or future action would be frustrated. When choosing the means of protecting the applicant's interest by an injunction, the court must also (c) balance the benefit that injunction offers to the applicant against the hardship to the counterparty.

As a relief, the court may order, among other things:

- the attachment of movable property, receivables, or other property rights;
- the garnishment of wages or monies in bank accounts;
- that a security interest, such as statutory mortgage, be created in the property of the defendant;
- that an enterprise be put into compulsory administration;
- that existing relationships, rights or behavior between the parties continue in the interim; or
- enjoining the opposite party from taking certain actions.

When granting an injunction, the court sets a time limit within which an initial pleading should be filed, failing which the interim order is cancelled. The time limit must not exceed two weeks.

In order to obtain a preliminary injunction, a party must file a written motion presenting the basic facts of the case and other crucial elements that would persuade the court that the statutory requirements summarized above are satisfied. In practice, such motions are often similar to statements of claim, however, there is no requirement to offer full evidence.

Normally, interim proceedings are held *ex parte* until an order of the court of first instance is issued. The parties may appeal to the court of second instance.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

See question 5.3 above. Generally, a preliminary injunction would order attachment of such property as the applicant shows is available and under the control of the opposing party, and is necessary and sufficient to protect the applicant's interest, subject to the balancing of hardships. As a practical matter, the attachment of assets and/or garnishment of monies is ordered to protect monetary claims.

The enforcement of injunctions is subject to the rules on enforcement of judgments, accounting for the type of remedy ordered and the scope of the injunction.

5.5 Are there other interim remedies available? How are these obtained?

See question 5.3 above. In addition, a special kind of interim remedy applies to final, but appealable judgments by the court of the first instance. On the plaintiff's motion (and in some circumstances, *sua sponte*), the court may order that the judgment be immediately enforceable pending the appeal. Similarly to an application for a preliminary injunction, the plaintiff must demonstrate that there is a credible threat of irreparable harm or other statutory grounds (e.g., that the judgment was based on a promissory note, warrant, bill of lading or a public document; or that the judgment orders recovery of property from which the plaintiff was wrongly excluded).

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Generally, there are three types of remedies:

- Order that the defendant perform a set obligation (most commonly, payment of damages or the transfer of an asset under the defendant's control);
- Declaratory judgment (i.e. declaration of the existence / non-existence of a legal relationship or a right such as declaration of the validity of a contract); and
- Reformation of an existing contractual relationship between the parties (for example, setting a higher level of remuneration than previously agreed in the contract).

Damages tend to be compensatory, but there are some specific circumstances in which punitive damages could conceivably be awarded by a court.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

Polish civil procedure is quite inflexible in situations in which a party does not have access to the documents in possession of another party (in particular the adversary) and if a party does not have accurate knowledge of the existence of certain documents.

There is a rule obliging each person to present, by court order, a document proving each fact of vital importance for adjudication in the case, which is in a party's possession, unless such a document contains confidential information.

However, in practice, courts are reluctant to issue court orders, especially if the party seeking documentation cannot precisely describe the documents it is seeking.

The other reason why the disclosure of evidence by the adverse party is difficult is that practical means of enforcing court orders mandating disclosure are limited and not particularly effective (e.g., it is virtually unheard of that a party or counsel should be held in contempt of the court for failing to comply). The most relevant practical consequence of a party's failure to produce evidence upon a motion by the other party is the court's discretionary power, as the trier of fact, to interpret failure to do so as the admission of the fact or facts meant to be proved with the nondisclosed material.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents come under this rule?

The duty to present a document upon a court order may be avoided if a person is entitled to refuse to testify as a witness as to the facts covered by the document or if a person holds the document on behalf of a third party who could, for the same reasons, assert a privilege. However, even in such circumstances the order must be complied with if the holder of that document (or the third party) is under duty to produce it with respect to at least one of the parties, or if the document in question was issued to the benefit of the party requesting

the taking of evidence. A risk of losing the dispute is not considered the kind of harm that would excuse noncompliance with a production order.

The documents that may fall into the above rule, allowing their holder to refuse to produce them by asserting a privilege are, among others:

- communications subject to attorney-client privilege;
- statements subject to husband and wife correspondence privilege;
- documents subject to professional confidentiality privilege; and
- documents subject to privilege against self-incrimination (criminal responsibility and material harm other than loss of the case).

7.3 How do witnesses provide facts in court, through oral evidence or written evidence? Can witnesses be cross-examined on their evidence?

Witnesses give oral evidence under oath (unless the parties consent to examination of a witness without taking an oath) and they can be cross-examined both by the opposing party and the court.

7.4 What are the rules pertaining to experts?

When submitting their briefs, parties often rely on written opinions of private experts to support their positions on various aspects that require scientific, technical or other professional knowledge. Such party-commissioned opinions are considered private documents or assertions of fact by the submitting party. While they may carry certain evidentiary weight, they are normally treated as a reference material for court-appointed experts whose opinions, per the Code of Civil Procedure, constitute a separate type of evidence subject to special rules.

If the case involves elements of scientific, technical or other professional knowledge, the court is required to use the assistance of a court appointed expert before a judgment is issued. Making factual determinations without first taking evidence from a court-appointed expert(s) in the appropriate field normally constitutes a reversible error of the trial court.

Court-appointed experts normally prepare a written report within the limits set forth by the court in an order (often, the court will ask specific questions pointing to primary evidence to be used by the expert). The report is usually supplemented by the expert at trial, in the form of testimonial evidence.

Court-appointed experts frequently become acquainted with the parties' experts' opinions, so it is of vital importance that the parties to present the standpoints of their own experts, even though the court then appoints independent experts.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

Once a first instance judgment, accompanied by a written opinion of the court, is served, the losing party has two weeks to file an appeal.

An appeal must specify the objection that the appellant has against the judgment. The court of second instance considers the case under the *de novo* standard, in light of substantive law, being also entitled to its own assessment of the evidence. However, it is bound by the scope of the procedural objections raised by the party.

Normally, the appellate court can rule on merits. In a limited number of situations (in particular, where the case was resolved by the court below without reaching the merits), it may remand the case back for reconsideration to the court of first instance, or discontinue the proceedings.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Yes, opt-in class actions have been available since 2010. There are some pending proceedings but, to our knowledge, no case has been finally resolved under this form of procedure.

The Code of Civil Procedure provides that the court may order that separate cases be heard jointly if they are related. There is also a possibility to collectively initiate proceedings if claims are based on analogous factual and legal grounds and the court's jurisdiction exists for each of the claims individually, as well as jointly (formal joinder).

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

The losing party must reimburse the winning party's the costs, but the level of reimbursement is limited to a set statutory amount dependent on the amount in issue and/or the subject matter of the case. When the party moving for costs so requests, the court may apply a multiplier from one to six to the base statutory amount, should the complexity of the case and/or the effort of the attorneys justify it. Courts have broad discretion in applying these multipliers.

The above statutory caps (even after a multiplier is applied) tend to be low when juxtaposed with the actual market cost of legal representation in high-stakes or complex commercial litigation. Therefore, only a negligible portion of the attorney's fees actually paid by the prevailing party in such cases are practically recoverable from the losing party.

Moreover, in some circumstances, if the court finds it fair and reasonable, the losing party might not be charged costs or might be charged only partially. When the parties settle the case within the framework of pending court proceedings, the costs will not be reimbursed and each party will bear its own costs, unless they agree otherwise.

According to the Code of Civil Procedure, when awarding costs, the court evaluates whether such costs were reasonable and necessary in view of the nature of the case. Typically, there will be statutory court fees that each given party must pay during proceedings and the coverage of miscellaneous expenses, for example the remuneration for court appointed experts.

When determining the costs incurred by a party represented by a qualified lawyer, the court shall evaluate the amount of work necessarily performed and actions taken by that lawyer, including actions taken to amicably settle the dispute, even those before the claim was brought to court, and the character of the case, and the lawyer's contribution to resolving and settling the case.

The maximum level of legal costs that are subject to reimbursement, is set by law.

8.4 How is interest on costs awarded and calculated?

There is no specific provision pertaining to interest charged on costs. When the court awards reimbursement, costs are quoted without interest. However, if the party obliged to pay the costs of the winning party fails in its duty to do so, the general rule applies. Under this rule, if the debtor delays in discharging its pecuniary obligation, the creditor may demand interest for the time of delay, even if he/she suffered no damage and even if the delay was the result of circumstances for which the debtor is not liable for. In the absence of an agreement between the parties as to the rate of interest, statutory interest rates apply.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Once a judgment is final and binding, a claimant can apply for an enforceability clause which should be immediately granted by a court of first or second instance.

The successful party may then file for enforcement of the judgment to a bailiff, who will take the appropriate actions as prescribed in the rules, depending on the nature of the obligation resulting from the judgement.

9. CROSS-BORDER LITIGATION

9.1 Do local courts respect the choice of governing law in a contract? If yes, are there any exceptions to this?

The matter of choice of law is subject to many regulations at the national and international level. Generally, the choice of governing law by the contracting parties is allowed. The main areas in which there may be restrictions pertaining to a choice of law are, for example, insurance contracts, consumer protection rights, and labour law. Additionally, there is a so-called public order clause, which does not allow the enforcement of a foreign law that is incompatible with the fundamental assumptions of Polish law.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The Code of Civil Procedure provides that parties may agree in writing to choose the jurisdiction of foreign courts, excluding the jurisdiction of Polish courts in cases concerning property / financial claims if such agreements are effective under the laws of the chosen state.

Generally, an agreement which excludes the jurisdiction of Polish courts cannot concern the following cases:

- those in which the exclusive jurisdiction of Polish courts is non-negotiable (for instance concerning real property in Poland);

- those subject to labor law, unless an agreement was concluded after the dispute arose;
- those resulting from agreements concluded by consumers with their places of residence or usual stay in Poland;
- those arising from an insurance claim; and
- those pertaining to family-law relations when there is a strong nexus between the parties and Poland.

It should be noted that Poland is bound by EU regulations (Regulation (EC) no. 44/2001 as amended by Regulation (EU) no. 1215/2012, which is applicable since January 2015) and multilateral or bilateral international agreements, which may treat the matter of jurisdiction differently, so every case must be analysed individually.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

The Code of Civil Procedure provides no separate rules regarding service applicable to foreigners serving local parties.

Poland, as a member of the European Union, is bound by Regulation (EC) 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 or Commercial Matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. According to this act, any person interested in judicial proceedings may serve judicial documents directly, via judicial officers, officials or other competent persons of Member States, wherever such direct service is permitted.

Poland is also a party to The Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).

The most practical way to serve foreign documents in Poland is to retain local counsel to ensure that local requirements are followed.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

With respect to taking evidence, the Code of Civil Procedure requires that the courts communicate with the courts or other authorities of foreign states, and with Polish diplomatic missions and consular offices, unless otherwise subject to specific provisions.

As a member of the European Union, Poland must follow the procedure laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters.

If the case does not come under this regulation, other international agreements may apply, such as The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).

9.5 How can a party enforce a foreign judgment in the local courts?

The enforcement of foreign judgments is subject to various regulations, some of which are contained in the Code of Civil Proceedings. As a rule, foreign court judgments in civil matters that lend themselves to enforcement through receiving the full faith and credit of a final, domestic court judgment when certified as such by a Polish court. A judgment is certified as enforceable in Poland if it is also enforceable in the state that issued it and as long as none of the (narrow) exceptions specified in the Code exists.

As in other EU-member countries, special rules facilitating the enforcement of a judgment from another EU Member State apply.

If the proceedings have been initiated in the foreign member state before 10 January 2015, the judgment must be declared enforceable by a Polish court under Art. 32 ff. Regulation (EC) no. 44/2001. The Polish court will declare the judgment's enforceability if the party seeking to enforce it submits a copy of the judgment as laid down under Art. 53 of Regulation (EC) no. 44/2001 and a certificate complying with the requirements of Art 54 of Regulation (EC) no. 44/2001.

If proceedings were initiated after 10 January 2015 in another EU Member State, no separate declaration of enforceability is necessary any longer. The party seeking enforcement may commence with enforcement proceedings in Poland immediately and only has to give a bailiff a copy of the foreign judgment pursuant to Art. 42 (1) (a) Regulation (EU) no. 1215/2012 and a certificate pursuant to Art. 42 (1) (b) Regulation (EU) no. 1215/2012.

There are also other specific regulations, so each case should be analysed separately.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

In large commercial disputes, parties would prefer arbitration to court litigation since it gives them the possibility of having their cases resolved by a panel of arbitrators who could have a more business-oriented approach than a common court judge, and often also relevant experience or expert knowledge. At the same time, certain commercial actors consciously choose domestic courts because they perceive arbitration to be costly or domestic courts as more favorable (which is true, particularly among State-controlled entities).

Until recently, mediation had not been a frequently used tool in commercial disputes, but this has now changed and mediation, subject to the parties involved agreeing to it, is increasingly resorted to in the common courts. The future will show whether it is, effectively, a substitute to trial in court or merely a chance for the parties to better understand the opposing party's position.

Negotiation is a process which parties often adopt in parallel to commencing court litigation, especially if they are closely cooperating as business partners in field where the dispute has arisen or in other fields.

10.2 How do parties come to use ADR? Is ADR set apart from court rules and procedures, or do parties have to agree? Can courts compel the use of ADR?

ADR is always voluntary. As for mediation and negotiation, there is a provision in the Code of Civil Procedure, that in disputes amenable to resolution by amicable settlement, the court shall strive to reach such settlement at any stage of the proceedings, in particular by encouraging parties to use mediation. In fact, the courts often ask the parties involved to try the mediation / negotiation route, but opting for this procedure is always at their own discretion.

There must always be an effective arbitration clause agreed to by the parties to waive the jurisdiction of the common courts.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

There are no special rules of practice in mediation / negotiation, and no separate rules of evidence apply in such proceedings. Arbitration proceedings are subject to the rules adopted by the tribunal or agreed between the parties, as well as to default rules of the permanent arbitral court selected by the parties.

According to the Code of Civil Proceedings, the mediator, the parties and other persons participating in mediation proceedings must keep confidential any facts disclosed to them in connection with the mediation (the parties may release the mediator and other persons participating in the mediation proceedings from this obligation). Settlement offers, concessions and other statements made during mediation are inadmissible at trial, before a common court and an arbitral tribunal.

There are no specific rules regarding confidentiality in negotiations. Confidentiality in arbitration is determined in the agreed rules of arbitration.

10.4 How are costs dealt with in ADR?

The mediation and negotiation process does not entail any substantial additional costs in contrast to arbitration proceedings, which are perceived as costly. In some cases, the costs of arbitration may be higher, in some comparable to common court proceedings.

10.5 Which bodies offer ADR in your jurisdiction?

There are two permanent arbitration courts in Poland that are most popular in dealing with resolving disputes:

- the Court of Arbitration at the National Chamber of Commerce in Warsaw (*Sąd Abritrażowy przy Krajowej Izbie Gospodarczej w Warszawie*);
- the Court of Arbitration at the Confederation of Lewiatan (*Sąd Arbitrażowy przy Konfederacji Lewiatan*).

The parties also use *ad hoc* arbitration or the international institutional arbitration bodies, such as:

- the ICC International Court of Arbitration;
- the Vienna International Arbitral Centre (VIAC);
- the London Court of International Arbitration (LCIA).

As for mediation, a mediator is commonly appointed by the common court from the list kept by the court.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

There are no substantial pending proposals for dispute resolution reform at this time.

Romania

Tiberiu Csaki

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

The most widely used dispute resolution method remains the litigation in the common courts of law.

In addition, international arbitration, especially in contractual disputes involving foreign corporations, is also preferred as a method of settling large commercial disputes.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The general limitation period consists of 3 years, provided that no other special rules are applicable. However, particular limitation periods may vary from between 6 months up to 10 years, depending on the matter.

The following are a few examples of applicable limitation periods in various areas:

- In respect of real estate rights, the limitation period is 10 years;
- In respect of insurance rights, the limitation period is 2 years; and
- In respect of the fees of public notaries and bailiffs, the limitation period is 1 year.

The rule is that the limitation period is triggered from the date the right holder had knowledge, or should have had knowledge, about the fact that that the respective right arose.

The following are several other situations in which the limitation period is triggered:

- In case of a contract, if the contract was terminated by a court ruling, the limitation period starts from the moment the court decision becomes final;
- In the case of construction with visible defects, the limitation period starts from the date of the handing over of the construction;
- In the case of tort liability, the limitation period starts as of the date the claimant became aware of the damage and the person responsible for it.

2.2 What is the structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The Romanian court system consists of the following four types of courts:

- First instance local courts;
- Tribunals;
- Courts of Appeal; and
- High Court of Justice and Cassation (this court has limited competence, including judgment of appeals from decisions of the Court of Appeal in administrative disputes and issuance of decisions providing guidelines in the case of inconsistent interpretation of specific legal matters by the lower courts.

Large commercial disputes are heard by the Tribunals as first instance courts and the appeals are settled by the Court of Appeal, the rulings of the Court of Appeal being final.

Larger Tribunals and Courts of Appeal have separate sections dealing with IP, labour, administrative disputes, tax, family and insolvency matters.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

EU lawyers may conduct court cases in the jurisdiction of Romania, including large commercial disputes, subject to Directive 98/5/EC, Directive 2005/36/EC, and a set of Romanian regulations regarding the activity of EU lawyers or non-EU lawyers in Romania.

Foreign EU lawyers may practice in Romania on a non-permanent or a permanent basis.

EU lawyers may practice occasionally, on a non-permanent basis in Romania, based on the rules applicable in their state of origin, without being required to register with the Romanian Bar.

On a permanent basis, EU lawyers, as well as non-EU lawyers, are authorized to practice their profession on the terms set out in the provisions of Law no. 51/1995 for the Organization and Practice of the Lawyers, upon registration on a special list of foreign lawyers maintained by the bar.

The procedure consists of a registration application, which must be accompanied by a certificate, issued by a competent authority of the home country, stating that the applicant is registered in that country as an authorized legal practitioner.

Foreign lawyers are registered on a list maintained by the Romanian Bar and are authorized to practice only to the extent of giving legal advice or opinions on the law of their home country or on international law.

In order to be entitled to provide legal advice based on Romanian law, an exam must be passed consisting of Romanian law and the Romanian language.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Neither the law, nor the statutes of the profession, set minimum or maximum thresholds for legal fees, and the fee structure (i.e. hourly rates, blended rates, capped/fixed amount, success fees) may be freely agreed with the client.

If the Romanian Bar Association entrusts a lawyer with a public judicial case, then the fee amount will be established by the courts, based on a Protocol signed between the Romanian Bar Association and the Ministry of Justice, from a fund managed by the latter.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

All litigation costs are fully covered by the parties. In order to submit a claim in court, claimants must pay an upfront judicial stamp duty (which varies, depending on the object of the litigation and the amount claimed) as well as other costs arising throughout the proceedings (e.g. for expert report costs, translation fees).

Third party funding or insurance for litigation costs is not regulated, is uncommon and therefore would be unlikely to be accepted by the courts. In order to facilitate access to the judicial system to individuals lacking sufficient funds to pay the stamp duty, subject to certain conditions, the courts may grant a so called "public judicial aid", consisting of a full exemption, reduction or payment in instalments of the stamp duty.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

As a general rule, court proceedings are open to the public.

However, if the proceedings involve sensitive issues concerning morality, public order, minors' interests, matters regarding the private life of the parties or it is in the interest of justice, the court may decide to conduct the proceedings only with the presence of the parties involved in the respective case.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

As a general rule, parties of a dispute are not obliged to take any pre-court actions conduct.

4.3 How does a typical court proceeding unfold?

In Romanian, a typical court proceeding consists of:

- The submission of the claim, filed by the plaintiff in the court;
- An administrative examination of the court is carried out by the judge to whom the case was allocated on random basis, in order to verify whether the claim complies with the formal requirements imposed by the Civil Procedure Code. If the claim fails to meet all of the requirements, the judge will ask the claimant to comply with the applicable requirements, under the penalty of cancellation of the claim;
- After all the requirements are met, the judge orders communication of the claim to the defendant, who then has the obligation to file a statement of defence within 25 days of receiving the claim. This term may vary in different procedures;
- Once the statement of defence is submitted, it shall be communicated to the plaintiff, who is entitled to reply within 10 days upon receiving the statement of defence;
- Should the defendant have his or her own claims, he or she may submit, in the same time as the statement of claim, t a counterclaim which will follow the same procedure as the initial claim submitted by the plaintiff;
- After having served the claim and the statement of defence to the parties, the judge will establish a date for the first court hearing, by sending a subpoena to all the litigating parties;
- The supporting evidence as well as the exceptions/ objections must be mandatorily indicated in the claim and in the statement of defence. Failure to do so deprives the respective party from the benefit of producing evidence before the court;

- Except where related to the merits of the case, the exceptions raised by the parties are debated and ruled upon by the court at the first hearing;
- At the following hearing, the parties will argue on the relevance and admission of the evidence they have requested;
- Such evidence is to be produced in court, subject to the decision of the judge, and, additional hearings may be necessary if the case involves complex issues (testimony of the parties, hearing of witnesses, expert report, etc.);
- After all of the evidence admitted by the court and produced by the parties is gathered, the court will close the debates and ask the parties to present their closing arguments, usually the parties also submit post-hearing briefs summarizing their closing arguments;
- The next stage of the proceedings consists of the courts' assessment of the case and rendering of the ruling. The written decision, including the reasoning of the judgement, is prepared afterwards by the court; and
- Decisions issued by first instance courts are subject to appeal and in strictly limited situations, to extraordinary ways of appeal.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

There are a number of types of procedural actions that may result in a case being dismissed before the full trial:

- Issues invoked by the court, *ex officio*, during the whole proceeding, even if they are not pointed out by the defendant in the statement of defence, such as:
- Lack of jurisdiction of common courts (for example, if a matter is in area of jurisdiction of a public authority, not a court of law);
- Lack of legal standing;
- No capacity to act as a legal representative in court; or
- The dispute has been already settled by the parties in front of a court or by a settlement (*Res judicata*).
- Actions invoked by the defendant that can result in a case dismissal prior the full trial, provided that they are admitted by the court:
- Lack of jurisdiction of common courts (for example, in cases of a contractual dispute, a resolution clause providing for arbitration);
- Trigger of the statute of limitation;
- Failure to comply with the pre-litigation procedure; or
- Lack of material or territorial jurisdiction.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

No, the claimant cannot be obliged to provide security for defendant's costs under the provisions of the Civil Procedure Code.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Generally, in any commercial matter, at the same time as filing a claim, a party may petition in court for preliminary injunctive relief in order to secure satisfaction of a likely favorable judgement. Such an injunction is subject to a separate procedure and is intended to complete prior to the settlement of the claim.

The injunction may be granted provided that the party demonstrates that (a) its claim or interest to be protected by the injunction is *prima facie* justified; and (b) in the absence of the injunction, the party will suffer irreparable harm, in particular because it would be impossible or impracticable to enforce a future judgment in the case.

If granted, the court may order as a relief, among other things:

- attachment of movable property, receivables, interest, or other patrimonial rights;
- garnishment of defendant's bank accounts; or
- security interest, such as a conservatory/provisional mortgage, upon the property of the defendant.

The preliminary injunction petition should include a brief summary of the merits of the case and evidence that the statutory requirements described above are satisfied.

The preliminary injunction is settled based on an expedited procedure. Usually all parties involved are summoned,

but depending on the emergency of the situation, the proceedings may be also held *ex parte*, as decided by the judge. The ruling on the preliminary injunction may be appealed to the upper court.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

See reply to question 4.3 above.

5.5 Are there other interim remedies available? How are these obtained?

See reply to question 4.3 above.

Please see point 4.3 above.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

There are a number of different remedies available at trial:

- Acknowledge the termination of a contract;
- Compensatory damages;
- Specific performance by the defendant;
- Order the defendant to pay an amount of money; or
- Declaratory judgment (declaration of the existence/non-existence of a contractual or legal right).

Only compensatory damages can be awarded in commercial law suits. In respect to interest, both compensatory and punitive interest are allowed to be granted.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

If a party would like to use a document as a means of evidence, that respective party has to disclose the document to the judge and to the other party, at which point it will be submitted to the case-file.

If a party states that the opposite party holds a relevant document, the court may order that the opposite party disclose that document and submit it to the case-file.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

A party may not be obliged to disclose a document in the following cases:

- The document deals with aspects strictly related to the private life or dignity of a person;
- Filing the document might result in breaching the confidentiality obligation; or
- Filing the document may result in criminal charges against the party or its relatives.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses provide facts to the court only through an oral statement in front of the judge, which is recorded by the court clerk attending the hearing.

After the hearing of the witness is complete, the court clerk will print out the statement, which will then be signed by the witness if the witness considers the transcription of the clerk correct and according to the statement, at which point it will be submitted to the case-file.

In the Romanian legal system, the questions of the parties are addressed to the witness by only the judge.

Cross examination of the witness is allowed and is to be made via the judge, as described above

7.4 What are the rules pertaining to experts?

Expert reports are commissioned by judicial experts registered with the Romanian Ministry of Justice, according to their specific area of expertise (e.g. accounting, construction, cadastral, etc).

The expert reports may be commissioned out of court as extra-judicial reports, by an expert freely designated by a party, or in court, as judicial reports.

From evidentiary standpoint, judicial reports have more weight as compared to extra-judicial reports.

As a guarantee of the impartiality of the expert(s), the designation of judicial expert(s) is made by the judge randomly, in public hearings. The parties may oppose the designation, only if there are suspicions that the expert(s) would be biased.

In addition, the parties are entitled to designate their own expert to participate as counsel in the preparation of the report by the judicial expert(s).

The expert designated by the parties may endorse the report of the judicial expert(s), or draft their own report. The judicial expert(s) may be ordered, by the judge, to appear before the court, if required to clarify certain issues in the report.

The parties may object to the report of the judicial expert, and if such objections are upheld by the court, the expert(s) will have to respond to the objections.

Finally, in limited circumstances (failure to deliver the report in time, material omissions in the report, etc.), the judicial expert(s) may be removed by the court and replaced by another expert by following the same designation procedure.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

As a general rule, after receiving the written decision of the first instance court, the losing party may appeal the decision in 30 days. However, the Civil Procedure Code establishes shorter terms for the submission of the appeal in some situations (e.g. the appeal term in a challenge against enforcement procedure is 10 days).

The appeal must include the reasons why the first instance decision should be set aside, the relief sought, as well as the evidence supporting the appeal.

Usually, except for documentary evidence, production of new evidence is not admissible in the appeal and the appeal is to be settled based on the evidence produced before the first instance court.

Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

There are no express regulations in this respect.

However, the Civil Code of Procedure allows more than one claimant or defendant to take part together in a court case, as a co-participation, provided that the rights subject to trial are derived from the same source or are similar to one another.

Furthermore, the Civil Procedure Code allows different institutions, non-profit organizations, or authorities to start a court trial, in order to defend the rights and interests of individuals or group of individuals.

The most common class actions are usually found in the area of labor litigation and consumer claims against the banks.

8.2 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

As a general rule, the losing party has to pay the litigation costs of the other party.

If the claim of the plaintiff has been admitted, the judge can award the costs spent by the successful party (lawyers' fee, stamp duties, expert fees, etc.), which will be recovered from the defendant.

The courts may reduce the amount of the lawyer's fee, if it considers it excessive.

If the plaintiff's claim was partially admitted, then the awarded costs will be proportionally reduced.

8.3 How is interest on costs awarded and calculated?

The interest on costs awarded by the court does not have a special regime; therefore, the general regulations covering the interest rate of 6% per annum shall apply.

When the court awards costs, there are no awards on interest, if the parties did not make such a request. Therefore, the interest must be expressly claimed for the court to award it.

If the party obliged to pay the costs fails to fulfil its obligations, the creditor may start an enforcement procedure, demanding delayed interest.

8.4 What are the procedures of enforcement for judgments within your jurisdiction?

The final decision may be enforced by the winning party, through an authorized bailiff.

The bailiff will prepare a separate enforcement file, based on the request of the creditor, and ask for court approval to start the enforcement procedure.

Once the approval of the court is granted and obtained from the enforcement court, the bailiff will proceed with the enforcement procedure.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

In the Romanian legal system, in respect to the matter of choice of law, the European Regulation (CE) no. 593/2008 ("Rome I") has priority for applicability. If the Rome I regulation is not applicable to a certain situation, then the national legislation will prevail.

Generally, choice of law clauses in contracts can be enforced by Romanian courts, save specific areas of dispute, such as child custody and family matters, real estate, insolvency, insurance, inheritance, company related matters, and consumer protection, where the parties cannot derogate from the jurisdiction rules set by the Romanian Civil Procedure Code. The Civil Procedure Code also allows the parties to establish a preferential court which will be charged with solving any claim arising from the contract or even choosing arbitration as a method of dispute resolution. However, if the clause infringes the fundamental public rule of law and morals, it will not be enforceable.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The Civil Procedure Code stipulates that parties may agree to choose the jurisdiction of foreign courts, provided that the Romanian courts do not have exclusive jurisdiction on that matter (for example, in matters regarding real estate property).

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

There are no separate rules in Romanian legislation regarding foreign parties serving local parties.

As a member of the European Union, Romania is bound by the Regulation (CE) no. 1393/2007 of the European Parliament and of the European Union Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (service of documents).

According to this regulation, any person interested in judicial proceedings may serve judicial documents directly via the judicial officers, officials or other competent persons of Member States.

Romania is also a party to The Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).

Furthermore, in this respect, Romania has bilateral conventions signed with several states that are non-members of the European Union and did not adhere to The Hague Convention of November 15, 1965, such as Cuba, Morocco, North Korea, Mongolia, Republic of Moldova, Serbia, Syria and Tunisia.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

There are applicable European and International Conventions ratified by the Romanian state, in order to establish procedures to be followed in such circumstances.

Regulation (CE) no. 1206/2011 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters provides the necessary rules to be followed if a local witness is needed in a foreign jurisdiction.

According to the provisions of Regulation no. 1206/2011, a member state must address a request to the competent authority - the Ministry of Justice - in order to demand that such evidence should be obtained.

If it is necessary to hear a local witness, then such action shall be performed by the competent local authority. However, the witness can refuse to testify.

In addition to the abovementioned, Romania is also part of The Hague Convention of 18 March 1970 on the Obtaining of Evidence Abroad in Civil or Commercial Matters.

Similar bilateral conventions are signed with Russia, Cuba, Turkey, China, North Korea, Morocco, Moldavia and other countries.

9.5 How can a party enforce a foreign judgment in the local courts?

A foreign judgment can be enforced in the local courts, provided that the conditions of the European Union's Regulations and of the Civil Procedure Code are fulfilled.

If the foreign judgment was awarded in a state member of the European Union, there are special provisions which facilitate the enforcement of such an award in another EU Member State. If the proceedings have been initiated in the foreign member state before January 10, 2015, the judgment must be declared enforceable by a Romanian court, according to Chapter III of the Regulation (CE) 44/2001. In this respect, the Romanian Courts will declare a foreign judgment enforceable, provided that the mandatory conditions are complied with. Furthermore, the party seeking to enforce the judgment has to submit a copy of the judgment in order for the Romanian judge to acknowledge its authenticity, and a certificate, according to this regulation.

However, if the court proceedings were initiated in a member state after 10 January 2015, there will be no need for the previously described declaration of enforceability, as Regulation (CE) no. 1215/2012 will apply.

The party seeking enforcement can begin the enforcement procedure in Romania immediately, and must submit a copy of the foreign judgment, as well as a relevant certificate, to the bailiff, pursuant to Regulation (CE) no. 1215/2012.

If the foreign judgment was awarded in a non-member state of the EU, the Romanian Civil Procedure Code shall be applicable.

In this case, the party seeking enforcement must file a request with the Romanian courts in order to be awarded an enforcement decision, provided that all of the conditions stated by the Civil Procedure Code are met.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

In large commercial disputes, parties prefer arbitration rather than common court litigation, as it allows them to have specialized arbitrators which may have a more business-oriented approach or relevant expertise. Furthermore, the dispute is usually solved in a shorter period of time, which is a considerable advantage as common court litigation can last up to several years. Usually, parties choose the national arbitration chambers to solve their disputes.

With respect to mediation, until recently, the Romanian legislation imposed the request that every claimant follow an informative mediation session about the advantages of mediation before filing a claim with the common court. Given the fact that the Constitutional Court decided that such an obligation violates the right to have free access to justice, at present, such obligation is abolished. Therefore, although it is still possible to use the mediation, such procedure is not common in the Romanian legal system.

Negotiation is a process usually adopted by the commercial parties before starting a trial, in order to avoid the costs and the uncertainty of common court litigation. Therefore, parties have the possibility of negotiation before, or during, the trial, in order to sign a settlement to solve the dispute.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

ADR is voluntary and is applicable only if the parties agree to it. With respect to the settlement of the dispute, the rules of the Civil Procedure Code state that the judge shall encourage each party to reach such settlement, at any stage of the proceedings, therefore helping the parties solve the dispute amicably.

However, it is the parties' decision as to whether they choose ADR or not. The courts can not compel or oblige the parties to use ADR.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

There are no particular rules of evidence for all ADR procedures. However, there are some specific rules which apply to each ADR procedure differently.

Arbitration proceedings are subject to the rules adopted by the tribunal, or agreed to between the parties, as well as the default rules of the permanent arbitral court selected by the parties.

With respect to mediation, according to the Civil Procedure Code, the mediator and the parties involved in the mediation proceedings must keep any facts or documents disclosed during the mediation procedure confidential.

There are no specific rules regarding confidentiality in negotiations. However, the parties can agree to specific rules before starting the discussions, specific rules, according to their interests.

10.4 How are costs dealt with in ADR?

As a general rule, each party shall support its share of the costs of ADR.

10.5 Which bodies offer ADR in your jurisdiction?

Usually, parties choose the permanent arbitration courts in Romania. We outline a few examples below:

- The Court of International Commercial Arbitration within the Chamber of Commerce and Industry of Romania;
- The County Courts of Arbitration (e.g.,);
- The Court of Arbitration within the Romanian-German Chamber of Commerce and Industry;
- The parties also use ad-hoc arbitration or the international institutional arbitration bodies, such as:
- The ICC International Court of Arbitration;
- The Vienna International Arbitral Centre (VIAC); and
- The London Court of International Arbitration (LCIA).

As for mediation, a mediator can be chosen by the parties to settle their dispute, based on a specific agreement concluded in that respect.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

There are no substantial pending proposals for dispute resolution reform at this time.

Russian Federation

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1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

In the Russian Federation judicial system, depending on the category of the dispute, civil cases may be considered by both courts of general jurisdiction and by the state arbitration (commercial) courts. The parties to the dispute and the nature of the disputed legal relationship are the main criteria for differentiating between the competence of these branches of the judiciary. Generally, courts of general jurisdiction consider civil cases to which an individual who is not a sole proprietor is a party, while the state commercial courts consider disputes involving legal entities and entrepreneurs.

In the vast majority of cases, commercial disputes are considered by state commercial courts, i.e. via the state justice system. The state judicial system in Russia remains dominant, and the role of alternative methods of dispute resolution is relatively low. State commercial courts are federal courts.

State commercial courts remain favorable due to lower costs, expedited procedure and the short term of considering disputes, as well as the so-called electronic justice system (which, for example, allows for the submission of documents over the Internet and may arrange hearings remotely for parties in disparate geographical locations) and relative accessibility (state commercial courts exist in every region of the Russian Federation).

Russian jurisdiction is, in general, favorable to arbitration and alternative dispute resolution, but the role of arbitrations in solving disputes should not be overestimated. It should also be noted that recently, Russia's legislature has initiated reforms to laws regarding arbitration, and these reforms are ongoing.

When it comes to commercial disputes involving foreign investment, the most famous arbitration institution in Russia is currently the ICAC (The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry or "MKAS").

Mediation was the focus of amendments to Russian procedural legislation some six years ago, when the law on alternative dispute resolution (mediation procedure) was adopted in 2010. Despite significant efforts, mediation is very rarely applied in practice.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The general statute of limitations is three years (art. 196 of RF Civil Code). Unless otherwise established by law, the statute of limitations for initiating an action shall start from the day than the person learned, or should have learned, about the violation of his right and of the identity of the competent defendant in respect of the claim for protection of this right.

The statute of limitations for a claim for declaring a voidable transaction invalid and, for the application of consequences of the invalidity thereof, is one year (art.181). The statute of limitations for such a claim is counted from the day of termination of the violence or duress under the influence of which the transaction was concluded (Item 1 of Article 179), or from the day that the plaintiff learned, or should have learned about other circumstances that would constitute grounds for declaring the transaction invalid. These terms are subject to suspension and interruption in certain cases.

In any case, the limitation period may not exceed ten years, as from the date of violation of the right for which protection this period is fixed, except as established by Federal Law No. 35-FZ of March 6, 2006 on Counteracting Terrorism.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

Commercial, or so called "arbitrazh", courts administer justice in the sphere of entrepreneurial and other economic activities. These courts consider commercial disputes between companies and individual entrepreneurs, and also disputes with the state when it comes to entrepreneurial activity. Thus, these courts hear administrative, financial, bankruptcy and other legal issues.

The system of commercial courts is composed of four elements:

- Commercial courts of the constituent entities or regions of the Russian Federation (courts of first instance). This consists of more than 80 commercial courts – one for every one of Russia's defined regions (its constituent entities);
- Appellate commercial courts (the appellate instance). There are 21 appellate courts as of 2016;

- Commercial circuit courts (the cassation instance). There are 10 cassation courts; and
- The RF Supreme Court is the highest judicial body of the commercial courts.

There is also a specialized court within the system of commercial courts – the Intellectual Property Rights Court. It hears disputes related to intellectual property.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

As a general rule, yes, they can, and there are no any special requirements.

A capable person having the properly formalized and confirmed authority to conduct a case may act as a party's representative in a state arbitration court. According to current regulation, there is even no need to be duly qualified as a lawyer in order to act as a representative. Any person regardless of their qualifications may act as a representative. That being said, amendments to the legislation establishing the relevant restrictions are likely to be adopted in the near future.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Parties to legal service contracts are absolutely free to choose any suitable system of payment. There are no statutorily-regulated caps or rates.

However, there are two main factors that should be taken into account.

First, the RF Arbitration Procedure Code stipulates that expenses related to legal services that have been incurred by the person to whose benefit a judicial act has been adopted shall be recoverable by the court from the other person participating in the case *within reasonable limits*.

Thus, de facto legal fees are almost never recovered entirely: the court is entitled to lower the amount of fees recovered from the other party (disregarding the fact that the winning party has already paid all the costs and expects the return). In practice, courts actively use this right and significantly lower the level of adjudicated disbursements.

Second, normally courts are quite skeptical of *success fees* and in many cases, such a condition of a legal services agreement might be considered void and null.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Traditionally a party pays its own legal costs. Paid sums are subject to further disbursements between parties depending on the outcome of proceedings.

Third-party funding as a form of investment is not specifically prohibited by the law, but is very rarely applied in practice. A party who does not pay its costs by itself will not obtain a decision for disbursements of costs, as courts normally adjudicate only those sums that were paid to the lawyer by the party itself.

Insurance payment for litigation costs as a special form of insurance is not directly stipulated by the law and is very rarely applied.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

As a general rule, court hearings dealing with commercial disputes are public.

In camera hearings are possible only in cases where a public hearing might entail disclosure of national or other (e.g. commercial, official) secrets. Parties to a case are allowed to attend hearings in all cases.

Judgments and other judicial acts are declared in public and are also available at the courts' official database on the Internet.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

As a general rule, a party to a commercial dispute arising from civil-law relations is required to send a written pre-trial claim to the potential defendant. This claim should outline the essence of the dispute and contain a request to grant the potential claimant's claims (e.g. to pay a debt). The potential claimant has the right to proceed with serving a lawsuit in court only upon

the expiry of 30 days from the moment of sending or serving the pre-trial claim, should the dispute not be resolved.

Parties to a commercial contract may alter the above obligatory pre-trial dispute resolution effort conditions. It is worth noting, this requirement is not applicable to certain types of disputes, for example corporate disputes, insolvency claims, and some others.

Should a party fail to comply with the above requirement, the court will return the lawsuit without consideration or, in case the court discovers this in later stages of the proceedings, vacate it without consideration.

4.3 How does a typical court proceeding unfold?

The major stages of a significant commercial litigation action are as follows:

- Filing of claim: The claimant files a statement of claim with the court and serves it to the defendant. The statement of claim should set out the facts of the case, contain references to supporting evidence and law (though the claimant can provide further evidence at later stages, as well), indicate the remedy sought and comply with a range of other formal requirements.
- Initiating proceedings: Provided the statement of claim is compliant with all requirements and filed with the competent court, a judge, upon 5 days' consideration, accepts it for consideration and schedules a preliminary hearing, generally to take place within 1-2 months.
- Preliminary hearing: The preliminary court hearing is a feature of the preparatory stage of consideration of the claim and is meant to familiarize both the judge and the parties with the essence and scope of the proceedings, decide upon parties' motions, inquire about the possibility of a settlement, and generally prepare the case for a trial.
- Trial: Once the case is declared prepared, the court schedules a trial hearing. The case may be adjudicated within one hearing, but commonly several take place. The general term for the adjudication of a commercial case is 3 months from its receipt by the court, but in practice longer proceedings are not uncommon.
- At the trial stage, the court adjudicates the case on the basis of evidence provided by the parties or obtained by the court, which may include documents, testimony, in-court expert examinations, and other evidence compliant with formal requirements. All evidence is subject to analysis at a court hearing on an adversarial basis and with equal defence standards applicable to both parties.
- Parties have the right to attend a court hearing and send their attorney(s), but failure to do so does not, in itself, prevent the court from adjudicating the case *in absentia*. Usually, in major litigation, parties' counsels appear and argue their cases, often providing separate written submissions on relevant topics.
- Judgment: As a result, the court issues a judgment which should as a general rule contain the full reasoning for the court's decision. The judgment is subject to appeal and becomes enforceable upon expiry of a respective 30-day limitation or upon consideration of the appeal, if filed (see questions 20 and 24).

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

A complete list of grounds for the termination of proceedings prior to a full trial and without consideration of the case on the merits is clearly stipulated by Russia's procedural law. If the requirements of the relevant procedural laws are met, a court shall terminate proceedings irrespective of the positions of the parties.

For instance, according to article 150 of the RF Arbitration Procedure Code, the court shall dismiss a case if it establishes that:

- The case is not subject to consideration in an arbitration court;
- There exists a judicial act of an arbitration court, of a court of general jurisdiction or of a competent court of a foreign state, adopted on with regards to a dispute between the same persons, on the same object and on the same grounds, with the exception of cases where the arbitration court has refused to recognize and to execute the decision of the foreign court;
- There exists a decision of a reference tribunal, passed on the dispute between the same persons, on the same object and on the same grounds, with the exception of cases which the arbitration court has refused to issue a writ of execution for forcible execution of the decision of the reference tribunal;
- the plaintiff has refused the claim and the refusal has been accepted by the arbitration court;

- an organization which is a party in the case has been liquidated;
- after the death of a citizen who is a party to the case, the disputed legal issue does not admit legal succession;

including other criteria.

The court shall also cease proceedings where if an amicable agreement has been approved. In the absence of the above indicated grounds, a case, as a general rule, cannot be dismissed without a full trial.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Russian procedural legislation does not feature a provision on the creation of a security undertaking (a counter injunction) as a mandatory condition for granting a motion for provisional measures. At the same time, the applicant's provision of such an undertaking significantly increases the likelihood of the court granting a motion for provisional measures.

The procedure for a security undertaking is described in detail in the RF Arbitration Procedure Code. The law provides for voluntary provision of security by the applicant in order to increase the chances of the application being granted, and provision of security at the request of the court. According to Art. 94 of the RF Arbitration Procedure Code, the arbitration court, when allowing a party to secure a claim, may, upon the motion of the defendant, demand that the person filing the application secure the claim, or suggest that this person at its own initiative secure the reimbursement of the defendant's possible damages, by depositing money in the court's bank account in the amount suggested by the court, or by providing a bank guarantee or surety or other financial security in the same amount.

An undertaking may also be provided by the defendant instead of granting provisional relief for recovery of money, by depositing money in the amount of the plaintiff's claims in the arbitration court's bank account.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Both branches of the judiciary in Russia have the power to grant urgent temporary measures in cases that are within their competence. Generally, the procedures for granting the measures contemplated by applicable Russian procedural codes are similar.

Pursuant to Art. 91 of the RF Arbitration Procedure Code, provisional measures may include:

- attachment of monetary assets (including monetary assets that will be credited to a bank account) or other property owned by the debtor and that is in the possession of the debtor or third parties;
- injunction prohibiting the defendant and third parties from taking certain actions concerning the subject of the dispute;
- imposition on the defendant of the duty to take certain actions in order to prevent damage to or deterioration of the disputed property;
- placing the disputed property in the custody of the plaintiff or a third party;
- stay of recovery under an enforcement or other document disputed by the plaintiff and the recovery under which is effected in an indisputable (without acceptance) procedure; or
- suspension of sale of the property, if a claim is brought for the release of the attached property.

The arbitration court may grant other provisional measures, and may also grant multiple provisional measures simultaneously.

Provisional measures are allowed at any stage of the proceedings, if failure to grant these measures may make enforcement of a judgment difficult or impossible if the enforcement of the judicial act is expected to take place outside of the Russian Federation, as well as for the purpose of preventing extensive damages to the applicant. Therefore, to obtain an interlocutory injunction a party must apply with the relevant application establishing satisfaction of the indicated grounds.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

In accordance with the provisions of Art. 93 of the RF Arbitration Procedure Code, following consideration of the application to secure the claim, the court shall issue a ruling to secure the claim or refuse to secure the claim. Copies of the ruling to secure the claim shall be forwarded to the parties to the case and third parties on whom the arbitration court has imposed duties to enforce the provisional measures, not later than the day after it has been issued, and, depending on the type of measures granted, to the state authorities and other

authorities responsible for the state registration of property or rights thereto.

Although the ruling of an arbitration court to secure a claim, or refusing to secure a claim may be appealed, filing an appeal against the ruling shall not stay the immediate enforcement of the ruling. The RF Civil Procedure Code contains a similar regulation.

5.5 Are there other interim remedies available? How are these obtained?

Please refer to Question 5.3.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Types of remedies

The RF Civil Code provides a list of remedies that one may seek in a court of law (article 12), including:

- recognition of a right;
- restoration of the situation that existed before the given right was violated, and the suppression of the actions that violate the right or create a threat of its violation;
- recognition of the disputed deal as invalid and the implementation of the consequences of its invalidity, and the implementation of the consequences of the invalidity of any insignificant deal;
- invalidation of corporate decisions;
- invalidation of a state body action or local self-government body action;
- award of an execution of the duty;
- compensation of losses (damages);
- reimbursement of penalties;
- compensation of moral damages; or
- termination or amendment of the legal relationship.

The abovementioned list of remedies is not exhaustive, as there may be other types of remedies stipulated by other laws of the Russian Federation.

Losses (damages) and their nature

Based on provisions of the Russian Civil Code, losses are the expenses which the person whose right has been violated made or will have to make to restore the violated right, the loss, or the damage done to his property (the compensatory damage), and also the lost profits that this person would have derived under the ordinary conditions of civil turnover, if his rights were not violated (the forgone profit).

Damages in Russian legislation are of compensatory nature. Currently, punitive damages are not recognized in Russian law.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

Disclosure of facts and evidence referred to by a party

The law requires that each party participating in a case disclose the circumstances they refer to as a ground for their claims or objections to other participants to a case prior to a court hearing, or within a specific period fixed by the court. The law also prohibits reference to evidence not disclosed to other participants in advance.

However, the court is obliged to fully and comprehensively consider each case, including all relevant circumstances and significant evidence available. Accordingly, in practice the above requirement is not uncommonly breached by litigators who often prefer to serve new evidence as late as possible (e.g. immediately before a court hearing). Usually it would not entail dismissal of such evidence by the court, but the judge may postpone consideration of the case if newly provided evidence is significant and essential.

The party who failed to timely disclose its evidence might be considered as abusing its procedural rights and delaying court proceedings. As a consequence, the party may be forced to bear the procedural costs entailed by such abuse, but this provision is not very commonly applied, either.

Disclosure of facts and evidence relevant to a case and known to a party

Russian procedural law does not require that the parties disclose all documents relevant to the dispute regardless of whether they support or adversely affect their case. On the contrary, obtaining and providing any evidence as a general rule is considered their right, but not an obligation.

Therefore should a party to a commercial dispute be aware of any facts unfavorable to its case, such party is under no obligation to disclose it to the court and/or other party. Theoretically, however, withholding such facts might be regarded as an abuse of procedural rights. Anyway, a party can ask the court to oblige the opponent to disclose certain evidence in the form of a judicial request, but it is up to the discretion of the court to satisfy such a motion.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

As a general rule no privilege of non-disclosure is envisaged by Russian procedural law in terms of timely disclosing facts and evidence referred to by a party. Some restrictions are stipulated by the law (e.g. advocate secrets, seal of confession), but they are rarely applied with regards to commercial litigation.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses are persons aware of any facts significant to a case, and summoned by a court upon the parties' request. A witness provides these facts in oral form only within a court hearing, with no exceptions. The court may request that a witness provides a written brief of his oral statement but only after such oral statement is heard.

A party who applied for the summoning of a witness examines first. After that, the other party has the right to cross-examination. The court can ask questions to a witness at any moment.

7.4 What are the rules pertaining to experts?

Under Russian procedural law an expert is a person appointed by the court to conduct an (in-court) expert examination, i.e. to execute a necessary analysis of facts relevant to a case and requiring special knowledge to deal with them, and draft a written expert opinion upon the results of such examination. An expert opinion is one of the types of evidence allowed by law and should contain a description of the analysis conducted, outline of methods applied, and expert's conclusions with respect to questions raised.

Since an expert examination is scheduled by the court upon a party's request, candidate experts, as well as questions to be resolved, are usually provided by the applicant. Other participants to the case have the right to contest the suggested candidates and suggest their own candidates, as well as comment upon the scope of the examination.

Any person possessing certain specialized knowledge can be appointed as an expert. Usually, to corroborate their candidates, applicants provide documents confirming that their candidate expert is indeed qualified in the relevant domain (documents confirming education, experience, and regalia). For certain types of expert examinations, such as evolution of assets, certain additional requirements should be met by the potential expert.

Upon considering all parties' arguments, the court issues a written ruling scheduling an expert examination and appointing a particular expert(s) to conduct it, as well as setting forth exact questions that should be addressed in the expert opinion.

The expert then carries out an expert examination and provides the court with his written opinion. If necessary he can be summoned by the court and interviewed to clarify his conclusions, but no additional questions may be raised before him within that examination. In the course of the expert examination, the expert should not interact or converse with either party to the case.

Russian procedural law does not envisage out-of-court expert examinations. A party willing to provide the court with some advice on specialized issues would usually obtain a so-called specialist opinion, which is basically a written analysis by a person qualified in a certain domain of facts relevant to a case, and which can, in essence, be very similar to an expert opinion. In practice, such specialist opinions are widely used by parties and usually accepted by courts. However, the court would generally attach less weight or reliance to specialist opinions than to expert opinions because, unlike an expert, a specialist is not subject to criminal sanctions should his opinion turn out to be knowingly false.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

As described above (please refer to Question 2.2) the system of Russian state commercial courts is composed of four levels.

Appellate instance. A losing party has the right to file an appeal to a court of appeal from a decision of an arbitration court of first instance, which has not yet come into legal force. An

appeal may be filed within one month after the adoption of the decision by the first instance arbitration court.

The court of appeal has the right:

- to leave the decision of the arbitration court of the first instance without change, and the appeal without satisfaction;
- to cancel or change the decision of the court of the first instance, fully or in part, and to pass a new judicial act on the case; or
- to repeal the decision fully, or in part, and to stop legal proceedings on the case, or to leave the statement of claim without consideration fully, or in part.

The resolution of the arbitration court of the appellate instance shall enter into legal force as of the day of its adoption.

Cassation instance. A decision of the arbitration court of the first instance and the ruling of the arbitration court of appeal may be appealed fully, or in part, in cassation proceedings.

A cassation appeal may be filed within two months from the day of entry of the appellate court's resolution.

A court of cassation appeal does not retry the case or re-evaluate the evidence, but deals only with issues of law.

A court of cassation appeal has the right:

- to leave the decision of the arbitration court of first instance and (or) the resolution of the court of appeal without amendment and leave the cassation appeal without satisfaction;
- to repeal, or amend the decision of the court of first instance and (or) the resolution of the court of appeal fully, or in part, and to pass a new judicial act;
- to cancel, or amend, the decision of the court of first instance and (or) the resolution of the court of appeal fully, or in part, and to return the case for new consideration to the corresponding arbitration court whose decision or resolution is cancelled, or amended;
- to cancel, or amend, the decision of the court of first instance and (or) the resolution of the court of appeal fully, or in part, and to submit the case for consideration to another arbitration court of the first or appellate instance;
- to leave in force one of the decisions or resolutions adopted earlier on the case; or
- to cancel a decision of the court of first instance and (or) a resolution of the court of appeals fully or in part, to terminate the proceedings on the case, or to leave the statement of claim without consideration, fully, or in part.

The resolution of an arbitration court of the cassation instance comes into legal force as of the day of its adoption.

Second cassation instance. A losing party may appeal resolutions of a court of cassation in the Supreme Court.

Cassation review at the Supreme Court is a two-tiered system of proceedings. A Supreme Court judge first decides whether there are grounds for review of the cassation appeal at a panel session. The refusal to transfer the case for such review may be challenged to the Supreme Court's chairman or deputy chairman.

If the challenge is successful, the cassation appeal is transferred for review by a panel of the Supreme Court.

Supervisory instance. The supervisory review by the Presidium of the Supreme Court is an extraordinary procedure for commercial disputes since only the rulings of the Supreme Court can be challenged via such instance.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Class action litigation (Chapter 28.2 of the Russian Arbitration Procedural Code) was implemented in Russian commercial litigation in 2009.

The Code prescribes that corporate disputes, disputes connected with exercise of the activity of professional securities market participants, and other disputes may be considered in class actions.

The facts established by an effective decision of an arbitration court in a case on the protection of the rights and legitimate interests of a group of persons already tried may not be proved again when an arbitration court tries another case based on the application of a representative of the same group against the same respondent.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

According to the general rule, the costs incurred by the persons participating in a case to whose benefit a judicial act has been adopted shall be recovered by the arbitration court from

the other party. Where a claim has been partially allowed, the costs shall be placed on persons participating in the case in proportion to the amount of allowed claims.

The expenses related to paying for legal representation (which are often the most considerable portion of expenses) incurred by the person to whose benefit a judicial act has been adopted shall be recoverable by the arbitration court from the other person participating in the case, within reasonable limits. Thus, reasonableness is the principal factor in such respect.

Additionally, regardless of the results of the case, the courts shall place costs on a party abusing his procedural rights.

8.4 How is interest on costs awarded and calculated?

Interest on costs is not directly considered in the Russian law.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

There are two principal procedures of enforcement of judgments dealing with recovery of money: through a bank of the debtor and through the state bailiff service.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

The obligatory force of choice of law clauses is directly prescribed in Russian law. Therefore, Russian courts generally enforce such clauses. Parties entering into a contract may choose, by agreement between, them the law that will govern their rights and duties under the contract.

However, the parties are not absolutely free to choose applicable substantive law, as relevant restrictions are stipulated by civil legislation. Thus, the right of ownership and other real rights to immovable and movable property shall be determined according to the law of the country where such property is located. Contracts relating to plots of land, tracts of sub-soil and other immovable property located on the territory of the Russian Federation, shall be subject to Russian law.

Consumer law also provides some restrictions. The selection of the law governing a contract to which a party who is a natural person using, acquiring or ordering or intending to use, acquire or order movable things (labor, services) intended for personal, family, household or other purposes and not connected with the pursuance of entrepreneurial activity may not cause the deprivation of such natural person (consumer) of the protection of the rights thereof provided by the imperative norms of the law of the country of the consumer's place of residence, if the consumer's contractor (the professional party) exercises its activities in the country of the consumer's place of residence.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Yes, basically the court must follow the rules stipulated in a contract with respect to jurisdiction over dispute. However, there are indeed several types of disputes that are subject to exclusive jurisdiction of Russian courts. For example, where the dispute refers to the property of the Russian Federation or the immovable property located within the territory of Russia, disputes related to creation, registration or liquidation of Russian legal entities and disputes related to contesting of the decision of Russian legal entities` bodies. Administrative cases or other disputes related to public relationships involving foreign entities are subject to the exclusive jurisdiction of Russian courts as well.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Russia is a party to The Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used to effect service in Russia.

The Ministry of Justice of the Russian Federation (ul. Zhitnaya, 14 Moscow 117970) is designated as the Central Authority for the purposes of Article 2 of the Convention, as well as the authority competent to receive documents transmitted by consular channels, pursuant to Article 9 of the Convention.

The following authorities are competent to forward requests in accordance with Article 3 of the Convention:

- Federal courts;
- Federal bodies of executive power and bodies of executive power of the subjects of the Russian Federation;

- The Procurator's Office of the Russian Federation;
- Civilian registry offices;
- Notaries and other officials authorized to perform notary functions;
- Guardianship and trusteeship bodies; and
- Members of the advocacy.

The courts of the Russian Federation are competent authorities, according to article 6 of the Convention.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

The Russian Federation is a party to The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), which contains a procedure that can be used to take evidence from a witness in Russia.

9.5 How can a party enforce a foreign judgment in the local courts?

The enforceability of a foreign judgment in Russia is, in all cases, resolved by a competent Russian court on the basis of an application by the person that won the judgment.

The only exception is judgments of commercial courts of the Republic of Belarus, which are directly enforceable in Russia in the same way as domestic judgments under a bilateral international treaty.

Since Soviet times and in the Russian Federation today, there is a rule that recognizing and enforcing a foreign monetary judgment in Russia requires an international treaty providing for such enforcement. Therefore, enforcement of judgments from countries with which Russia does not have such a treaty is severely impeded.

At the same time, a lot of exceptions can be found in the practice of Russian courts where the courts have held that enforcement of foreign judgments was possible on the basis of reciprocity without an international agreement, although this practice is not uniform. The ability to enforce foreign judgments on the basis of reciprocity is acquiring more supporters among judges and in Russian legal doctrine; however, it has not received any backing in law.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Arbitration is the most common ADR procedure in large commercial disputes in Russia. Other ADR types (such as mediation) are not very popular and are quite rarely applied in comparison to arbitration. It should be noted that currently litigation is the prevailing dispute resolution procedure.

Arbitration can be applied to any civil dispute with certain exceptions provided by law, and mediation to civil, labor and family disputes.

Russian local entities usually prefer to resolve disputes by means of litigation. On the other hand, foreign companies involved in business relations with Russian partners, or conducting business activity in Russia, prefer to include arbitration clauses in their contracts, especially for the purpose of large commercial dispute resolution. Arbitration is also preferable if contractual relations of disputes parties are governed by foreign (non-Russian) law.

Recently (at the end of 2015), Russian legislators adopted several laws in order to make arbitration a more popular and effective method of dispute resolution.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Usually parties come to use ADR based on the relevant clause in their contract (usually an arbitration clause).

Commercial courts in Russia shall encourage parties to settle their differences by means of a settlement agreement or ADR procedure, including arbitration and mediation. However, participants of a trial are not obliged to follow courts' recommendations and may insist on consideration of the dispute by the court.

Furthermore, parties to pending litigation may ask the court to postpone hearings in order to apply an ADR procedure; courts generally grant such motions or assist the parties in another manner.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Russian Arbitration Law provides a few general rules of evidence with which arbitrations conducted in Russia must comply, such as the right of an arbitration tribunal to reject submission of additional evidence due to extensive delay.

More detailed rules of evidence shall be either stipulated in rules of arbitration institution (e.g. rules of ICAC at the RF CCI), established by arbitration (in the case of *ad-hoc*) or developed by parties to the arbitration.

Mediation, as well as arbitration, is a confidential procedure, and all the information related to the mediation or arbitration procedure shall not be disclosed to any third party unless otherwise provided for by law or agreed to by parties.

10.4 How are costs dealt with in ADR?

As a general rule, arbitration costs are allocated based on the arbitration parties' agreement or in accordance with the pro rata principle depending on the volume of granted and rejected claims. The rules of the arbitration institution may provide different costs allocation rules.

By analogy with arbitration, in cases of mediation, allocation of costs shall be conducted based on the parties' agreement or according to the mediation institution.

10.5 Which bodies offer ADR in your jurisdiction?

At present there are plenty of institutional arbitrations in Russia, however, one of them is known better than others - The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce (ICAC at the RF CCI). There are also several famous arbitration tribunals established to resolve disputes arising in specific industries (energy, gas and oil, construction, etc.).

Currently there are several mediation centres established in Russia.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

Recently, Russian legislation on arbitration has been modified significantly; some of new provisions already became effective while others shall become effective in 2017. Recent millstones in arbitration reform are as follows:

- Permission of the Russian Government will be required in order to establish an arbitral institution;
- The jurisdiction and rights of *ad hoc* arbitration is becoming limited, compared to arbitral institutions;
- Most corporate disputes will be allowed to be settled by means of arbitration; and
- State courts will be required to provide assistance to parties to arbitrations in specific situations (e.g. to consider a motion of an arbitration party for arbitrator disqualification).

Scotland

Malcolm Gunnyeon

What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

Litigation: Raising court proceedings is the definitive method of resolving large commercial disputes between two parties who are unable to agree on an alternative method of settlement or resolution. All claims for payment of money with a value of £100,000 or less must be raised in the Sheriff Court. There are a number of Sheriff Courts in Scotland and while there are a number of mechanisms for determining jurisdiction, the default rule is that the claim should be raised in the court which is local to the Defender. Where the claim exceeds £100,000 the party raising the action (the Pursuer) may choose to raise it in the Sheriff Court or in the Court of Session (in Edinburgh). In each of the Sheriff Court and Court of Session a commercial action procedure is available. Commercial procedure is designed to be quicker and more flexible than "ordinary procedure".

Parties to a commercial action are expected to have made efforts to resolve matters before the action commences and a pre-action protocol applies. Court fees are relatively modest compared to England and Wales and are not fixed by reference to the value of a claim. For example, in the Court of Session, the fee for commencing proceedings is £300 in all cases.

Arbitration: Parties may agree to refer a dispute to arbitration and arbitrations most commonly arise through a provision in a contract between the parties. A tribunal consisting of one or more arbitrators assesses the legal and factual issues in dispute between the parties and decides the outcome. Where the arbitration is seated in Scotland, the Arbitration (Scotland) Act 2010 applies to the arbitration. An arbitration "seated" in Scotland can in fact take place anywhere and the dispute can be determined by a foreign law if appropriate. The tribunal's decision is binding and rights of appeal are restricted. The process is similar to court proceedings but generally more flexible. Proceedings are subject to strict confidentiality requirements which is often attractive to the parties in dispute. Arbitration may be less expensive and take less time than court proceedings if only because there is usually no appeal. The parties have the opportunity to choose an arbitrator with industry knowledge and specialist technical expertise. They can also tailor the arbitration process to their particular needs by agreeing to modify or disapply certain rules set down in the Arbitration (Scotland) Act. Arbitration is often most effectively used for international/cross-border disputes as it can overcome jurisdictional issues inherent in court proceedings. This can avoid one party having a "home" advantage and benefiting from a more extensive enforcement regime.

Negotiation: Given the expense, risk and time involved in court and arbitration proceedings, it is common for parties to attempt to resolve disputes through negotiation. Where court proceedings are raised under the commercial procedure, parties are expected to have fully set out their respective positions in correspondence and to have disclosed any relevant documents or expert reports before the commencement of proceedings. Otherwise there is no requirement to engage in pre-action correspondence. However, parties may attempt to negotiate a resolution on a without-prejudice basis at any point during court proceedings, without sharing details of any settlement offers or discussions with the court.

Additionally the court rules provide a mechanism for formal offers known as "Defender's tenders" or "Pursuer's offers". There are strict requirements such an offer must meet but a valid and well-pitched offer can impose considerable pressure on an opponent (particularly a Defender) to settle, as a party who refuses the offer only to achieve a less advantageous result when the court makes a final determination may face sanctions in expenses.

Mediation: This is the most commonly used method of Alternative Dispute Resolution (ADR). It is used by parties who wish to achieve an agreed settlement but who cannot reach an agreement through negotiation.

The parties meet with an independent, trained mediator (usually an advocate, or former advocate or expert in a particular field) who liaises between the parties to identify issues and facilitate an agreed commercial settlement which is then recorded in writing. The mediator does not determine the underlying dispute and so any agreement reached as a result of mediation lacks precedent value. There are a number of specialist mediators offering this service in Scotland.

Expert Determination: An independent expert may be appointed by the parties to resolve the dispute. The parties' contract may make provision for expert determination but an ad hoc agreement to use this method may also be reached. Provided the parties agree, the expert's decision is legally binding. This is a quicker and more informal way of resolving a dispute than court proceedings. It is of assistance where the dispute centres on a technical issue (for example, defective products). It allows for the matter to be resolved by an expert who is familiar with the technical/specialist issues. It is unsuitable for disputes where there is a disagreement about the interpretation of a contract. It is also possible within the context of a formal court dispute to ask the court to remit the dispute to a "person of skill". This is akin to expert determination and if the remit is agreed by all parties the decision of the person of skill will ordinarily be given effect to by the court.

Adjudication: Parties to a construction contract have a statutory right to refer a dispute to adjudication at any time. The adjudicator's decision is temporarily binding on the parties until the dispute is finally determined by court proceedings or arbitration, though parties can choose to accept the adjudicator's decision. Adjudication is a quick and cost-effective way of resolving a dispute as there is a standard 28-day time period between referring the matter to an adjudicator and the adjudicator's decision (though the time period may be extended). It is specifically designed to sustain the flow of cash down the supply chain in the short term, and facilitate the continuation of construction works. The speed of the process means that the level of enquiry is not necessarily as thorough as court proceedings.

1. Court litigation

1.1 What limitation periods apply to bringing a claim and what triggers a limitation period?

Unless otherwise specified in a contract between the parties, the Prescription and Limitation (Scotland) Act 1973 sets out the periods for bringing a claim. If a claimant fails to raise and serve a claim within the relevant time period, the claim will, in principle, be time-barred. In Scotland, this time-frame is commonly referred to as "the prescriptive period".

2. Limitation periods

Type of Claim	Statutory limitation period	Triggering event/date
An obligation arising from a breach of contract	Five years	The date on which the act constituting the breach occurred
Negligence (i.e. breach of duty not contained within a contract) excluding personal injury and latent damage	Five years	The date on which the damage is suffered which is calculated by reference to the first point at which loss was suffered, even if the party suffering the loss was unaware that the loss arose from negligence
Damages for latent damage (i.e. damage which is not discoverable immediately)	Five years	The date on which the party suffering loss first became aware, or could with reasonable diligence have become aware of the damage
Liability arising from fraud	Five years	The date of the fraudulent act or, in certain circumstances, the date the party suffering the loss became aware, or could with reasonable diligence have become aware of the damage
Personal injury (excluding certain claims relating to childhood abuse)	Three years	The date of the injury
Defamation (equivalent of libel/slander)	Three years	The date on which the defamatory statement first came to the notice of the person defamed
Liability arising from the Consumer Protection Act 1987	Ten years	The date on which the product was supplied

3. Court structure

3.1 What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

The main courts in Scotland are the Sheriff Court, the Sheriff Appeal Court and the Court of Session.

There are six Sheriffdoms in Scotland, each with a number of Sheriff Courts. The Sheriff Court has exclusive jurisdiction in relation to most commercial disputes with a value of £100,000 or less. A specific commercial procedure to deal with commercial disputes is available in most Sheriffdoms. Cases in the Sheriff Court are always heard by a single Sheriff. Appeals from the Sheriff Court are taken to the Sheriff Appeal Court which sits in Edinburgh.

The Court of Session is the highest civil court in Scotland and sits in Edinburgh. The Court of Session has exclusive jurisdiction in a number of areas, including judicial review and in relation to the insolvency of companies with a share capital exceeding £120,000.

Complex and high value commercial disputes will usually be raised in the Court of Session. All actions are heard at first instance before a single judge of the Outer House of the Court of Session (Outer House judges are known as "Lords Ordinary"). The Pursuer can elect to raise the action as a commercial action at the point the action is commenced. Alternatively an action raised as an ordinary action can be transferred to the commercial roll on the motion of either party. Any dispute "arising out of, or concerned with, any transaction or dispute of a commercial nature" is eligible to be dealt with on the commercial roll.

Each action on the commercial roll is allocated at the outset to a specific commercial judge in the Outer House. The allocated judge will oversee the action from commencement to conclusion and takes an active role in case management.

Appeals are taken to the Inner House of the Court of Session and are heard before a bench of three senior judges (the Inner House Judges are known as "Senators of the College of Justice"). The ultimate appeal court in respect of Scottish civil matters is the Supreme Court of the United Kingdom.

4. Rights of audience

4.1 Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Advocates (the Scottish equivalent of a barrister) have full rights of audience in all courts and tribunals in Scotland (and the Supreme Court in Scottish appeals) and typically conduct the advocacy in the Court of Session (where the solicitor has day-to-day conduct of the case generally). Solicitors with full practising certificates have full rights of audience in all Scottish tribunals, the Sheriff Courts and the Sheriff Appeal Court. Solicitors do not have rights of audience in the Court of Session unless they have achieved the status of "Solicitor Advocate" which requires specialist training.

European lawyers can be instructed in relation to cases before the Scottish courts provided they are instructed along with a solicitor or advocate who is entitled to practise before that court.

Non-EU lawyers have no rights of audience in Scotland and cannot conduct cases (or appear as advocates) in Scottish courts.

5. Fees and funding

5.1 What legal fee structures can be used? Are fees fixed by law? The fees a law firm charges its own client are not fixed by law.

In dispute resolution matters, law firms often charge clients for the time spent on the claim on an hourly rate basis.

Other potential fee structures include:

- Success fee arrangements
  These are arrangements in which the solicitor will not receive its fees (or may receive less than normal) if the client loses the case. The solicitor will often receive normal fees plus a "success fee" if the case is successful. The success fee is calculated as a percentage uplift of the agreed hourly rate or by reference to the fee element of a judicial award of expenses (with the success element capped at 100% of the fee element of the judicial award). Success fees are not recoverable against the losing party.

- Damages-based agreements (DBAs)
  A DBA is another type of contingency fee agreement where the fee paid to the solicitor is based on a percentage of the compensation received by the client (this is usually a settlement sum or damages from the other party). DBAs are currently not permitted in Scotland.

In June 2017, a bill seeking to reform the law relative to civil legal expenses was introduced to the Scottish Parliament which proposes, among other things, to cap success fees and to introduce DBAs. Its outcome is awaited.

5.2 How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Litigation in Scotland is primarily funded privately. However, forms of litigation funding and insurance are becoming increasingly common.

- After the event (ATE) insurance
  This legal expenses insurance policy, obtained after the dispute has arisen, covers a party's potential liability in the event it loses its case. The policy usually covers the other side's legal costs and disbursements. As a result, it is often combined with another form of litigation funding in respect of the party's own costs. ATE insurance is becoming increasingly available for Scottish disputes.
- Before the event (BTE) insurance
  These are policies purchased prior to a dispute arising and usually cover legal fees and disbursements up to a specified limit. Examples include motor insurance and residential landlord cover.
- Third party funding
  This is an arrangement where a third party agrees to pay some or all of the claimant's legal fees and disbursements in return for a fee payable from the proceeds of the claim (whether following a judgment or settlement). If the case is unsuccessful, the funder is generally unable to recover any sum. While the market for third party funding is not as developed in Scotland as it is in England and Wales, third party funding is becoming increasingly available.

6. Court proceedings

6.1 Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

Confidentiality
Court hearings are public unless there is a good reason for them to be heard in private.

Details of all cases calling in the Court of Session, and most cases calling in the Sheriff Court, appear on the Rolls of Court which are displayed in court and published on the Scottish Courts and Tribunal Service's website. Judgments pronounced by the court are often published on the court website.

Arbitration proceedings subject to the Arbitration (Scotland) Act 2010 are subject to strict confidentiality requirements.

6.2 Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

Pre-action conduct
Before raising a commercial action in the Court of Session, parties are required to comply with the pre-action protocol set out in the court's practice direction which requires parties to engage in Pre-Action Communication. This requires a potential Pursuer to set out its claim in writing and in sufficient detail to enable the other party to understand and respond to it. The potential Defender is also expected to set out its defence in substantial terms. Parties are expected to exchange the documents which they intend to rely on as part of the pre-action protocol. Parties are also expected to obtain and disclose any expert report on which they intend to rely before the action commences.

The Practice Direction stipulates that unless there is real urgency and/or exceptional circumstances, cases should not be placed on the commercial roll unless and until the parties have had careful discussions as to whether the action is truly necessary.

Should a party fail to comply with the Pre-Action Practice Direction or an applicable Protocol, the court will take that conduct into account when awarding costs of the action. For example, a claimant who fails to send a letter explaining its claim may be penalised in terms of costs even if it is ultimately successful.

6.3 What are the main stages of typical court proceedings?

Main stages

The main stages in large commercial cases proceeding under the Court of Session commercial procedure are:

- Service of the Summons
  The Pursuer prepares a Summons and lodges it with the court for signetting (which is the authority of the court to serve the Summons on the Defender). The Pursuer should elect at this stage to use the commercial procedure. The Summons must summarise the circumstances out of which the action arises and set out the orders sought and the legal basis for seeking those orders. A Schedule listing any documents founded upon by the Pursuer must be appended to the Summons. While the Summons should be in abbreviated form, it must give fair notice of the Pursuer's case to the Defender. Where the purpose of the action is to obtain a decision only on the construction of a document, a simplified form of Summons may be used. It is service of the Summons which constitutes commencement of the action and which stops the clock running in relation to time bar. Service must be effected within a year and a day of signetting, otherwise the action will cease to exist and cannot be resurrected. Following service of the Summons, the action becomes live when the Pursuer returns the Summons for calling. The Pursuer must return the Summons for calling no earlier than 21 days after service (and no later than a year and a day after service). The Pursuer is not required to give the Defender notice that the Summons has been returned for calling. However, the court publishes a roll of all actions that have been returned for calling. Once an action has been called, the Defender has three days to enter appearance by informing the clerk of court that the action is to be defended. Thereafter, the Defender must lodge written answers within seven days of the calling date. Again, the answers ought to be brief and contain a schedule of documents founded upon.
- Case management
  Following the lodging of answers, the court will allocate the case to a particular commercial judge who will fix a Preliminary Hearing. The same commercial judge will oversee all stages of procedure in the case and has flexibility to make such orders as he or she thinks fit for the speedy determination of the action. At the Preliminary Hearing, the commercial judge will determine what further specification of the claim and/or defences is required and will fix a timetable for the adjustment of the pleadings. Parties are often ordered to lodge specific documents required to determine further procedure (such as expert reports and witness affidavits). Orders for the disclosure of documents are often made at the Preliminary Hearing stage. Following the preliminary stage, a Procedural Hearing is fixed. Parties are required to lodge a written statement of proposals for further procedure in advance of the Procedural Hearing. At the Procedural Hearing the commercial judge will appoint the case to a substantive hearing to determine the issues in dispute. The substantive hearing will take the form of a Debate (hearing on legal arguments only), a Proof (an evidential hearing) or a Proof Before Answer (a hearing combining legal and evidential issues).
- Disclosure
  There is no prescribed disclosure exercise as there is in England and Wales. It is always open to a party to an action to obtain an order for the disclosure of documents by way of a procedure commonly referred to as "Specification of Documents". In commercial actions, the judge may also require parties to disclose certain documents such as expert reports.
- Witness statements of fact
  Where witness evidence is required, parties are ordinarily required to exchange and lodge witness statements in advance of the Proof and there is usually an opportunity to lodge rebuttal statements.
- Preparation for Substantive Hearings
  Each party will require to prepare for the Substantive Hearing by: agreeing and lodging joint bundles of documents; preparing and exchanging witness statements; preparing written submissions and lodging Notes of Argument (as appropriate). An Advocate or Solicitor-Advocate must be instructed to conduct Substantive Hearings. Following the Substantive Hearing, the judge issues a written judgment, and a court order known as a "Decree".

7. Interim remedies

7.1 What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

- Summary Decree
  This is a mechanism whereby an action can be determined in a summary manner (i.e. without detailed examination of the facts and law). The availability of the remedy and the test is different in the Court of Session and the Sheriff Court. Summary Decree is not a substitute for a legal debate and is primarily intended for use where a party's case is fundamentally defective.
- Summary Decree in the Court of Session
  A Pursuer in a commercial action in the Court of Session may make a motion for Summary Decree. The court may grant the motion if there is no defence disclosed to the action or any part of it to which the motion relates. The procedure requires a hearing at which the court will consider the written pleadings and can also have reference to documentary or affidavit evidence. Summary Decree will not be granted unless the court is satisfied that the defence is bound to fail. As an alternative to granting the motion, the court may order any party (or a partner, director or other office-bearer of a party) to produce documents or lodge affidavits in support of any assertion of fact upon which it relies.
- Summary Decree in the Sheriff Court
  In a commercial action in the Sheriff Court either party may move for Summary Decree. The test is whether the opposing party's case (or any part of it) has no real prospects of success. The court must be satisfied that there is no compelling reason why Summary Decree should not be granted. As in the Court of Session, the court will have regard to the written pleadings and can also consider documentary or affidavit evidence. Where the motion is made by the Pursuer, the Sheriff may grant Summary Decree against the Defender in relation to all or part of the action. Where the action is brought by a Defender, the court may dismiss all or part of the Pursuer's claim. The Sheriff may also order any party (or a partner, director or other office-bearer of a party) to produce documents or lodge affidavits in support of any assertion of fact upon which it relies.

7.2 Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

A court in Scotland can order a party to find "caution" (pronounced kay-shun) for expenses. The grounds for caution depend on whether an order is sought against a Pursuer or a Defender.

- Orders for Caution against a Pursuer
  Where a Pursuer is a UK limited company, an order may be made under section 762 of the Companies Act 1985. The Act provides that caution may be ordered where "it appears by credible testimony that the company will be unable to pay the Defender's expenses if successful in his defence". Relevant factors will include the publicly available accounts (or failure to lodge them with Companies House as required) and available statements regarding the solvency of the company (for example, statements from suppliers who have not been paid timeously). Where the Pursuer is an individual, a common law test applies and the threshold for obtaining an order for caution is much higher. It is not sufficient simply to show that the Pursuer may be unable to pay the Defender's expenses if successful and, as a general rule, caution will only be ordered against an individual Pursuer in exceptional circumstances. One instance where caution is more likely to be granted is where the Pursuer (whether an individual or a company) is not resident within the United Kingdom, particularly if resident in a jurisdiction where the enforcement of an award of expenses is likely to be difficult (however, caution will not be ordered on this ground alone in respect of a Pursuer resident within the European Union).
- Orders for Caution against a Defender
  The general rule is that caution should not be ordered against a Defender (whether the Defender is an individual or a company). The rationale behind this is that a person called to court is entitled in all cases to defend himself. Caution will only be awarded against a Defender in exceptional circumstances such as where there is a substantial counterclaim or abuse of process by the Defender.

An alternative to caution is the sisting of a "Mandatary". This is applicable where a party (either a Pursuer or Defender) is resident outwith Scotland. In such cases the court may order that party to introduce a party based in Scotland to be responsible for the proper conduct of the action and to be liable for expenses. Again, such an order is more likely to be granted where the party is resident in a jurisdiction in which an award of expenses would be difficult to enforce. It would therefore by unlikely to be considered appropriate where a party is resident elsewhere in the United Kingdom or in the European Union.

7.3 What are the rules concerning interim injunctions granted before a full trial?

Availability and grounds

Interim Interdict: A party can petition the court for interim interdict. Interdict is a Scottish remedy which is broadly comparable to the English injunction. However, interdict is available only as a negative order (i.e. it is an order of the court prohibiting a party from taking certain actions). Interdict is not available as a positive order (i.e. an order compelling a party to take particular actions). There are two essential tests which the petitioner must meet in order to obtain interim interdict:

- the petitioner must demonstrate that it has a prima facie case. Essentially the court must be satisfied that there is at least some prospect that the petitioner will ultimately be successful; and
- the balance of convenience must favour the making of the order. The court's aim is usually to maintain the status quo.

Specific Implement: A party to a contract can seek a positive order compelling the other party to perform its contractual obligations. It is competent to seek an interim order for specific implement. The test is similar to that for interim interdict.

7.4 What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

In certain circumstances a Pursuer can take steps to ensure the Defender's assets are preserved pending determination of the action. This process is know in Scotland as interim diligence or diligence on the dependence. The Pursuer may apply for an interim order at any time including before the action is served on the Defender. There must be reasonable grounds for the granting of an interim order and the court must be satisfied:

- that the Pursuer has a prima facie case on the merits;
- that there is a real and substantial risk of the debtor becoming insolvent before any decree in the Pursuer's favour could be satisfied; or that there is a likelihood of the debtor removing, disposing of, burdening or concealing assets; and
- that it is reasonable in all the circumstances, including the effect on the debtor and any other party having an interest in the assets which would be caught by the order.

The following types of interim diligence are available:

- Arrestment on the Dependence
  This is essentially a freezing order which prevents third parties who hold money to the Defender's order from paying it to the Defender or any other party. Interim arrestments are commonly served on the main clearing banks and on any other party suspected of holding cash which is payable to the Defender. The sums which can be arrested are capped by reference to the value of the claim plus interest.
- Inhibition on the Dependence
  The effect of an interim inhibition once registered is that the debtor cannot sell heritable property without the consent of the Pursuer.
- Interim Attachment
  Interim Attachment provides a form of interim security over corporeal moveable property (i.e. any property other than land or intellectual property rights). There are a number of exceptions to the type and value of property which can be attached.

7.5 Are any other interim remedies commonly available and obtained?

Caveats

It is possible for an individual or company to lodge a document known as a caveat with the Scottish courts. The effect of a caveat is that an interim order will not be granted before the Defender is given the opportunity to address the court. A caveat is therefore an extremely useful tool and parties in disputes, particularly if in financial difficulties, should consider lodging caveats to prevent interim orders being granted against them without notice. Note that caveats do not prevent orders for the inspection of documents or other property in terms of Section 1 of the Administration of Justice (Scotland) Act 1972.

8. Final remedies

8.1 What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

The most common remedies sought in commercial actions are:

- Damages. The court may order the payment of damages and interest.
- Specific Implement. The court may order a party to a contract to perform its contractual obligations.
- Interdict. The court may order a party to refrain from committing certain acts, either for a specified period or indefinitely.
- Declarator. The court may make binding determinations, for example as to the correct interpretation of a contract or as to the ownership of certain property.

Damages under Scottish law are generally compensatory and rarely, if ever, punitive. Most civil claims involve claims for damages either as the principal claim or as an alternative (for example, an alternative to specific implement). In contract cases, the aim is to compensate the innocent party for the loss suffered as a result of the breach. The damages awarded should put the party in the position it would have enjoyed had the contract been performed. So a claim for breach of contract would ordinarily be limited to loss of profits (as opposed to turnover) and incidental costs arising from the breach. Contracts can provide for liquidated (or pre-ascertained) damages for specified breaches.

The court will generally enforce a straightforward liquidated damages clause when freely agreed by the parties, provided these are a genuine pre-estimate of loss. If the contract provides for a more complex remedy for breach (for example, disentitling the party in breach from deferred consideration), the court will enforce this if persuaded the claimant had a legitimate interest in performance of the relevant obligation and that the sanction for breach is not extravagant, exorbitant or disproportionate when compared with that interest. Otherwise, such a clause will be struck down as a penalty.

9. Evidence

9.1 What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

Disclosure

There is no prescribed disclosure exercise in Scotland (as there is in England and Wales). However, it is always open to a party to an action to seek an order for the disclosure of documents:

- Specification of Documents
  A party to an existing action can seek an order for the disclosure of documents (including electronic documents) by way of a procedure commonly referred to as "Specification of Documents". This mechanism is commonly used to obtain disclosure from another party to the action or a third party. For a Specification of Documents to be granted it must be specific and relate to the case set out in the pleadings; it must not be used as a fishing exercise. Disclosure under a Specification of Documents is usually satisfied by way of a voluntary procedure in terms of which the disclosing party lodges a certificate and any applicable documents with the court. Mechanisms are in place to protect confidential and privileged documents. If documents are not disclosed voluntarily the court may appoint an officer, known as a Commissioner, to recover the documents.
- Section 1 Orders
  It is also possible to obtain an order under Section 1 of the Administration of Justice (Scotland) Act 1972. This Act applies both to existing civil proceedings and to proceedings which are likely to be brought. While a Specification of Documents order only applies to disclosure of "documents", a Section 1 Order applies to documents and other property (including land) and orders can be made for the production, inspection, detention, preservation or photographing of such property. Again, mechanisms are in place to protect confidential or privileged material.

In commercial actions, the judge may also require parties to disclose certain documents such as expert reports as part of the case management procedure.

9.2 Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document? Privileged documents

In both the Specification of Documents procedure and Section 1 orders, parties must disclose the existence of all documents covered by the order. However, a party can mark certain items as confidential or privileged. In that case, documents are usually placed in a sealed envelope and disclosed to the other party only if ordered by the court (or a Commissioner, where appointed).

The most common forms of privilege are:

- Legal advice privilege: applies to confidential information passed between solicitor and client for the purposes of providing legal advice;
- Litigation privilege: applies to communications when litigation has commenced or is in contemplation. As a general rule all material which is prepared or gathered by a party in preparation of its own case is privileged. Reports and records of accidents prepared by a party are usually always privileged even if prepared before litigation is in contemplation.
- Privilege in aid of settlement negotiations: documents created in a genuine attempt to settle an existing dispute are protected from disclosure. Note that the use of "without prejudice" wording is not of itself sufficient to render a document privileged.

Additionally, apologies made in accordance with the Apologies (Scotland) Act 2016 are not admissible in civil proceedings for the purposes of determining liability or in any manner which is prejudicial to the party who made the apology.

Privilege applies to both private practice and in-house solicitors (providing the in-house lawyer holds a current practising certificate). Note that the position of in-house lawyers is not protected in relation to EU competition law investigations.

9.3 Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Examination of witnesses

Where a proof is required, witnesses of fact are almost always required to give oral evidence. In commercial actions, common practice is to lodge written witness statements in advance. The witness would usually be required to adopt the witness statement as their evidence in chief and there will be limited scope to expand upon that in oral evidence.

Right to cross-examine

When a witness is called to give evidence it is always open to the opposing party to cross-examine. The party calling the witness then has an opportunity to re-examine but this is limited to clarifying matters raised in cross-examination.

9.4 What are the rules in relation to third party experts?

Third party experts

Appointment procedure

Standard practice is for each party to instruct its own expert witness. The expert's duty is to the court. The role of the expert is to assist the court on matters within his expertise. This duty overrides any obligation to the party from whom the expert receives instructions and fees. The court does not supervise the appointment of expert witnesses, save that consideration to the suitability of an expert may be a factor in relation to an award of expenses.

As noted above, it is also possible in appropriate circumstances for the court to remit the determination of certain technical matters to an expert known as a "person of skill".

Role of experts

Opinion evidence from a witness with particular skills or expertise is admissible where it is necessary to assist the court to determine technical matters which are outwith the court's expertise. An expert must explain the basis of his or her evidence where it is not based upon personal observation. Where conflicting expert evidence is led it is for the court to determine which evidence it prefers.

Fees

The person instructing an expert is liable for his or her fees, which usually include a day rate for appearing as a witness. The successful party can only recover the costs of instructing their expert if the court certifies the expert as a skilled witness. The court must be satisfied that the witness is a skilled person and that it was reasonable to employ the person for the purposes of the action.

10. Appeals

10.1 What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which courts

Appeals to the Inner House. Decisions of commercial judges in the Court of Session are heard before a bench of three judges of the Inner House. The process of appealing to the Inner House is known as "reclaiming". Any judgment which constitutes a final disposal of the action, or part of the action, can be appealed without leave. Appeals must be lodged within 21 days (though, in some specified cases, a shorter period applies).

Grounds for appeal

Broadly speaking the available grounds of appeal are: that the first instance decision was based on an error of law or that the judge misdirected himself; or that the judge at first instance has not properly considered or assessed the evidence. It is also possible to bring an appeal on procedural grounds, for example if the first instance judge has not given adequate reasons for the decision.

11. Class actions

11.1 Are there any mechanisms available for collective redress or class actions?

There are currently no procedures for the bringing of class actions in Scotland. However, the Civil Litigation (Expenses and Group Proceedings) Scotland Bill was introduced to the Scottish Parliament in June 2017. The Bill proposes the introduction of a class action procedure in terms of which parties (including individuals and third party groups such as consumer rights or environmental organisations) will be able to opt-in to actions brought in the Court of Session. The procedure is yet to be finalised.

12. Costs

12.1 Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

The default position is that the successful party is entitled to recover its costs from the unsuccessful party.

As a general rule, the successful party usually recovers around 60% of its costs from the unsuccessful party. In certain circumstances, the court may order an additional fee. The factors to be taken into account when determining whether to award an additional fee include:

- the complexity/novelty of the issues in dispute;
- volume of documents involved;
- the place and circumstances of the case (for example, where evidence requires to be obtained from another jurisdiction);
- the importance of the case to the client;
- the value of the case;
- the steps taken in attempt to settle the case.

The court will also be told about any formal settlement offers made by the parties when determining costs. Either the Pursuer or Defender may make a formal offer known either as a "Pursuer's Offer" or a "Defender's Tender". These formal offers are made by intimating it to the other party and lodging it with the court. The clerk of court lodges the offer but does not advise the judge of its existence until it is either accepted or the action is determined. These formal offers can have a potentially significant impact on the expenses position.

It should be noted that the Scottish position is distinct to the English "Part 36 Offers" and careful consideration requires to be given to formal offers depending on the circumstances of each case.

Expenses are awarded "as taxed". Following an award of expenses, the party in whose favour the award is made must prepare an account of legal expenses and lodge these with the Auditor of Court (within four months of the date of the order). The Auditor fixes a "Diet of Taxation" at which the successful party's account and any objections lodged before the other side are considered. Following the taxation, the auditor determines the expenses and outlays payable to the successful party.

13. Enforcement of a local judgment

13.1 What are the procedures to enforce a local judgment in the local courts?

If the Decree is not satisfied voluntarily, the creditor must apply for an "Extract Decree" (this is the official copy of the Decree which can be used for enforcement purposes). Usually an Extract Decree will be issued seven days after the judgment is pronounced. Once in possession of an Extract Decree, the judgment creditor can instruct court officers known as "Messengers at Arms" to serve a document known as a "Charge for Payment" which is an official demand for payment. The debtor has 21 days to make payment in accordance with the Charge for Payment, failing which further enforcement action can be taken:

- Arrestment in execution
  The creditor can serve a Schedule of Arrestment on any person holding property on behalf of the judgment debtor. Most commonly, arrestments are served upon the major clearing banks to arrest funds held in a bank account in the name of the debtor. The property will be automatically released to the creditor after 14 weeks unless the debtor signs a mandate authorising its release in advance of that date. It is also possible to arrest other types of property (for example, for fees payable by a third party to the debtor or shares held by the debtor).
- Arrestment of earnings
  The creditor may serve a Schedule of Arrestment on the debtor's employer (providing the employer is subject to the jurisdiction of the Scottish courts). The employer is required to pay a prescribed part of the debtor's salary to the creditor until the decree is satisfied.
- Attachment of moveable property
  The creditor can in certain circumstances seize the debtor's moveable assets (for example vehicles, cash and goods). There are detailed rules governing attachment and a number of restrictions on the ability to attach goods.
- Inhibition in Execution
  A creditor can register an Inhibition in the Register of Inhibitions. The effect of a registered Inhibition is that the debtor cannot sell heritable property without the consent of the creditor.
- Land Attachment
  The Bankruptcy and Diligence etc (Scotland) Act 2007 introduced a new right of enforcement known as a "Land Attachment". As at June 2018, the relevant provisions of the act have not been brought into force. When in force, the act will permit a creditor to register a Notice of Land Attachment in the Land Register. The creditor will ultimately be able to apply to the court for a warrant to sell the land and to apply the proceeds of sale to the outstanding debt.
- Bankruptcy
  Where the debtor is an individual, the creditor can ultimately petition the court for their bankruptcy (technically known as sequestration). If the petition is granted the court will appoint an insolvency practitioner, known as a trustee in sequestration, to manage the debtor's financial affairs. The debtor may be required to make a contribution from income for a period of up to four years. The trustee realises the debtor's assets and collects income contributions. After deduction of the costs of the sequestration, the trustee then distributes the sums realised proportionately among all creditors, including the petitioning creditor. Secured creditors are repaid from any secured assets before any ordinary creditors can be repaid. Once the insolvency is concluded the debtor is released from all pre-insolvency debts. Sequestration has a damaging

effect on the debtor's credit rating and reputation. The threat of sequestration is therefore a powerful tool for persuading a debtor to satisfy the decree voluntarily. There is, however, a risk that the creditor will recover significantly less than the sum owed. There can also be a significant delay before any recovery is made.

- Liquidation
  Where the debtor is a company, the creditor can ultimately petition the court for it to be wound up. If the petition is granted the court will appoint an insolvency practitioner, known as a liquidator, to wind up the company's affairs and the company will ultimately be dissolved. The liquidator realises the company's assets and, after deduction of the costs of the liquidation, distributes the sums realised proportionately among all creditors, including the petitioning creditor. Secured creditors are repaid from any secured assets before any ordinary creditors can be repaid. As with sequestration, the threat of winding-up can be very effective in encouraging voluntary settlement. Equally, there is a risk that the full sum will not be recovered and that there will be significant delay before any funds are received.

14. Cross-border litigation

14.1 Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

The Scottish courts will respect the choice of governing law in a contract subject to limited exceptions relating to:

- Unfair Contract Terms Act 1977;
- Financial Services and Markets Act 2000;
- mandatory rules of law (or provisions that cannot be derogated from by agreement) including those relating to employment and consumer contracts and;
- situations where applying the choice is manifestly incompatible with public policy; and

The quantification of damages will usually be determined by Scottish Law.

14.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The jurisdiction of the Scottish courts is governed by EU legislation and domestic law.

Where EU legislation, or the Lugano Convention, applies (for example, where a jurisdiction clause names a court in, or the defendant is domiciled in, the EU or within a country signed up to the Lugano Convention) the Scottish courts will generally respect choice of jurisdiction clauses. The main exceptions relate to:

- matters over which other courts have exclusive jurisdiction (for example, in relation to immoveable property, some questions as to company law, insolvency law, public registers, registered IP rights and enforcement of judgments);
- situations where a party submits to the jurisdiction of a court other than the one specified in any clause; and
- instances where there are special rules in relation to the types of contract, such as employment, consumer or insurance contracts.

In cases that fall within these exceptions, it is possible that the courts of Scotland may disregard an alternative choice of jurisdiction clause and claim jurisdiction for itself.

In relation to claims arising out of contracts that have a jurisdiction clause naming a jurisdiction outside the EU or Lugano Convention countries, the Scottish courts will respect the chosen jurisdiction in the contract unless the court considers that the "ends of justice" would be best served by applying a different jurisdiction.

14.3 If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

The usual methods of service in Scotland include:

- personal service by court officers (Sheriff Officers or Messengers at Arms);
- service by first-class recorded delivery post (from within the UK).

It is not possible to serve proceedings using email or fax.

Scotland is a party to the EC Service Regulations and the Hague Service Convention. These treaties provide further procedures for overseas service into Scotland, which the Scottish courts recognise as valid.

14.4 What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

Scotland is party to the EU Taking of Evidence Regulation and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. If a foreign court (from any territory) requests assistance with a witness, and makes an application, the Court of Session may make an order compelling a witness to submit to examination either orally or in writing.

14.5 What are the procedures to enforce a foreign judgment in the local courts?

Enforcement of a foreign judgment

General principles

Scotland, as part of the United Kingdom, has bilateral treaties for the reciprocal enforcement of judgments with numerous countries including:

- The EU;
- EFTA (European Free Trade Association) countries;
- Commonwealth countries; and
- Hague Convention countries.

The procedure for enforcing foreign judgments covered by these arrangements varies depending on the underlying treaty and the specific statutory rules applicable in Scotland. Generally, the party wishing to enforce the judgment lodges the paperwork specified by the relevant treaty and an affidavit that it is entitled to enforce the decree in Scotland. If this is in order, the Court of Session registers the foreign judgment and makes an order permitting enforcement.

Judgments which are subject to the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933 may be enforced provided they are final and conclusive and for a sum of money (but not for taxes, a fine, or other penalty).

Judgments issued by EU member states are treated as if they were an enforceable Scottish judgment and so the creditor can simply serve a Charge for Payment on the debtor (together with a certified translation of the original judgment and a certificate from the issuing court) without the need for a further order.

Judgments issued in other jurisdictions are more difficult to enforce and require the creditor to raise an action of "decree conform" in the Court of Session.

Enforcing Foreign Arbitration Awards

The Scottish courts will recognise an arbitration award made in accordance with the New York Convention. Convention awards can be directly enforced in Scotland without the requirement of any additional procedure.

15. Alternative dispute resolution

15.1 What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

ADR can be highly successful in settling commercial disputes either: (i) without commencing court proceedings; or (ii) after commencing proceedings but before a substantive hearing.

ADR methods are split between non-binding and binding processes:

- the non-binding processes include negotiation, mediation, conciliation and early neutral evaluation. Negotiation and mediation are by far the most popular;
- the binding processes include appointing an expert to determine a technical issue (expert determination), adjudication and arbitration.

15.2 Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

ADR does not form part of the court procedure in Scotland. While courts encourage parties to explore extra-judicial settlement (and are likely to allow parties time to engage in ADR, particularly mediation or settlement negotiations), the court will not order parties to engage in ADR (the only exception to this is in relation to the Simple Procedure Rules introduced in 2016 for claims with a value of less than £5,000 in which the court can direct parties to attend mediation).

15.3 How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Where parties voluntarily engage in ADR, it is usual for them to agree that the process will be confidential and that any documents produced or admissions made will be protected from disclosure in future proceedings.

- Arbitration: The form of evidence can be agreed between the arbitrator and the parties, though it generally follows similar principles to court proceedings with (usually limited) disclosure of documents, witness statements and expert reports. Arbitrations (and the documents produced for the purpose of the arbitration) are recognised as confidential and hearings generally take place in private. The scope of the confidentiality obligation may differ depending on the circumstances of the case and the obligations can be modified by agreement. The arbitrator has flexibility as to where and how evidence is given (for example, witnesses may give evidence remotely by way of video-conferencing). Arbitration is governed by the Arbitration (Scotland) Act 2010 unless otherwise specified by the parties.
- Adjudication: There is no express duty of confidentiality in adjudications under the Scheme for Construction Contracts (Scotland) Regulations 1998, but they are generally treated as confidential. The parties will lose confidentiality if required to enforce the adjudicator's decision at court. The parties can agree to use documents produced in the adjudication for the purpose of subsequent court proceedings.
- Mediation: Confidentiality is integral to the mediation process, which is usually conducted on a without-prejudice basis. Mediation agreements will usually include express provisions regarding confidentiality (for example, that no party (including any third party who attends the mediation) may disclose any information arising out of or in connection with the mediation for any purpose, without the consent of the other party).
- Negotiation: If negotiations are conducted on a without prejudice basis, written correspondence and documents produced for the purpose of negotiation/settlement are usually prevented from being put before a court, provided the negotiation is a genuine attempt to settle the dispute. The court distinguishes between admitting without prejudice communications as evidence (which is not allowed) and admitting that without prejudice communications have taken place (which is allowed). Without prejudice protection does not protect an admission of fact unless that is specifically agreed by the parties.

15.4 How are costs dealt within ADR?

This depends on the type of ADR.

Arbitration: The arbitrator is under no obligation to order that one party pays another's costs, but often does so if the parties do not agree otherwise. If the arbitrator is to decide, this depends on the relative success or failure of the award.

Adjudication: The usual rule is that each party bears its own costs. The costs are not usually recoverable from the losing party and the adjudicator has no power to make costs orders. Costs will not be recoverable even if there is subsequent litigation between the parties on the same dispute. The adjudicator's fees are usually borne by the losing party, but are often split between the parties where there has been mixed success. The adjudicator decides who should be responsible for his costs but the parties are often jointly and severally liable.

Mediation or negotiation: Costs are a matter for commercial agreement between the parties. Parties often share the mediator's fees and agree to bear their own legal fees. Legal costs can, however, be used as a tool in negotiations. If a settlement is not reached, costs will usually become part of the costs of the litigation and will be dealt with by the court in the usual way after trial (i.e. loser pays the winner's costs subject to other factors such as conduct, albeit that the costs recovered in relation to a mediation will be substantially less than the actual costs incurred). However, it is always open to the parties to agree otherwise

15.5 What are the main bodies that offer ADR services in your jurisdiction?

- The Chartered Institute of Arbitrators;
- The Royal Institute of Chartered Surveyors;
- The Faculty of Advocates (Arbitration Service).

Additionally there are a number of private firms offering mediation services, including specialised commercial mediation.

16. Proposals for reform

16.1 Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

There are a number of proposed reforms before the Scottish Parliament's 2017/18 session. These include:

- the introduction of class actions;
- the reform of the law of prescription and limitation of actions; and
- the reform of the law on legal expenses in civil claims.

Additionally, the Scottish Law Commission is currently undertaking a review of the remedies for breach of contract which may result in substantial reform of the law.

Slovak Republic

Katarína Pecnová, Martin Mendel, Matej Košalko

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Large commercial disputes are predominantly decided in arbitration proceedings, as standard court proceedings in Slovakia are considerably time and cost consuming. Arbitration proceedings are regulated under Slovak Arbitration Act (act No. 244/2002 Coll). and rules of procedure of the arbitration court selected by the parties, as amended). Civil court proceedings are regulated under Slovak Civil Procedure Act (act No. 160/2015 Coll.) effective as of 1 July 2016. The aim of the new rules applicable in civil dispute resolution procedures is, *inter alia*, to speed up the proceedings. At the same time, it is expected to take some time for Slovak courts to master effective application of the new rules.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

Limitation periods are regulated in Slovakia by the Commercial Code and Civil Code. In commercial relations, the general limitation period is four (4) years and commences on the day on which the claim can be raised before the court for the first time (or that the right can be exercised against the other party). The parties can agree to extend the limitation period to up to ten (10) years, which is the maximum period permitted under Slovak law. Limitation period is interrupted if the court, arbitration or mediation proceedings are commenced.

Under the Civil Code, the general limitation period is the three (3) years and other provisions (limiting freedom of the parties to agree to the majority relating to aspects of the limitation period) are applicable in relations between parties other than business parties.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

The structure of the courts in the Slovak Republic consists of three tiers. District courts are the courts of the first instance, hearing all types of disputes including large commercial disputes. Regional courts serve as the appellate courts (appeal is a standard remedy available against any judgment of the court of first instance). The Supreme Court should be consistent with in the Slovak Republic when deciding on the extraordinary appeals (this remedy is available only under very specific conditions – for example, if the court of the first instance and the appellate court have opposing opinions on the case heard).

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Foreign lawyers can provide legal services in Slovakia, as follows:

- Hosting Euro-advocate (i.e., citizen of a member state of the European Union or European Economic Area and attorney authorized to provide legal services therein);
- Settled Euro-advocate (i.e., a Euro-advocate registered in Slovakia);
- Foreign advocate (i.e., citizen of a member state of the Organization for Economic Cooperation and Development and attorney authorized to provide legal services therein); and
- International advocate (i.e., citizen of a member state of the World Trade Organization and attorney authorized to provide legal services therein).

A hosting Euro-advocate provides legal services in Slovakia only temporarily and occasionally. They are not authorised to prepare agreement(s) the transfer of real estate and must cooperate with local (Slovak) advocate if representing a client in proceedings where Slovak law requires representation by the advocate (e.g., proceedings regarding extraordinary appeal before the Supreme Court) or in criminal court proceedings. A hosting Euro-advocate may be requested to prove that they have valid insurance for damage caused by the provision of legal services in Slovakia and a valid license to provide legal services in their home state (i.e., in a member state of the European Union or European Economic Area).

For registration with the Slovak Bar Association, the Euro-Advocate shall prove that they:

- are citizens of a member state of the European Union or European Economic Area;
- have a valid license to provide legal services in their home state (i.e., in a member state of the European Union or European Economic Area); and

- have valid insurance for damage caused by provision of legal services in Slovakia.

Limitations applicable to a hosting Euro-advocate do not apply to a settled Euro-advocate.

Foreign advocates and international advocates, though registered with the Slovak Bar Association, are not allowed to represent a client before the Slovak court or other public authority.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Hourly billing is the predominant legal fee structure. However, the market is highly competitive and alternative arrangements are becoming increasingly common. These include:

- Contingency fees (that is, an agreement where the lawyer only receives a fee if the client wins);
- Fixed (task-based) fees; or
- Discounted rates.

Although under Slovak law the structure of legal fees can be agreed upon between the parties, in court proceedings, the winning party is usually awarded compensation of its legal fees, up to the amount set out in the Decree of the Ministry of Justice of the Slovak Republic (No. 655/2004 Coll. on fees of attorneys, as amended). Under the Decree, the formula for calculation of legal fees is set out as follows: the number of "acts of legal services" multiplied by the "base payment". The first meeting with the client and take-over of their representation, drafting of a petition, response or other filling, or participation at the court hearing lasting less than two hours are each defined as an "act of legal services" in the decree. The base payment is dependent on the amount claimed in the proceedings. For example, if EUR 1 million is claimed, the base payment would be EUR 2,425.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Commercial litigation is generally funded by the parties although, occasionally, third parties may fund the costs of litigation.

Certain types of insurance for litigation costs are available (for example third party liability or professional negligence). Most of those insurance policies provide for compensation of damage suffered by the insured party (including costs of the proceedings) once granted under the court (arbitration) decision against which no (further) appeal is available, and they exclude coverage for intentional misconduct

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Generally, court proceedings are public. The court can decide that the proceedings will not be public only if public hearing of the case could threaten protection of confidential and other sensitive information set out by Slovak law, or another important interest of the party or witness.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

Although it is quite common for a potential claimant to send a demand letter before commencement of court (arbitration) proceedings, such practice is not explicitly regulated by Slovak law nor is it required by the Slovak courts.

4.3 How does a typical court proceeding unfold?

Court proceedings are commenced upon the filing of a petition. The claimant must attach documentary evidence invoked by the petition thereto. The court shall deliver the petition to the defendant(s). Together with the petition, or within the period set out in the court request at the latest, the claimant shall pay a court fee. In commercial matters, the court fee is 6% of the claimed amount, but minimum €16.50 (if less than €275 is claimed) or minimum €99.50 (if it is claimed that performance cannot be evaluated by money). In any case, the court fee should not be more than €33,193.50.

Except for the petition and response, the claimant may be required to deliver their one other position to the submission of the counterparty. Then the court shall order an oral hearing, present evidence needed and issue the judgment. The losing party may appeal within fifteen days after the judgment in writing is delivered. Proceedings before the first instance court last around 12-18 months. Appellate proceedings can last 24 months or more.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Slovak law, in contrast to the Anglo-American legal system, does not provide a defendant with a pure legal instrument, such as a motion to dismiss, which will automatically result in dismissing a case. However, in each case the defendant has an opportunity to express its views and suggest that the petition be dismissed.

Usually, defendant's response to the petition is provided to the court upon its request in writing and shall contain all defences which the defendant invokes, including the submission of respective documentary evidence.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Slovak law does not entitle the defendant to request that the claimant provide security for the defendant`s costs. The obligation to secure costs of the proceedings can only be ordered by the court in connection with an interim injunction securing evidence in intellectual property matters.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The court may order an urgent measure to regulate legal relations, or where the enforcement of the eventual decision could be threatened. The urgent measure may be ordered before the court proceedings are initiated, during the proceedings or even after termination of the court proceedings.

Through an urgent measure, the court may impose the following obligations:

- To deposit a financial amount or item with the court;
- Not to dispose of certain property or rights; or
- To perform, refrain from, or permit a certain action.

The party filing an application for the order of an urgent measure shall provide all required information, including a description of circumstances (i) reasoning necessity to urgently regulate relations or risk that enforcement of the eventual decision could be threatened and (ii) reliably evidencing nature and term of the right that is to be protected by the urgent measure.

In the event that the urgent measure is ordered before initiation of the court proceedings, the claimant is usually ordered to bring a petition within a period specified by the court.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

If there is a risk that enforcement of a monetary claim would be threatened, the can could order that a pledge be established over the rights, assets or other property of the defendant, to secure the monetary claim of the claimant. The pledge is established by court order and is perfected upon registration in the relevant register (such as Notarial Central Register of Pledges, Real Estate Cadastre or Trademarks Register). Enforcement of such court pledge is only possible only after the secured claim is awarded by the final court judgment.

5.5 Are there other interim remedies available? How are these obtained?

A special form of interim measure seeks to safeguard the evidence. Evidence may be safeguarded by making a request before, during or even after the court proceedings, if there is a concern that such evidence may later not be produced or obtained at all or only with difficulty.

In addition, a special legal regulation applies for the purpose of safeguarding the subject of evidence in matters regarding intellectual property rights.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Remedies available under Slovak civil procedural law differ according to the type of proceedings and the claim of the claimant. The final remedy may therefore be as follows: (i) a decision as to whether there is a right or not, (ii) a decision regarding the determination of personal status (marriage, divorce, paternity etc.), or (iii) a decision regarding the performance of an obligation.

Most common are claims regarding (non) performance by the defendant, such as fulfilment of a (monetary) obligation or compensation of damage. Civil proceedings are dominated by compensatory remedies. Punitive damages are not recognized under Slovak law.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

Pursuant to Slovak civil procedural law, the parties decide which evidence they propose to the court in the proceeding, however they have no legal claim to requesting disclosure of documentation.

It's in the courts' discretion whether to accept the evidence proposed by the parties. In cases where it's essential for the court to affirm further facts, the court may develop evidence beyond that which was proposed by the parties, in case it's already in the file.

The legislation distinguishes between public and private documents. If evidence proposed by a party to the court proceedings, which is not in its possession, was approved by the court, the court has power to order that third parties, or the other party, submit such documents as evidence to the court.

The court also can request evidence from authorities, other courts, or legal entities. The requested party is obliged to submit all requested documents to the court, except in specific cases, as set forth by legislation.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

Pursuant to Slovak law, parties have the right not to disclose requested documents to the court where:

- It contains - according to special regulation - classified information;
- Submission of such document would cause criminal prosecution to such party or its closely related person; or
- Confidentiality obligations imposed on certain relationships set forth by laws would violated (e.g. confidentiality under tax laws, client-attorney confidentiality, bank secret, etc.).

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Under the Slovak Civil Procedure Act the court may summon a natural person to appear in court and testify as witness, only upon a petition. Such witness is obligated to do so and provide facts through an oral testimony. The court may order the witness to provide the answers and testimony in writing (through a sworn affidavit), but only in exceptional situations and for the reasons of economic efficiency.

Witness may refuse to provide testimony only where:

- There is a risk of his/her criminal prosecution (or persons close to the witness); or
- The witness would breach a confessional secret, or secret of information disclosed to the witness, as person authorized with pastoral care.

The court may call the witness to give an on-going account of all he/she knows of the subject of the interrogation. Then, the parties to the proceedings, the court and other subjects that have consent of the court, may interrogate the witness by asking questions.

Questions that induce a response, questions that are misleading, deceptive questions that are not connected with the subject of proceedings, and questions that would include facts, which are aimed to be detected through the testimony, shall not be posed to the witness.

7.4 What are the rules pertaining to experts?

Slovak law recognizes professional opinion and expert opinion. If it is necessary to assess facts that require professional knowledge, the court may order – based on the petition of a party – a professional opinion. The court will examine, if the conditions of professional knowledge were met.

If the court´s decision depends on a review of the facts, and a professional opinion is not sufficient, the court will appoint an expert. Several experts can be appointed in cases where the reviewed facts overreach the specialization of one expert. Experts submit a written expert opinion, unless they are ordered otherwise. The expert´s list is maintained by the Regional Court.

The parties may appoint their own private experts. Where the private expert opinion fulfils all prerequisites set forth by the law, and contains clause on awareness of consequences of consciously false expert opinion, the court will accept such an expert opinion as if ordered by itself.

Experts are not allowed to draw up their expert opinion if their impartiality could be doubted. The expert´s role is to answer specific questions of the court and verify facts (e.g. technical, scientific, etc.) that are important for the proceeding. Experts may review the court proceeding file. For the purpose of the preparation of an expert opinion, the court may order third parties to assist the expert. In such cases the third party shall appear before the expert, submit the expert with the requested document, provide explanations, etc. Such cooperation may be enforced by penalties imposed by the court.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

The party may appeal against the decision of the court of first instance to the court of appeal. An appeal must be filed with the court that has issued the first instance decision within fifteen (15) days from the delivery of the decision.

Generally, the appeal is not permissible against decisions:

- issued based on acceptance of a claim or waiver of a claim;
- issued based on non-action of the defendant; or
- in both cases, except for appeals filed for reasons where the conditions for issuance of such decisions were not met.

Further, appeals are also not permitted if they challenge only the reasoning (justification) given by the court for its rulings.

An appeal against a judgment may only be based on the assertions specified in article 365 of the Slovak Procedure Act.

If the appeal is filed in a timely manner and is admissible, the first instance decision cannot enter into force until the appeal is finally decided on by the appellate court.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Slovak law does not explicitly recognize class actions or other forms of collective redresses.

Nevertheless, Slovak law recognizes the following instruments, which have features similar to class actions:

- Actions for refraining from infringement can be brought before a court under consumer protection laws, as well as by associations or professional organizations with a legitimate interest in protecting consumers and authorized persons specifically listed with the European Commission; and
- Actions for refraining from infringement, and for remedying harmful effects, can be brought before the court by legal persons entitled to defend the interests of competitors or customers in the area of protection against unfair competition.

Formal commencement of proceedings in specific matters may prevent other petitioners from initiating proceedings for same nature of claims, arising from the same conduct or circumstances, against the same defendant. In such cases final judgment resolving the matters shall also be binding on other parties entitled to claim against the defendant for the same claims arising from the same conduct or circumstances.

Furthermore, there is so called *procedural partnership*, where there are more than one entity acting as plaintiffs or defendants. The court may decide, for the sake of efficiency, that such a procedural partnership shall be represented only by one designated entity, provided that there are 10+ entities acting as plaintiffs.

Slovak Civil Procedure act recognizes:

- Separate procedural partnership – each plaintiff acts on its own behalf and does not bind other plaintiffs by its legal actions;
- Inseparable procedural partnership – legal actions taken by any plaintiff shall be consented to by all remaining plaintiffs, and the court´s judgment binds all plaintiffs; and
- Compulsory procedural partnership – statutory obligation binding the plaintiffs to act collectively.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

According to Slovak Civil Procedure Act, costs relating to the proceedings consist of:

- Attorneys remuneration;
- Costs necessary for the collection of evidence; an
- Remuneration of the other officials (notary, translator, etc.).

Attorney´s remuneration shall be set in relation to the value, type of the matter-in-question and number of legal service actions performed by the attorney.

The court fee is a one-off payment of the plaintiff calculated on the value of the matter in question. Non-material damage disputes have their value set by law.

Where the defendant has been successful to defense of its rights in the full extent, or almost full extent, it shall be entitled to reimbursement of all the costs incurred. If the defendant wasn't successful in defending its rights to the full extent, the court may proportionately decrease the value of the costs awarded, or not award costs at all.

8.4 How is interest on costs awarded and calculated?

The interest on costs of the proceedings cannot be awarded or enforced under Slovak law.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Slovak jurisdiction recognizes distrainment enforced by a distrainer, who is a natural person that the state commissions to lead the distrainment office (referred to in the Execution Code as "execution" and "executor").

If the obliged party has not fulfilled the order voluntarily, execution proceedings are initiated by application of the entitled party, delivered to the executor.

Decisions which may be enforced by execution are stipulated in Article 41 (2) of the Execution Code.

Within 15 days of receipt of the application, the executor must request an enforcement (execution) order from the respective court. The court shall issue the order within 15 days. Thereafter, the executor sends notification of the execution to both parties. Such notification contains information with respect to the manner execution, preliminary costs and the payment of outstanding receivables, or file from objection within 14 days from delivery of the notification. At the same time, the obliged party is prohibited from disposing of its property that is subject to the execution (except for settlement of the respective receivables).

Execution of a monetary obligation can be carried out in, inter alia, the following ways:

- Withholding from wages and other income;
- Charges against, or withholdings from, the obligor's bank accounts;
- Sale of movable property;
- Sale of securities;
- Sale of immovable property;
- Sale of enterprise.

Execution of obligations other than monetary obligations can be carried out in the following ways:

- Vacating the property; or
- Seizure of a thing; or
- Division of property co-owned by the obligor.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Slovak courts shall, generally, respect the choice of governing law in contracts, subject to limited exceptions in:

- EU legislation, in particular, Regulation I Regulation (Regulation (EC) No. 593/2008 on the law applicable to contractual obligations) and Rome II Regulation (Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations); and
- domestic legislation, in particular, Slovak Private International Law Act (act No. 97/1963 Coll. on international private and procedural law, as amended).

According to the Rome I Regulation, parties are not allowed, by their choice, to:

- prejudice the application of mandatory provisions of the law of the country where all elements relevant to the situation at the time of the choice is made are located;
- prejudice the application of EU law if all elements relevant to the situation at the time of the choice is made are located in one or more Member States;
- deprive the consumer or employee of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable;
- various restrictions in the case of insurance contracts; or
- escape overriding mandatory provisions (i.e. public policy) of the law of the forum.

According to the Rome II Regulation, parties are not allowed to:

- agree to submit their non-contractual obligations to the law of their choice prior to an event giving rise to the damage occurred, unless all parties to such agreement are businesses;
- prejudice the application of mandatory provisions of the country where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located; or
- prejudice the application of mandatory provisions of EU law, where appropriate as implemented in the Member State of the forum, if all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States.

The Slovak Private International Law Act applies if the relevant circumstances would fall outside of the application of the Rome I Regulation and Rome II Regulation. The Private International Law Act contains similar limitations to the Rome I Regulation. However, due to the broad application of the Rome I Regulation and Rome II Regulation, it is unlikely that any situation would arise in practice that would fall outside of the scope of these regulations.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The jurisdiction of Slovak courts is governed particularly by:

- EU legislation, in particular, Brussels I Recast Regulation (Regulation (EC) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) and the Lugano Convention;
- domestic legislation, in particular, the Private International Law Act; and
- international conventions that bind the Slovak Republic, such as the CMR Convention.

Slovak courts shall, generally, respect the choice of jurisdiction, subject to limited exceptions:

- matters over which courts have exclusive jurisdiction (for example, proceedings which have as their object certain rights in immovable property, some questions related to company law, the validity of entries in public registers, IP rights);
- situations where a party submits to the jurisdiction of a court;
- instances where there are special rules in relation to the types of contract, such as employment, consumer, or insurance contracts; or
- if the court chosen in the contract refuses to entertain the claim.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Under Slovak law, in litigation before Slovak court, any documents are addressed to the court with corresponding number of counterparts and the court then delivers the documents to other parties. According to Slovak procedural rules, the court shall, generally, serve any documents through (i) registered mail or (ii) a court courier.

Because of Slovakia's membership in the EU, the Regulation (EC) No. 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters applies in Slovakia. The Slovakia is also a party to Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and various bilateral agreements with other countries.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

The procedure of assistance to foreign courts in the Slovak Republic (such as the examining of a witness) depends on the country of the requesting court. Slovakia is a party to The Hague Convention of 1 March 1954 on Civil Procedure and The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Generally, if a foreign court seeks assistance with examination of a witness in the Slovak Republic, such request shall be addressed to the Slovak Ministry of Justice. The Slovak Ministry of Justice would pass the request to the relevant court that would examine a witness.

The Slovak Republic, as a member state of the EU is also bound by Regulation (EC) No. 1206/2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. Under

the regulation, a court of a member state of the EU may directly request assistance with obtaining witness examination from the respective Slovak district court.

There are also bilateral agreements between Slovakia and third countries that regulate the procedure of taking of evidence in Slovakia upon a request from such third countries' courts.

If there is no agreement on taking of evidence between Slovakia and the country of the requesting court, the Slovak court may provide assistance, provided that mutual assistance would be provided to Slovak courts by the country of the requesting court. In this case, the requests would be also processed by the Slovak Ministry of Justice, who would then delegate the duty to take evidence to the relevant Slovak court.

9.5 How can a party enforce a foreign judgment in the local courts?

The procedure for enforcing a foreign judgment in the Slovakia depends on the country of the issuing court.

Slovakia is party to the Lugano Convention and, as a member state of the EU, it is bound by the respective regulations, such as Brussels I Recast Regulation.

A judgment given in a member state of the EU, or the Lugano Convention, which is enforceable in that state shall be enforceable in Slovakia. Such judgment shall be delivered to a court executor who shall deliver it to the relevant Slovak district court. Slovak court will then deliver the judgment to the defendant in Slovakia and ask him to state any reasons opposing enforceability within 15 days. If the defendant does not state any reasons, or if the court dismisses such reasons, the court shall appoint the court executor to enforce the judgment under the same conditions as a Slovak judgment.

If there is no agreement between Slovakia and the country of the court issuing the judgment, the procedure for enforcing the judgment is governed by the Private International Law Act. According to section 64 of the Private International Law Act, the Slovak court may, generally, refuse recognition of a foreign judgment if (i) the Slovak court has exclusive jurisdiction under Slovak law, (ii) the enforced judgment is not final and enforceable in the country of its origin, (iii) there was a violation of due process, (iv) there is former decision of Slovak court, (v) enforcement would be against Slovakia's public policy, or (vi) it is not a judgment on the merits.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

The most common ADR procedures in Slovakia are arbitration and adjudication. Slovak law also recognizes and regulates mediation, but mediation is not commonly used in Slovakia to resolve large commercial disputes.

Arbitration is used in various types of commercial disputes. On the other hand, adjudication is used predominantly in the construction sector. The reason is that adjudication is not formally recognized and regulated by Slovak law. However, FIDIC based construction contracts include an adjudication procedure.

There are no statistics available on the extent of resolution of large commercial disputes through ADR or court proceedings. In our practice, large commercial disputes are equally settled through ADR and courts in Slovakia.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Arbitration

Arbitration as ADR requires the agreement of the parties. The agreement may be concluded even during already pending court proceedings. If one of the parties initiates a dispute before a Slovak court, in violation of the arbitration agreement, the court shall stop the proceedings only if the other party objects, not later than at the time of submitting his first procedural action. However, the court will not issue an order or compel parties to arbitration in any other way than by merely refusing to entertain the claim.

Mediation

Mediation also requires the agreement of the parties. However, unlike in the case of arbitration, Slovak courts shall not stop court proceedings merely because the party initiated the court proceedings in violation of the mediation agreement. Slovak court may ask parties to try to settle their dispute through mediation in special matters (such as family matters).

Adjudication
As described above, adjudication is not formally recognized by Slovak law. Therefore, parties use adjudication only if an adjudication procedure is specifically agreed upon in the contract (such as FIDIC forms). However, if any of the parties initiate court proceedings in violation of the adjudication agreement, the court will merely disregard the adjudication agreement and decide on the subject matter.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Generally, rules regarding evidence depend on the agreement of the parties or applicable ADR rules. Provisions of the court's procedural rules apply if no such agreement or rules exist with respect to (usually limited) disclosure of documents, witness statements and expert reports.

Arbitration
According to the Slovak Arbitration Act, arbitration proceedings shall not be public, unless the parties agree otherwise.

In addition, the Slovak Arbitration Act imposes on an arbitrator a duty to keep any information learned during the arbitration proceedings confidential. However, the Slovak Arbitration Act does not impose a confidentiality duty upon the parties.

Mediation
According to the Slovak Mediation Act (act No. 420/2004 Coll. on mediation, as amended), the mediator, parties to the dispute and any third party shall keep confidential any information learned during the mediation, unless the parties agree otherwise.

Adjudication
As adjudication is not regulated by Slovak law, any confidentiality obligations must be agreed to between the parties.

10.4 How are costs dealt with in ADR?

Dealing with the costs of ADR depends on the agreement of the parties. In the case of mediation and adjudication, each party usually bears its own costs and equally share the costs of the proceedings (e.g. mediator's or adjudicator's fees). In the case of arbitration, the losing party usually bears the costs of the proceedings and the attorney's fees of the winning party.

10.5 Which bodies offer ADR in your jurisdiction?

Arbitration
In Slovakia, there are more than 100 permanent arbitration courts. However, based on the most recent amendment to the Slovak Arbitration Act, as of 1 January 2017, there will only be arbitration courts established by (i) law, (ii) legal entities established by law, and (iii) national sport associations. Therefore, from 1 January 2017 there will be practically only two permanent arbitration courts in Slovakia: (i) the Court of Arbitration of the Slovak Chamber of Commerce and Industry in Bratislava, and (ii) the Arbitration Court of Slovak Bar Association.

Mediation
There are currently 60 mediation centers registered in Slovakia.

Adjudication
Construction adjudication under FIDIC agreements is usually entertained by adjudicators registered and appointed by the Slovak Association of Consulting Engineers.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

Recently, a substantial reform of the dispute resolution in Slovakia has been completed, In particular:

- As of 1 July 2016, new procedural rules became effective, which entirely replace the old rules in order to make court proceedings more efficient;
- As of 1 January 2015, a substantial reform of the Slovak Arbitration Act became effective that will align the Slovak Arbitration Act with the UNCITRAL Model Law;
- As of 1 January 2015, a substantial reform of the Slovak Mediation Act became effective in connection with the implementation of alternative dispute resolution of consumer disputes.

Spain

Julio Parrilla, Arancha Barandiarán

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Litigation is still the primary method of solving disputes, although arbitration is becoming increasingly accepted for large disputes. Mediation still remains unfamiliar, even though relatively recent legal implementation has tried to enhance its use.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The Spanish Civil Code states the limitation periods to be applied to different classes of claims; the most relevant ones being: (i) a 5-year limitation period for contractual claims (with some exceptions); and (ii) a one-year limitation period for tort claims.

Regarding their calculation, they might vary depending on the particular circumstances of each case. However, the general principle stated in the Spanish Civil Code is that limitation period is calculated from the day on which the action become exercisable.

Time limits are considered a substantial law issue to be resolved in the judgment to be rendered.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

First Instance Courts examine disputes which are not expressly attributed to another area of law and appeals against Magistrate's Courts' decisions.

Commercial Courts are specialised courts on insolvency proceedings, transports, IP, trademarks, general contractual provisions, fair and unfair competition or company conflicts.

Commercial Courts do not have special divisions (each court is managed by a single Judge, assisted by a Court Clerk, who renders the judgments) but in large jurisdictions (such as Madrid or Barcelona) their decisions, if appealed, are examined by a specialised Section inside the High Courts of Justice.

Judgments on appeals are rendered by a college of three judges.

In the Supreme Court, the Civil Section deals with civil and commercial cassation appeals, and also renders its decisions as a college of three judges.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Being a member of any of the Spanish Bars is mandatory to conduct proceedings before the Spanish courts.

EU Member States lawyers applying for permanent professional practice in Spain must (i) be previously registered with another European Bar, (ii) request the recognition of their diplomas (pursuant to EU Directive 2005/36/CE), and (iii) pass a qualifying examination. For three years they must act together with a Spanish lawyer before the courts and may apply for full recognition and registration after that period.

In the case of urgent or occasional professional practice, the lawyer will be required (i) to be registered with another European Bars, (ii) to communicate to the Spanish Bar where the legal practice will take place, and (iii) to act together with a Spanish lawyer.

In the case of non-EU Member States Lawyers, the following is requested (i) the validation of the foreign diploma, (ii) the passing of a qualifying test, (ii) a nationality's waiver, granted by the Ministry of Justice, and (iii) the passing of a Master Degree program for Access to Legal Practice and the access examination required by the Ministry of Justice.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Court Agents' costs are calculated based on the rates approved by the Royal-Decree no. 1373/2003, of 7 November, and the guidelines stablished by the Bars (even if not mandatory) are often used in order to set Lawyers' fees.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

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 the Bars may be established.

Third-party funding or security for costs, even if not legally barred, are still unfamiliar practices in Spain.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings are public. However, "closed door" hearings can be agreed to on grounds of public order, national security, personal rights or liberties, children or parties' privacy, or when the Courts consider that publicity not be in the interests of justice.

The court must hear the parties before any "closed door" decision is taken and there will be no appeal against it.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

In general, there are no pre-action conducts or protocols imposed by law. However, in some specific areas, such as unfair competition claims, if the claimant has adhered to a Code of Conduct it is mandatory to file a prior claim before the competent supervisory body.

4.3 How does a typical court proceeding unfold?

Ordinary trials (juicio ordinario) are heard 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 on 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 brought at 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 less than €6,000. The complaint is filed before the First Instance/Commercial Courts and admitted by the court. When served on the defendant, the defendant is already informed of 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 during 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), in the case of uncontested debts. If the defendant does not oppose to such an application, or pays 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).

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Early dismissal of a claim is possible in cases where it has been opposed, such as:

- Lack of territorial or objective competence (this later to be examined also *ex officio* by the Court);
- *Res iudicata* or *lis penden*.
- Lack of joinder parties who should also be part in the proceedings;
- Inadequacy of the procedure followed; or
- Lack of legal standards in the complaint or counterclaim or precision in the parties or petitions.

The exceptions must be opposed in the statement of defense, and they will be analysed by the court and solved during the First Hearing.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

When applying for interim measures, the claimant must provide security for compensating any damages (not specifically costs) that such measures may cause to the defendant in the case that the main claim is not successful.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

The application is filed before the competent Court of First Instance/Commercial Court (attaching all available documentary evidence) and, if it is proved 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 to prove:

- an urgent situation or need, so that the interim measure request cannot be postponed until the claim is filed;
- that he has 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.

In addition, when an urgent situation occurs, the claimant is entitled to request, from the First Instance or Commercial Court, the adoption of certain pre-action interim measures. If such pre-action interim measures are granted, the must be filed within a term of 20 working days.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

- Preventive seizure;
- Intervention or Court administration;
- Deposit;
- Asset inventory; and
- Preventive annotation of the complaint in the public registries.

5.5 Are there other interim remedies available? How are these obtained?

Courts can agree to any measures deemed to be necessary to guarantee the efficacy of a future judgment to be rendered. In addition to the specific measures already mentioned, the Spanish Code on Civil Procedure specifically establishes the following:

- Preventive annotation of the complaint in public registries;
- Provisional cease of an activity, conduct or temporary prohibition of interrupting or ceasing an ongoing service;
- Intervention and deposit of income obtained by an unlawful activity to be seized according to the complaint, and deposit of amounts claimed as IP rights' compensation;
- Temporary deposit of materials, artworks or objects produced by an infringement of IT&IP rights; and
- Suspension of corporate agreements when the claimant owns at least 1 or 5 percent, if shares have been listed for trading on an official secondary securities market.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Courts can award money, establish positive or delivery obligations, prohibitions, or make declarations about the existence, effectiveness or interpretation of a relationship or legal status.

Only damages for actual loss can be compensated. 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 which are traditionally set very low, are "moral damages". Moral damages can only be awarded where expressly allowed by law and they compensate personal suffering outside of the economic sphere.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

All the documents supporting the pleadings of claim or the statement of defense must be attached to the pleadings when filed before the Court.

The possibility of disclosing additional documents at a later stage in the proceedings is restricted to those connected to new facts or statements made during the proceedings or dated after the filing of the briefs.

If agreed to 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.

The disclosure of documents by the counter-party, third parties and government or public bodies must be agreed to by the court, upon a party's request, on the basis that (i) such disclosure is relevant for the purposes of the proceedings, and (ii) the documents to be produced are sufficiently identified.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

Official documents declared to be confidential or secret are excluded from the obligation of disclosure (public interest privilege).

In addition, "attorney-client privilege" is recognized, 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 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses proposed and admitted by the court at the First Hearing must be brought, or summoned by the court, upon the party's request, for cross-examination before the court during the trial. Witnesses will declare one by one, in the order agreed to by the court, and will not be authorised to attend other witness interrogations before they are examined.

Witnesses' written 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.

7.4 What are the rules pertaining to experts?

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 defense. 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 at the trial in order to ratify his report and answer questions or clarifications requested by the parties.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

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 has 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 has 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 on 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.

For a decision rendered by the Supreme Court, and in 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 of admission, and around five years to render a decision on the merits of the case, if admitted.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

"Collective actions" were introduced by the Civil Procedure Act in 2001, entitling consumer associations to protect consumers' rights and interests.

There is no threshold standard to certify the action as a collective action, no opt-out system and the claim's admission shall be published.

The judgment to be rendered shall affect consumers who do not bring the collective action.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

The rules with respect to awarding 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.

Court Agents' costs are calculated based on the rates approved by the Royal-Decree no. 1373/2003, of 7 November, and the guidelines stablished by Bars (even if not mandatory) are often used in order to set Lawyers' fees.

8.4 How is interest on costs awarded and calculated?

The payment of interest is regulated by the provisions of the Civil Code and the Spanish Code of Civil Procedural Law. Courts cannot impose them discretionarily and they are awarded in the judgement to be rendered.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

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 credit 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.

Provisional enforcement is available when a judgment has been appealed.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Parties to a contract can choose the governing law and Spanish Courts will enforce it, except for the following areas in which, among others, mandatory rules apply: possession and ownership of real estate properties and moveable assets, ships, aircrafts and railway trains, shares, IT&IP rights, employment contracts, donations, or legal representation, bills of exchange, consumers, cheques and promissory notes, arbitration and choice of court agreements, law of companies, trusts or dealings before a contract is signed.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Spanish Courts do enforce contractual choices of jurisdiction, except for:

- Disputes to be solved within oral trials ("juicio verbal"), applications for payment ("juicio monitorio") of uncontested debts, checks or promissory notes ("juicios cambiarios");
- Choices of jurisdiction in adhesion contracts, imposed within

general terms of business or contracts entered into with consumers; and

- "In rem" actions over Real Estate properties, inheritances, legal assistance or representation of disabled or prodigals, protection of constitutional and personal rights (honorf, intimacy and own image), leases and evictions, condominiums, damages caused by vehicles, shareholders disputes, breaches of IP rights, unfair competition, patents and trademarks, general terms and conditions of business, third-party domain or possession claims connected to administrative proceedings, insurance and financing or hire-purchase of goods.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Spain has opposed direct service within its territory.

Therefore, the following proceedings must be respected:

- Under the scope of EU Regulation 1393/2007, the document to be transmitted is to be accompanied by a request (standard form) and sent to the competent First Instance Court. The Court Clerk will supervise the service the addressee, who may refuse to accept the document to be served if it is not written or accompanied by a translation into a language which the addressee understands or Spanish.

When the formalities concerning service of the document have been completed, the Court Clerk will confirm this through a certificate of completion (standard form), to be addressed to the transmitting body.

- Under the scope of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("The Hague Service Convention") or in case no international convention applies, service proceedings will be coordinated by the "*Servicio de Cooperación Jurídica Internacional*" of the Ministry of Justice.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

If a local witness is asked to appear for cross-examination in a foreign jurisdiction, the service of the court summons will follow the rules established under Question no. 9.2.

If the witness' testimony is to take place in Spain, to be used in foreign proceedings, a written request will have to be addressed, detailing the witness identification and contact details, the questions to be asked, confirmation on the right to refuse testimony or the need to declare under oath or promise.

9.5 How can a party enforce a foreign judgment in the local courts?

Regarding foreign judgments rendered in the European Union, a Member State's judgment will be recognized and enforced in Spain (without any prior registration) pursuant the provisions of EU Regulation No. 1215/2012.

The enforcement application is filed before the Spanish First Instance Courts (the jurisdiction is determined by the domicile of the party against 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, the decision is served on the enforced party, which will be granted a term to challenge the enforcement.

In the case of enforcement of foreign judgments rendered outside of the EU, or outside the scope of EU Regulation No. 1215/2012, and in the absence of a bilateral treaty, prior recognition of the decision under the provisions of the Law no. 29/2015, of 30 July, on international legal cooperation, which requires such judgment to respect 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 recognized (principle of reciprocity).

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Arbitration: This occurs where 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 an express agreement between 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 the arbitrator's knowledge and honest belief, in accordance with their natural sense of justice.

In both cases, 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 it does affect the way the arbitrator considers issues and finally resolves the dispute.

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 run to completion. 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.

Expert determination: Although there is no legal provision that regulates the expert determination as an alternative dispute resolution method, some technical contracts refer to expert determination as a dispute resolution method.

10.2 How do parties come to use ADR? Is ADR a part of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Parties must agree ADR as it is considered a waiver to the Court's jurisdiction.

Courts cannot compel the use of ADR, but they may assist with the arbitration process and enforce arbitration awards.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

ADR is confidential. The evidence produced and the awards rendered are protected against disclosure.

The rules regarding evidence are established by each arbitration court, but they are usually flexible and submitted to the arbitrator's admission.

10.4 How are costs dealt with in ADR?

The main costs to be faced are Arbitration Court taxes and arbitrator's and attorney's fees.

Each party assumes its own costs and share equally the common ones while the proceedings are pending.

The award to be rendered will expressly set how the costs incurred must be borne by the parties.

10.5 Which bodies offer ADR in your jurisdiction?

The major alternative dispute resolution institutions in Spain are:

International Courts:
Corte Internacional de Arbitraje de la Cámara de Comercio Internacional (ICC) with premises in Barcelona.

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.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

No.

The Netherlands

Anouk Rosielle, Dentons Boekel

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

In the Netherlands, disputes may be adjudicated privately (e.g, in arbitration) or litigated publicly in the courts. Both court proceedings and arbitration are common methods to settle large commercial disputes. The preference for either of these two proceedings depends the nature of the commercial claim. Specific sectors tend to have a preference for arbitration (construction, energy), while court proceedings are favoured for claims concerning, for instance, (corporate) liability cases.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The limitation period for claims arising out of commercial disputes and out of tort is in principle five years. For tort claims, he period commences the day after the claimant becomes aware of the fact that it has suffered damages and of the identity of the person responsible for the damages. For claims arising out of contract, the limitation period commences the moment the claim becomes due. A running limitation period can be interrupted, after which a new period may begin to run. In any event, claims become unenforceable 20 years after the event that caused the damage.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

There are three courts in the Netherlands for civil and commercial matters:

- district courts, of which the cantonal courts form part;
- courts of appeal; and
- the Supreme Court.

District courts are the court of first instance for almost all civil and commercial matters. The cantonal courts have jurisdiction over certain reserved matters such as employment cases, agency agreement claims and lease claims. Judgments of the district courts can be appealed before the court of appeals. The Supreme Court handles cassation appeals (appeals of court of appeals' judgments), which may only be based on misapplication of the law or non-compliance with essential procedural requirements

Dutch law provides for inquiry proceedings that consist of an inquiry into the policy of a company and the conduct of its business, and which may ultimately result in the establishment of 'mismanagement'. The competent court in inquiry proceedings is the Enterprise Chamber of the Amsterdam Court of Appeals.

As of 1 January 2018, parties can submit their claims with the Netherlands Commercial Court, which will be specialised in hearing complex international commercial cases. Proceedings can be conducted in English. Specialised judges hear the cases, with experience on technical and commercial matters. The proceedings are conducted under Dutch procedural law. There is no link with the Dutch jurisdiction required to seek out the Netherlands Commercial Court as the forum of choice.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Within the context of the European Union, lawyers of member states are allowed to conduct cases if specific requirements from the following EU Directives are met:

(i) The Services Directive (77/249/EEC), which ensures the possibility for lawyers in Member States to act under certain circumstances in their own (national) capacity in a different Member State.

(ii) The Establishment Directive (98/5/EC), which facilitates the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. After three years of practice and under specified circumstances, the non-Dutch lawyer can file a request to be admitted to the Dutch Bar as a lawyer, maintaining his or her domestic legal degree.

(iii) The Directive (2005/36/EC) on the recognition of professional qualifications. If a lawyer from a different Member State qualifies as produit fini after completion of an aptitude test, he is fully acknowledged as a Dutch lawyer.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

For legal fees, a distinction should be made between court fees and lawyers' fees. Court fees are an administrative fee, the amount of which is determined by the amount of the claim, with a maximum of (currently) EUR 3,984 per proceedings. The losing party is usually ordered to pay the legal fees, whereby the lawyers' fees of the counter party are capped to a specific amount set by law, and on average do not exceed EUR 50,000. Therefore, although there is little adverse cost risk, there also is no opportunity to receive payment of actual lawyers' fees from a losing party.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Litigation is typically funded by the parties themselves. Litigation funding has become more widespread in recent years, with several professional parties on the market. Funding has particularly gained ground in class action cases. Insurance for litigation costs is available.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

In principle, court proceedings are public. The court hearings are open to the public and the judgments (interim and final) are made available for the public. Anonymization of personal data is granted if the judgments are made available online, which they often are.

Certain specific hearings, such as bankruptcy hearings and juvenile cases, are dealt with behind closed doors, due to the sensitive nature of the matters.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

The proceedings before the Enterprise Chamber (see answer under 3 above) can only be commenced if the applicant has first expressed its grievances to the company and has given the company a reasonable period to address these grievances. Failure to do so will lead to inadmissibility of the claim.

4.3 How does a typical court proceeding unfold?

Proceedings commence by the claimant serving a writ of summons upon the defendant. The writ contains the claim, the relevant facts and all legal argumentation. Dutch procedural law provides for a number of detailed regulations on the content and manner of service of the writ. Not observing those rules can result in the writ being null and void. The writ mentions the first case-list date, which is the date upon which the claimant files the writ with the court and the defendant has to appear in proceedings, which is an administrative act whereby it informs the court what the name of its counsel is. The claimant is at liberty to choose any first case-list date it deems fit, as long as it is a Wednesday.

Once the writ is registered with the court, the defendant will receive six weeks to file its statement of defence. This term can be extended, until the claimant objects to further extensions. The statement of defence contains all arguments in fact and law against the claim. In more complex matters, it is not uncommon that a defendant will first file statements on incidental (often procedural) issues, such as the competence of the court or the request to start contribution proceedings, before it files its statement of defence. Those incidental motions are dealt with upfront by the court.

After the statement of defence has been filed, the court may order a personal appearance of parties, where they may provide further information to the court, plead their case and see if a settlement can be reached. Hearings within the setting of Dutch proceedings are not in a 'trial format', whereby the evidence is presented and the arguments set out in detail. The hearing primarily functions as a 'contact moment' with the court and a possibility to present the court with the essence of the case.

In straight forward matters, the court may render its judgment after this hearing. More often, the court will decide if parties can file further written statements of reply and rejoinder on specific issues, hear witnesses or allow for examination of experts. If parties so request, further hearings are scheduled.

After exchange of all written statements, the court will render its judgment. Completion of proceedings in first instance on average takes 1,5 – 2 years for more complex matters.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

A defendant can bring specific procedural issues before the court, prior to filing its statement of defence, to seek to have the case struck off before it continues on the merits. Without agreement between parties on this (see below), the possibilities for a defendant are limited. It can (i) contest the competence of the court or (ii) it can request security for costs if the claimant is a foreign entity. Either of these two grounds can lead to dismissal of the case before a debate on the merits.

In complex cases, it is known to happen that parties come to arrangements about the continuation of the proceedings. Parties can agree to have specific subjects of the claim (f.i. limitation, applicable law) dealt with upfront, by way of incidental motion upon which the court decides. The benefit for the claimant is that it has certainty about the course of the proceedings, the benefit for the defendant is that the proceedings can be terminated at an early stage, if the court accepts the defendant's arguments.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Yes, but only if the claimant is domiciled outside of the European Union.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Interim injunctions can be obtained within and outside of the scope of pending proceedings. Commonly, the injunction is requested in separate summary proceedings. These are of an informal nature, consisting of a writ of summons and a hearing, scheduled at short notice. At the hearing, the defendant must raise its defences in pleadings. Depending of the urgency of the requested injunction, judgments in summary proceedings can be rendered anywhere within a few hours up to a few weeks after the hearing.

Summary proceeding judgments are provisional by nature, but can have decisive effects. There is no limitation as to the nature of the sought injunction. Injunctions seeking payment of an amount are only awarded under very limited circumstances and as such are rare.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

There are two types of attachments orders;

(i) prejudgment attachments

A claimant can seek prejudgment attachment of any assets of a debtor. The debtor does not have to be domiciled in the Netherlands, its assets do. The application for attachment is handled on an *ex parte* basis and the debtor will first know of the attachments once they are levied by the bailiff. The claimant must commence proceedings on the merits for its claim shortly after the attachments are in place to obtain an enforceable title. Failure to initiate proceedings will lead to a lapse of the attachments. The prejudgment attachments prohibit a defendant to dispose of or encumber its assets. Once the claimant obtains an enforceable title against the debtor, the prejudgment attachments are converted to execution attachments (see below).

Prejudgment attachments can be levied on any assets of the debtor, such as real property, shares it holds, possessions, claims it has on third parties, bank accounts, etc.

(ii) execution attachments.

Execution attachments are levied with the sole purpose of obtaining assets to execute an enforceable title against. The attachments are made by the bailiff, with no court interference involved. Depending on the attached object, specific rules govern the manner in which the asset is executed. For instance, attached shares can only be sold via public auction (unless leave is obtained for a different manner).

5.5 Are there other interim remedies available? How are these obtained?

See above under question 12

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Courts can render declaratory judgments as well as award claims. In declaratory judgments specific facts or legal situations are established (f.i. the establishment that a legal act is null and void).

Claims can be demands for restitution (the awarding of damages) or a demand that the defendant is ordered to act or refrain from action in specific matters (f.i. prohibiting the continuation of unlawful conduct).

Damages are compensatory by nature; punitive or exemplary damages are not available. Damages are generally calculated by a theoretical comparison between the situation the claimant is in and the position it would have been in would the harmful conduct not have occurred. Compensation can consist of lost profit, incurred losses or, very rarely, loss of opportunities.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

Dutch law does not provide for the manner of discovery of documents, either pre-trial or during trial, as known in Anglo-Saxon jurisdictions. There are, however, specific disclosure obligations in certain situations:

- Article 22 Dutch Civil Code of Procudure (DCCP) provides that the court may order a party to submit certain documents it deems relevant to the case at hand. A party may only refuse to do so for compelling reasons. The court will decide whether the reasons cited are justified and if not, it may draw conclusions from this refusal as it deems fit.
- On the basis of article 162 DCCP, during the proceedings the court may order, at the request of a party or ex officio, that a party submit the books and records that it is required to keep in accordance with statutory obligations (such as a company's accounts). If the relevant party refuses to do so, the court may draw conclusions from this refusal as it deems fit.
- On the basis of article 843a DCCP, a party with a legitimate interest may request from the counterparty a copy of certain documents with respect to a legal relationship to which it or a predecessor is a party. The objective of this provision is to allow a party that is familiar with the substance of certain evidence, but does not have it in its possession (anymore), to request it from the party that does have it. A claim by virtue of article 843a CCP can be allowed if four elements are satisfied:

The requesting party (1) must have a rightful interest to claim disclosure of (2) certain documents or records, (3) that are at the disposal of or held by the requested party, and (4) that relate to a legal relationship to which the requesting person is a party.

The grounds for restriction are:

The person in possession of the documents is under the duty of confidentiality regarding such documents by virtue of his or her administrative position, profession or employment, (2) there are serious reasons why the holder of the documents should not comply with the claim for disclosure, or (3) there is a reason to believe that the proper administration of justice can also be guaranteed without the requested documents being disclosed.

A request based on article 843a DCCP can be made within the scope of pending proceedings or in a separate request.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

Parties are not obliged to disclose documents that are subject to attorney-client privilege. The court can request a party to submit documents that are subject to confidentiality, but it remains at the party's discretion to comply with that request. As stated above, the court may draw conclusions from a refusal to disclose documents as it deems fit.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Witnesses provide oral evidence in court. The witness is sworn in and evidence given in contradiction to the truth is considered perjury. Witnesses are under an obligation to testify if the court calls upon their presence, save for specific persons (lawyers, first degree family). As a principle, the witness's task is to inform the court. As such, traditionally the presiding judge would lead the hearing and ask the questions. Parties were then invited to ask any questions they had. There has been an informal shift to a system whereby the counsel of the party that has requested the hearing of the witness takes the lead and ask the witness questions. Cross-examination is possible, but not often used by opposing counsel.

The witness statement is not recorded nor transcribed verbatim by a court reporter. The presiding judge summarises the answers of the witness in a short witness statement.

7.4 What are the rules pertaining to experts?

There are no specific rules pertaining to experts. Usually, experts provide evidence in written statements, which have no different evidentiary value than statements of other persons.

It is not common for experts to provide further oral evidence at a hearing or be subjected to cross-examination.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

A party can appeal a judgment by serving a writ of summons in appeal upon the defendant within three calendar months after the date of the judgment. The appealing party can choose to either file a writ that contains all objections to the judgment in first instance, or only notify the defendant that the judgment is appealed against and that the substantiation of the appeal will be submitted at the first case-list date mentioned in the writ.

In appeal, a second and full review of the case on both facts and law is possible. In cassation before the Supreme Court, only points of law can be appealed against.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Since July 2005, the WCAM Act has come into effect. The WCAM provides for a mechanism that facilitates the universally binding effect of collective settlements. Pursuant to the WCAM, the parties to a settlement agreement may request the Court of Appeal in Amsterdam to declare the settlement agreement binding on all persons to whom it applies according to its terms (the interested persons). Interested persons do not have to be Dutch residents. If the settlement is declared binding, all interested persons are bound by its terms, save those that have opted-out within a specific time frame.

Furthermore, article 3:305a of the Dutch Civil Code provides for a collective action to protect common or similar interests of parties whose rights or interests are affected. A collective action can only be instituted by an association or foundation whose articles of association promote the interests that the collective action aims to protect. Second, the collective action can only result in a declaratory judgment as to the liability of the defendant. It is then for each of the injured parties to seek payment There is legislative reformation on its way that makes it possible for the association or foundation to directly seek monetary redress from the defendant.

8.3 A common practice in the Netherlands regarding collective redress is the bundling of claims by assigning these claims to a special purpose vehicle, that in its own name and for its own account can initiate proceedings. The special purpose vehicle is often set up by a litigation funder. Arrangements are made with the assignors about the distribution of proceeds between the assignors and the litigation funder.

8.4 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

See answer under 5 above.

8.5 How is interest on costs awarded and calculated?

Interest on costs is calculated from the date of the cost award until the date of payment. The statutory interest rate is determined by the government and adjusted to market circumstances. Interest is calculated on a compound basis.

8.6 What are the procedures of enforcement for judgments within your jurisdiction?

All actions related to enforcement (other than imprisonment) are initiated by a court bailiff. The available actions include collection of receivables (e.g. trade receivables, bank balances, insurance proceeds) and involuntary sale of stock, inventory and other movables, real estate and shares. Certain assets may be immune from enforcement (e.g. certain foreign state-owned assets) or subject to a special regime (e.g. aircrafts) and certain enforcement actions may amount to an abuse of right (e.g. satisfaction of the claim can also be achieved in a way that is substantially less burdensome to the debtor). Judgments other than payment orders may be strengthened with a monetary penalty. In extreme circumstances, a person may be imprisoned as long as the judgment is not satisfied.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Pursuant to article 3 of the Rome I Regulation (593/2008), contracts are governed by the law that is chosen by parties. As a rule, Dutch courts uphold the choice of law made by parties and are furthermore not hesitant to apply such foreign law to the case.

Based on the Rome I Regulation Dutch courts are entitled to give effect to overriding mandatory provisions of the law of the country where the obligations arising out of the contract must be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. Furthermore, courts may refuse the application of a provision of the law of any country otherwise applicable to the contract, if such application is manifestly incompatible with the public policy of the Netherlands.

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Based on the article 8 DCCP, as well as article 25 Brussels I Regulation (recast) (1215/2012), Dutch courts accept a choice of jurisdiction and assume this to be an exclusive choice, unless it is expressly stated otherwise. Dutch courts can disregard a choice of forum if it concerns individual labour law matters or consumer claims. Under specific circumstances, Dutch courts accept jurisdiction if it concerns interim measures or injunctions that have a close connection to the Dutch jurisdiction.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Within the European Union, the Service Regulation (1393/2000) applies, which sets out rules for simplified and streamlined service of judicial and extrajudicial documents. The Service Regulation determines that service of all documents and in respect to service shall be exempted from legislation or any equivalent formality when drafted in accordance with the templates as prescribed in the Regulation. Service can take place through court bailiffs, without interference of central authorities.

For service of documents originating from outside the European Union, the Hague Service Convention of 5 October 1961 is applicable. Service takes place through sending and receiving authorities.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

The Netherlands is party to the Hague Evidence Convention (18 March 1970), which provides for a mechanism to receive evidence from witnesses in foreign jurisdictions. If located in a jurisdiction that is a party to the Hague Evidence Convention, the judicial body can request the hearing of the witness through letters rogatory to the Dutch receiving authority (the Public Prosecutor's office). The authority determines if the criteria set in the Hague Evidence Convetion are met. If so, the relevant District Court will be ordered to execute the letters rogatory by hearing the witness under oath. The witness hearing takes place according to Dutch procedural law (see question 18 above), but courts are known to be quite flexible in accommodating special requests from the foreign courts, such as allowing a court reporter to be present.

9.5 How can a party enforce a foreign judgment in the local courts?

Within the European Union, based on the Brussels I Regulation (recast) (1215/2012), judgments rendered by other member state's courts are automatically recognised within other member state's jurisdiction. Enforcement can subsequently take place by following the regular rules of enforcement of the member state where enforcement of the judgment is sought.

Judgments rendered by a court outside of the European Union are not recognised automatically in the Dutch jurisdiction. Without a treaty in place, a party seeking enforcement of a foreign judgment must bring its claim before the Dutch court in proceedings on the merits. If, however, the court establishes that the following four conditions are satisfied, it will not perform a revision au fond of the judgment, but will declare the foreign judgment enforceable in the Netherlands:

- the foreign court's jurisdiction is based on internationally accepted grounds;

- the foreign judgment is the result of a proper judicial procedure (fair trial);
- the foreign judgment does not violate Dutch public policy; and
- the foreign judgment is final.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Arbitration is the most commonly used form of ADR and is often used in specific industries such as construction and the maritime and energy sectors. Arbitration is a widely used form of dispute resolution for large complex commercial disputes and the Netherlands have established arbitration organisations that provide for standard arbitration rules.

Mediation is a relatively unknown form of ADR for commercial disputes, and is mainly used for family law matters.

Binding advice proceedings is a form of ADR whereby an advisor gives a binding and non-appealable advice to parties. It is uncommon for complex commercial disputes to be handled via binding advice.

10.2 How do parties come to use ADR? Is ADR apart of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

The Dutch legal framework for arbitration can be found in the Arbitration Act, which is incorporated in Articles 1022 to 1077 DCCP. The greater part of these provisions is applicable if the seat of arbitration is in the Netherlands. Only a few provisions deal with arbitration outside the Netherlands. The provisions of the Arbitration Act are mostly of a regulatory nature, albeit with some mandatory provision.

Parties can revert to arbitration if they have agreed to submit their dispute to arbitration proceedings instead of court proceedings.

Mediation has to be agreed upon consensually as well, however Dutch courts have recently taken up the task to promote mediation and will regularly suggest the use of it to parties to court proceedings. Courts cannot compel parties to revert to mediation.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Based on most arbitration rules, proceedings are confidential by nature, even more so than court proceedings, which allow for public hearings and judgments. The documents submitted and admissions made are privileged.

10.4 How are costs dealt with in ADR?

The costs of the arbitrator and the arbitral institute are paid for by parties themselves. It is common that the losing party pays the entire cost of arbitration, including the counterparty's lawyers' fees.

10.5 Which bodies offer ADR in your jurisdiction?

The best-known and only general arbitration institution in the Netherlands is the Netherlands Arbitration Institute (the NAI). The NAI administers both national and international arbitral proceedings in a wide range of fields, and in principle has no restrictions as to the subject matter of the arbitration. In addition, there are a number of specialised arbitration institutions that focus on arbitrations related to specific industries. For the construction sector the Raad van Arbitrage voor de Bouw (Council for Arbitration for Construction) is leading and for maritime disputes Stichting TAMARA (Foundation Transport and Maritime Arbitration Rotterdam) offers specific arbitration rules.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

Please see under questions 3 and 21 for pending reform measures with regard to court proceedings.

Turkey

Ozgur Akman, Efe Onde

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

Turkey is a fast-developing financial market where many local and foreign investors can be found which is why commercial disputes are frequently encountered. Court litigation is still seen as the main method to resolve dispute resolutions. However, with the help and guidance of newly formed associations (such as Istanbul Arbitration Centre) alternative dispute resolutions are also trending nowadays. Most of our clients also prefer ICC to bringing their cases through arbitration. Full-service law firms are leading their clients into alternative dispute resolutions, namely arbitration. Mediation and negotiation in or out of court are also encouraged. Nonetheless, if the ADR methods fail, parties will have to recourse to court proceedings.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

According to the relevant articles of the Turkish Code of Obligations (TCO), the general time limitation is ten years regarding debts arising from contracts. However, there is also a limitation period of five years for some specific types of debt, while the limitation period for torts is two years. In specific laws, the limitation periods may vary. Either way, the limitation periods are triggered when these events occurred or the date when the occurrence of such event was aware of or a party should have been aware of the event.

If any claim regarding the dispute between parties is evoked in court proceedings, the limitation period is suspended.

2.2 What is the court structure for large commercial disputes? Are there special divisions in this court that hear particular types of disputes?

Commercial Courts of First Instance are competent to conduct trials regarding commercial disputes. Depending on the case type and the amount in dispute, the case may be tried by a committee of three judges or by a single judge. For instance, some cases are listed as "absolute commercial cases" in Article 4 of the Turkish Commercial Code (TCC) and these cases are heard by a committee. There are also IP Courts (these courts are not a division of Commercial Courts) which are competent to try commercial disputes regarding a company's intellectual property rights including patents, copyrights and brands.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

Foreign lawyers are not allowed to conduct any type of legal case in Turkey. In accordance with Attorney's Law, one of the conditions for admission into the legal profession and also to conduct a legal case is being a citizen of the Republic of Turkey. Also, an attorney has to be registered within the Turkish Bar Association in order to act as a lawyer.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Legal fees are set by Turkish Code of Civil Procedure Article 323. As such, legal fees are: (a) hearing, judgment and sentence fees, (b) notification and postal service fees due to the lawsuit, (c) expenditures regarding the case file and relevant documents, (d) viewing expenditures, (e) fees and expenditures paid to witnesses and experts, (f) charges, taxes and relevant expenditures for the documents obtained from governmental authorities, (g) daily travel and accommodation expenditures appraised by the judge in cases when parties are present and the case cannot be pursued by attorneys and; even if the attorney is not present, daily, travel and accommodation expenditures will be appraised when a party is heard in person, arraigned or takes an oath, (g) attorney's fees will be appraised by the law in cases pursued by an attorney, (h) other expenditures made during the proceeding.

Further, there is a separate code indicating the ratios and the exact amounts of the fees. The separate code regulates the fees for filing fees etc. The filing and other fees can either be calculated *pro rata* or they may be subject to fixed fees depending on the matter at issue.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

The general rule on funding of litigation is provided by Article 326 of the Turkish Code of Civil Procedure, and certain exceptions for specific situations are regulated by the following articles. As prescribed in Article 326, unless otherwise stated by the law, litigation expenses are paid by the losing party. In case both parties are found partially rightful, the expenses are divided accordingly. If the outcome is detrimental to two or more parties, either the expenses are divided among the parties or parties are held to be severally liable.

As regulated in Article 327, if a party caused the case to be prolonged unnecessarily or redundant expenses to be incurred may be held liable for all the expenses excluding judgement and writ fee or a part of it, even if it was the successful party.

As stated in Article 330, for the cases pursued by an attorney, attorney's fees are stipulated by law and will be awarded on behalf of the party.

The following part of the Code introduces the concept of legal assistance. People who are unable to pay litigation expenses without leaving themselves and their family in a significantly difficult situation may demand legal assistance given their claims have a solid foundation. Legal assistance proceeds until finalization of the judgement.

Pursuant to Article 339, all expenses deferred due to legal assistance are collected from the wrongful party at the end of the case or pursuance. In case the party who benefited from the assistance turns out to be wrongful, the expenses may be decided to be collected in equal installments within 1 year at most, if deemed appropriate. If the collection of the deferred expenses is understood to cause suffering of the beneficiary, the court may exempt the beneficiary from the complete or partial payment.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings of commercial disputes, are generally open to public regarding. However, there are exceptions in some cases, such as assignment of trustees or cases that involve commercial secrets, in which the court hearings become confidential and closed to the public.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

There is not a specific rule imposed on parties for pre-action conduct. However, after the presentation of petitions of both parties, at the pre-examination phase, the judge is obligated to ask the parties to have mediation meetings. If the mediation is unsuccessful, in that case the court procedures begin.

4.3 How does a typical court proceeding unfold?

Turkish court proceedings are typically based on five main steps:

- Phase 1: The presentation of petitions from both parties which is initiated by the plaintiff's presentation of his/her petition.
- Phase 2: Pre-examination of the case by the judge or the committee of judges.
- Phase 3: Examination and hearings where the parties plead, debate and prove their allegations.
- Phase 4: Oral proceedings that initiate with the termination of the examination phase.
- Phase 5: Ruling of judgement.

It should be stated that the judgment of the courts of first instance can be appealed.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

A court of first instance shall dismiss the case file before considering its merits in case of a lack of conditions provided by the relevant law. The conditions of filing a lawsuit are as follows:

The Turkish Courts must have a jurisdiction on the case file, the judicial remedy must be permissible, the court shall be on duty, the court must be authorized in cases of a presence of a precise authorization rule, the parties must hold a title to pursue a lawsuit, the plaintiff must make the necessary advance on expenses, the attorney must be qualified and must hold an appropriate power of attorney, the plaintiff must have a legal benefit for filing the lawsuit, the decision regarding the security deposits must be fulfilled if there be any, a final decision must not be present for the same matter at issue, a lawsuit having the same subject must not have been filed before the case file at issue, etc.

The courts also must dismiss the case file before reaching to its merits in case of a presence of an arbitration clause regarding the dispute.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

In principle, the claimant is not obliged to provide security. However, in some cases (which are stated in the Code of Civil Procedure and in International Private and Civil Procedure Act) a need for a security deposit may arise.

According to Article 84 of CCP, a security deposit may be claimed in the following situations:

- If a Turkish citizen that does not reside in Turkey initiates a lawsuit, intervenes to an already initiated case or pursuits it.
- If a defendant has been given a decree of bankruptcy or a restructuring process has been initiated about the defendant or he/she is in payment difficulty (documented with proof of insolvency).
- If need for security deposit arises during the court proceedings.

According to Article 48 of IPCPA, if a foreign legal entity wants to initiate a lawsuit or pursue a lawsuit, it must provide a security deposit. However, if:

- the legal entity is formed in a country which is a member of Convention of La Haye
- there is an agreement that states that a security deposit is not necessary between Turkey and the country from which the legal entity established in,
- a security deposit is not provided in the practice between both countries,

the obligation for a security deposit will be discharged.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

Interim injunctions can be demanded from the court by any party before or during the trial and in principle can be asked for in every lawsuit if the requirements are fulfilled.

Types of interim injunctions in Turkish law are:

- interim injunctions on movable properties
- interim injunctions on real estate
- interim injunctions on contentious/litigious properties or rights (in order to protect)
- interim injunctions regarding the obligation of doing or not doing something
- interim injunctions regarding a concern of an inconvenience or a serious damage that may result from delay
- interim injunctions enacted in specific laws

In order to obtain an interim or interlocutory injunction regarding the case, first of all the requirements regarding the claim must be fulfilled. These conditions are as follows:

- There must be a risk of difficulty or not being able to obtain a right in case of a change in current situation
- There must be a risk of inconvenience or serious damage that may result from delay.
- Interim injunction can only be served about the matter of dispute.
- The party that demands the interim injunction must partially prove his/her rightfulness.

If a party wants to be granted an interim or interlocutory injunction before a full trial, he/she must be the plaintiff. The demand must be conducted in the petition by giving clear information about the reason for such demand and the type of interim injunction demanded from the court. The plaintiff must also state on which right and dispute the demand is based. Most importantly, the party requesting an interim injunction must provide security in case his/her demand turns out to be unmerited. The plaintiff must initiate a lawsuit about the merit of the case within two weeks as of the date of petition regarding interim injunction.

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

An interim attachment must be based on a court decision. Interim attachment cannot be requested for every receivable. It shall be based on a document or court decision.

5.5 Are there other interim remedies available? How are these obtained?

In Turkish civil procedure, the interim remedies other than interlocutory injunctions are as follows:

- Recording of evidence and other similar interim remedies

- Interim injunctions in alimony cases (those involving claims for overdue alimony, maintenance, child support, pensions for the disabled or the family of the deceased, or medical expenses)
- Provisional payments in action for compensation

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

In the Turkish legal system, compensatory damages are available. There are mainly two types of damages in Turkish law:

- Pecuniary damages
- Moral indemnities

In order to claim both types of remedy, pecuniary or moral damage must be suffered. A fundamental principle of damages is the principle of '*restitutio in integrum*', that damages should represent no more and no less than the plaintiff's actual loss. The judge cannot order an indemnity more than the amount of indemnity stated in the plaintiff's petition.

There are no punitive damages in Turkey. However, the parties can determine a penalty for breach of contract as a monetary sum. If the contract is breached by one of them with fault, the other party can demand this sum. Also, there is no need for a damage to be suffered in order to claim the penalty.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

The parties must submit a statement of claim and evidence, including discovery, witness, documentary evidence and witness statements. Where no evidence is produced or the evidence produced is insufficient to support the claims made, the party that bears the burden of proof shall bear any unfavorable consequences.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

According to the contract between parties, there may be classified documents. However, in the process of litigation, confidential documents regarding the facts of the case should be disclosed. In some commercial lawsuits, parties submit their commercial books in order to prove their allegations. Nevertheless, in Turkish law there are rules allowing a party not to disclose a privileged document. Some civil cases, such as divorce cases or cases involving commercial secrets may be heard in private sessions if the parties concerned so request. For instance, in patent law, the documents related to the patents' content are not disclosed to public in order to protect the owner's rights".

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

First of all, it must be stated that witness statements are regarded as discretionary evidence. In Turkish civil procedure law system, witnesses provide facts to the court through oral evidence. They come to the hearing and are examined and heard by the judge. Only the attorneys of the parties can cross-examine the witness. If the parties themselves want to examine the witness, they have to direct their question to the judge and then the judge questions the witness accordingly. The oral statements of witnesses are written to the minute by the court clerk.

It should also be stated that if a legal entity is one of the parties in a case, such legal entities' body cannot be heard as a witness in same case.

7.4 What are the rules pertaining to experts?

Under Turkish Procedural Law, the parties can refer to two types of expert evidence: expert witnesses and expert opinions.

Expert witness: The judge may decide to consult to an expert witness upon parties' request or *ex officio* if the case requires specific or technical knowledge for identification regarding a specialized issue for ascertaining the facts of the case. The report of an expert witness is considered to be discretionary evidence. If the parties request to run an expert witness, they have to deposit a certain amount of retaining fee. If the party make the down payment, the court will not refer to an expert witness. For legal issues, the court cannot consult an expert witness. It should also be stated that the judge/court's final judgment does not depend on the expert witness' report.

Expert opinion: The parties may refer to an expert opinion if they feel the need of a scientific dictum. In Turkish procedural law, expert opinion is also considered as discretionary

evidence and it is not considered binding before court. The judge may decide to hear the expert in a hearing upon parties' request or *ex officio*.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

The period of appeal concerning commercial disputes is 15 days beginning from the receipt of the detailed ruling. In order to appeal the decision of a court of first instance, the parties must submit a petition of appeal and also deposit an appeal fee. The appeal fee varies depending on the type of the case. There are two types of fees regarding an appeal: fixed and proportional fees. Proportional appeal fees are calculated as ¼ of the case's amount in dispute. The date of the deposit of appeal fees is regarded as the date that the judgement is appealed. Thus, the date written on the petition of appeal is not the same with the date that the judgement is appealed.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

Class actions are not available in Turkish civil procedure law in the sense that they are available in the US law. Turkish law does not enable remedial actions to be brought by a group of people. However, as regards other forms of group or collective redress, Turkish Code of Civil Procedure Article 113 regulates "group litigations". As such, associations and other legal entities, as part of their status, can file lawsuits in their name, on behalf of those concerned and the determination of their rights, the elimination of the situation contrary to law or the elimination of the violation of the rights of those concerned in the future, in order to protect the interests of its members and of those that the association/the legal entity is representing. Therefore, an association, a chamber, stock markets and other legal entities may file a declaratory lawsuit, *actio negatoria* or reinstatement lawsuit but they cannot bring remedial action.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

In Turkish civil procedure law system, there are different types of costs, such as attorney fees, expert witness fees, postage expenses, and notice expenses. Generally, the claimant deposits an advance on expenses before the full trial process begins. The abovementioned costs and fees are deductible from this advance during the trial. At the end of the trial (with a few exceptions), the unsuccessful party is required to pay the successful party's costs. The amount of costs is assessed by the court and the sentencing for costs is ruled *ex officio* by the court, even if there isn't any claim for it.

8.4 How is interest on costs awarded and calculated?

Interest cannot be charged on litigation expenses. However, when it comes to execution proceedings, a certain interest rate can be charged.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

Enforcement relying on a judgment is stipulated under enforcement and bankruptcy law in Turkey. If you receive a judgment from a court within the jurisdiction of Turkey, the enforcement proceedings can be commenced before the execution offices. The execution office sends a writ for payment to the debtor and the debtor is given seven days for the payment or objection. If the debtor remains silent then the debt is deemed to be accepted. Further with the acceptance of the debt the enforcement proceedings are deemed to be finalized.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

In the case of a choice of law clause in a lawful contract, the court shall apply the law chosen by the parties without constraint while trying the case on the basis of Article 24 of International Private and Civil Procedure Act. However, there are specific cases where a choice of law clause does not apply (e.g., lawsuit regarding immovable property).

9.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Choice of jurisdiction by the parties is allowed under Turkish Law. However, there are limitations to such choice. In the cases outlined below the law does not allow the parties to decide jurisdiction by contract:

- Where the law provides for a certain and final place of jurisdiction. (i.e. personal insurance related lawsuits);
- In cases where the parties are not allowed to dispose over (i.e. divorce related lawsuits);
- Only merchants and public entities can enter into contracts determining place of jurisdiction.

In cases where the place of jurisdiction is certain and final, the court has to take this rule into consideration *ex officio* as it is deemed as a condition for initiating a lawsuit.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Article 38 of Notice Law no. 7201 regulates the rules of service for foreign parties within Turkey's jurisdiction. The article is as follows:

Notification made to foreigners

Article 38 – (1) Foreign documents will be communicated to those who, in issuing the notification to the relevant authorities through the Ministry of Foreign Affairs, and from there it will be sent to the embassy or Turkish general consulate in that country.

(2) If the intermediary of Ministry of Foreign Affairs is not required, the notification document sent directly by the ministries to the Turkish embassies or general consulates in that country.

(3) Ministry of Foreign Affairs and the ministry to which the notification issuing authorities are affiliated shall examine the issuance of notice document accordingly to articles 39, 40, 41, 43 and 47 and if there are mistakes and shortcomings are found, they shall correct.

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

The presence of a witness must be reported within the required period. A notice will be served to the address where the witness lives. The party must inform the court about this address. If the witness is a foreigner, then a translator will be appointed. In order for the court to appoint this translator, the party must deposit an amount of payment that will be designated by the court.

9.5 How can a party enforce a foreign judgment in the local courts?

The final and binding decisions rendered by foreign courts can be enforced after a decision is obtained from a Turkish Court. For such enforceability to be obtained, the mentioned decision of the foreign courts must be final and binding for all of the parties to the case and the enforcement shall be requested from a Turkish Court by a petition explaining such request.

Turkish Law does not permit a party to enforce a decision directly without examination of formal requirements of decree. Except some specific situations such as alimony and some decrees concerning family law, foreign judgments cannot be enforced in Turkey without any court stage by directly applying Turkish Enforcement Offices. As mentioned, judgements concerned can be only enforced in exceptional situations based on certain International Agreements. On other hand, this direct applicability is not possible for judgments related to litigation or divorces. As mentioned, if foreign judgment fulfils formal criteria of Turkish Law envisaged, it can be enforced. In addition, if a foreign judgment relates to immovable assets in Turkey, it shall not be accepted.

The procedure is governed with petty sessional (simple procedure) procedural principles. After petitions among parties (applicant and defendant), the case must be concluded. Therefore, as compared to other case procedures, enforcement of foreign judgment procedure is faster.

It should be stated that reciprocity is a precondition for enforcement in Turkey. Therefore, Turkish Citizens or Turkish Legal Entities must also be capable for enforcement in the country where the judgment is given.

Moreover, there must be a judgment which clearly states the decision, the amount in dispute, and the right given to

the successful party. There is also a presence of absoluteness decision criteria. These criteria generally require an applicant to obtain a new document related to judgment from foreign court, clearly stating that the decision is not appealed. In practice, courts refuse to enforce a decision without that clarification, despite of the fact that defendant can explain to the court that the judgment is not absolute. Therefore, upon the judgment's delivery it is better to have a separate document from the court that the judgment is not under appeal by the other party and an explanation that the judgment is a final decision.

A judgment which is given by a Turkish Court can be executed in Turkish Territory by application to Turkish Enforcement Offices under the framework of Turkish Courts. The decision shall be binding in Turkey and applicable as another ordinary Turkish Court Decree.

10. ALTERNATIVE DISPUTE RESOLUTIONS

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

In Turkey, with the developing legal market, alternative dispute resolutions become more popular each day. Court proceedings move slowly and sometimes (e.g., with numerous demands for expert witnesses) are expensive. This situation of Turkish courts does not appeal to high-scale companies. Therefore, ADR procedures are a lucrative alternative. Arbitration and mediation are the ADR procedures that are invoked for the most part.

Arbitration is becoming a popular procedure to resolve large commercial disputes. In November 2015, the Istanbul Arbitration Centre (ISTAC) was established in pursuit of the related law that entered into force in January 2015. The ISTAC's dispute resolution services are available to all contracting parties, without any membership requirements. If one of the parties is a foreign legal entity, arbitration is usually the preferred ADR procedure to settle the commercial dispute.

Mediation is another popular ADR procedure. Alongside the recent changes in regulations regarding civil procedure, the courts will require parties to participate in mediation services during pre-examination hearing in order to resolve their dispute without going to full trial. Thus, the choice of ADR procedures rather than court litigation is encouraged. However, it is still not preferred commonly.

10.2 How do parties come to use ADR? Is ADR a part of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Generally, courts will require parties to participate in ADR (specifically, mediation) at the pre-examination hearing. Nevertheless, ADR is not commonly chosen. Moreover, with the exception of mediation, ADR procedures are not obligatory.

On the other hand, if the parties have a valid arbitration clause in the agreement between them or a separate arbitration agreement, Turkish courts do not possess the jurisdiction to try the dispute, and it must dismiss the case on the basis of non-competence before going on a full trial.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Under the Turkish Code of Civil Procedure, arbitral tribunals (in arbitrations seated in Turkey and without any foreign element) may request local courts to grant injunctive relief and/or conduct determinations of evidence (Article 414). Under CCP, the parties may also choose the rules of arbitration for the arbitral proceedings. (Article 424). The arbitrators may also choose to decide without holding any hearings, and may also assign experts and conduct site visits (Articles 429 and 431, respectively). Furthermore, the parties to the arbitration may, with the approval of the arbitral tribunal, request the local courts to collect evidence (Article 432).

Under the Turkish Arbitration Act, which applies to arbitrations which are seated in Turkey but relate to a foreign element, arbitral tribunals may appoint experts and conduct site visits (Article 12(A)). An arbitral tribunal may request and order the parties to produce evidence. Furthermore, the tribunal may ask assistance from local courts of first instance for evidence gathering, in which case the court would apply the relevant provisions of the Turkish Code of Civil Procedure.

10.4 How are costs dealt with in ADR?

Court litigation is expensive. In comparison with court litigation, ADR procedures take less time and take a shorter path that economises the fees regarding the lawsuit and attorneys. As a matter of fact, some ADR procedures do not even require representation by lawyers.

10.5 Which bodies offer ADR in your jurisdiction?

- ISTAC offers both arbitration and mediation services.
- There are other local bodies such as İstanbul Chamber of Commerce (ITO), Turkish Union of Chambers and Commodity Exchanges (TOBB), etc. offering arbitration and mediation services.
- Mediation centers have been established within court houses, which makes it very accessible.

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

N/A

Ukraine

Roman Mehedynyuk, Nikolay Zhovner

1. MAIN DISPUTE RESOLUTION METHODS

1.1 In your jurisdiction, what are the central dispute resolution methods used to settle large commercial disputes?

In Ukraine, commercial disputes, regardless of the amounts and magnitude, may be settled in: (1) commercial courts, (2) courts of mediation (*treteyski sudi* in Ukrainian) and (3) if a foreign element is involved - by an international commercial arbitration tribunal.

Commercial courts are specialized of courts of general jurisdiction vested with the authority to deal with disputes between businesses. Businesses include legal entities and individuals who duly acquired the status of an individual entrepreneur.

As a matter of practice, courts of mediation are mostly used by financial institutions (e.g., banks and insurance companies) and such financial institutions tend to choose a 'preferred court of mediation' and indicate it as a dispute resolution forum in agreements with their clients.

The International Commercial Arbitration Court and the Maritime Arbitration Commission under the auspices of the Chamber of Commerce and Industry of Ukraine are two major permanent commercial arbitration institutions in Ukraine.

Cost wise, litigation in commercial courts is least expensive.

2. COURT LITIGATION

2.1 What are the limitation periods in your jurisdiction and how are they triggered?

The general statute of limitations is three years (Article 257 of the Civil Code of Ukraine). Pursuant to Article 261 of the Civil Code of Ukraine, the statute of limitations shall start from the day when the person learned or should have learned about the violation of his right or of the identity of a person who violated such right, subject to exceptions that may be prescribed by law.

2.2 What is structure of the court where large commercial disputes are heard? Are there special divisions in this court that hear particular types of disputes?

Ukraine is currently in transition from a four-tier to three-tier court system. Once the transition is complete, the three-tier 'sub-system' of commercial courts will consist of 'specialized' local (first instance) commercial courts, commercial courts of appeal, and the Supreme Court of Ukraine with the Cassation Commercial Court as its [Supreme Court's] structural division.

Courts of appeal may set up chambers for hearing particular types of disputes. The cassation courts are required by law to set up chambers for hearing particular types of disputes.

2.3 Can foreign lawyers conduct cases in your jurisdiction's courts where large commercial disputes are usually brought? If yes, under what circumstances or requirements?

The ongoing transition will ultimately ensure that only bar-admitted lawyers (advocates in the Ukrainian legal parlance) can conduct cases in Ukrainian courts. As of 1 January 2019, it would remain legally possible for non-Ukrainians (foreign nationals and stateless persons whether or not they are foreign lawyers) to act in court as 'de-facto' representatives under a power of attorney.

3. FEES AND FUNDING

3.1 How do legal fees work in your jurisdiction? Are legal fees set by law?

Legal fees are agreed upon by the parties (the client and the lawyer) with no legislative guidance/restrictions applicable in this regard. The current approach is that only the legal fees paid to bar-admitted lawyers (advocates) are recoverable by the winning party.

3.2 How is litigation typically funded? Is third party funding and insurance for litigation costs available?

Parties to litigation pay their respective costs. Third party funding is not customarily used since the winning party will then face problems seeking recovery of legal costs paid other than its own funds. Insurance for litigation costs is available as a type of voluntary insurance, but rarely used in practice.

4. COURT PROCEEDINGS

4.1 Are court proceedings open to the public or confidential? If public, are there any exceptions?

Court proceedings are open to the public with a few exceptions such as cases dealing with state secrets or adoption of children as well as the cases that might reveal details of private lives or information humiliating human honor or dignity.

All court decisions are public and are required by law to be uploaded to the official online Court Decisions Register of Ukraine on the next day after such decision has been duly prepared and signed. Certain protected information may be removed from court decisions passed in a closed hearing and provided that such information is protected against disclosure.

4.2 Are there any rules imposed on parties for pre-action conduct? If yes, are there penalties for failing to comply?

The Code of Commercial Procedure of Ukraine does contain a procedure for pre-trial settlement of disputes. It was rendered optional by a decision of the Constitutional Court of Ukraine in 2002 as hindering access to justice and, thus, being contradictory to part two of Article 124 of the Constitution of Ukraine ('The jurisdiction of the courts shall extend to all legal relations that arise in the State').

Therefore, all pre-trial actions are optional and there are no penalties for failing to comply with them.

How does a typical court proceeding unfold?

A typical court proceeding unfolds as follows:

1) Filing of claim: The claimant files a statement of claim as well as documents attached thereto with the court and serves it on the defendant(s). The statement of claim should set out the facts of the case, any claims, contain references to supporting evidence and law, indicate a remedy sought and comply with a range of formal requirements.

2) Acceptance of claim and initiation of proceedings: Provided the statement of claim is compliant with all requirements and filed with the competent court, a judge upon 3 days' consideration accepts it for trial. Under the general rule, the case is to be decided within 2 months counting from the acceptance date and, by parties' request, may be extended for up to another 15 (fifteen) days. In practice, it takes much longer to render a decision.

3) Trial: At the scheduled date, a court holds a trial. The case may be adjudicated within one hearing, but frequently it takes several hearings.

At the trial stage, the court adjudicates the case on the basis of evidence provided by the parties or obtained by the court, which may include documents, testimony, in-court expert examinations, explanations from persons summoned by court, and other evidence compliant with formal requirements. All evidence is subject to analysis at a court hearing on an adversarial basis and with equal defence standards applicable to both parties.

Parties have the right to attend a court hearing and send their attorney(s), but failure to do so does not in itself prevent the court from adjudicating the case in absentia. Usually, in major litigation parties' counsels appear and argue their cases, often providing separate written submissions on relevant topics.

4) Judgment: As a result, the court issues a judgment which should, as a general rule, contain the full reasoning for the court's decision. The judgment is subject to appeal and becomes enforceable upon expiry of a respective 10-day limitation or upon consideration of the appeal, if filed.

5. INTERIM REMEDIES

5.1 When seeking to have a case dismissed before a full trial, what actions and on what grounds must such a claim be brought? What is the applicable procedure?

Before commencement of the proceeding, the judge shall (at its own initiative) dismiss the filed lawsuit in cases that:

- the lawsuit is not subject to consideration by commercial courts of Ukraine;
- there exists a proceeding between the same parties, regarding the same subject matter and on the same grounds in a commercial court or another body authorized to settle commercial disputes, or such a dispute (including in foreign courts or other foreign dispute resolution forum);
- death or declaration of death of a physical person or termination of a business being plaintiff or defendant in the filed lawsuit, unless the disputed relations allow legal succession.

The above list of grounds for dismissal of the lawsuit prior to commencement of the proceeding is exhaustive.

Should any of these grounds be learned by court after the proceeding has started, the court has to dismiss the case as well. As a practical matter, a defendant may make the court aware of the relevant circumstances in its objections or explanations; there are no prescribed formalities for these types of documents.

The parties also have the right to conclude an amicable agreement (both prior to first trial or in the trials stage), which amicable agreement has to be approved by a court, with simultaneous discontinuation of the proceeding. The amicable agreement must be signed by the parties, and all parties to the amicable agreement must apply to the court with a formal petition to approve it.

5.2 Can a claimant be ordered to provide security for the defendant's costs?

Yes. If a person applies for an interlocutory injunction (*zapobizhni zahody* in Ukrainian, see more details in item 5.3 below) prior to filing a claim, the court may order that the applicant deposits a certain amount to the court's account. Amounts so deposited by the applicant shall be utilized to cover damages (if any) caused by the interlocutory injunction, or returned to the applicant if the claim is ultimately resolved in its favor.

5.3 What interim or interlocutory injunctions are available and what does a party have to do in order to be granted one before a full trial?

According to Chapter V1 of the Commercial Procedure Code of Ukraine, a person who has grounds to apprehend that submission of necessary evidence may afterwards become impossible or difficult, and there are grounds to suppose that the rights of such person are violated or there exists a real threat of violation of the rights, such person (applicant) may request the court to impose interlocutory measures.

Available interlocutory measures are:

- a call for evidence;
- the inspection of premises;
- the arrest of assets belonging to the person subject to the interlocutory measures.

In order to request the imposition of interlocutory measures, the applicant has to file a motion supported by the requisite documents listed in the Commercial Procedure Code.

A lawsuit on the merits must be filed with the court within five days of the court's decision on the imposition of interlocutory measures. Once the lawsuit is filed, interlocutory measures continue as interim measures (*zahody do zabezpechennya pozovu* in Ukrainian, see more details in item 5.4 below).

5.4 What kinds of interim attachment orders to preserve assets pending judgment or a final order (or equivalent) exist in your jurisdiction and what rules pertain to them?

According to Chapter X of the Commercial Procedure Code of Ukraine, the commercial court, upon a motion of a party to the proceeding or of the public prosecutor, or on the court's own initiative, may order interim measures, which are the following:

- arrest over assets or monetary funds belonging to the defendant,
- prohibiting the defendant from taking certain actions,
- prohibiting other persons from taking certain actions concerning the subject matter of the dispute,
- discontinuation of enforcement of a writ of execution.

The above list of available interim measures is exhaustive.

Interim measures may be available at any stage of the court proceeding in case that non-imposition of such measures may make the enforcement of a court decision difficult or impossible.

5.5 Are there other interim remedies available? How are these obtained?

In commercial court procedures, only the measures indicated in items 5.3 and 5.4 above are available.

6. FINAL REMEDIES

6.1 What are the remedies available at trial? What is the nature of damages, are they compensatory or can they also be punitive?

Article 16 of the Civil Code of Ukraine provides the list of remedies which one may seek in a court, namely:

- the recognition of a right;
- the invalidation of an agreement;
- the discontinuation of an action which violates the right;
- the restoration of the situation that existed before violation;
- forcing of execution of an obligation in kind;
- the change of legal relationship;

- the termination of legal relationship;
- compensation of loss or other recovery of damages;
- compensation for moral damages;
- declaring illegal decisions, actions or failures to act of state or municipal bodies and their officers.

The list of remedies is not exhaustive, and the court may protect the rights and interests by another means provided for by an agreement or the law.

Losses (damages) and their nature

Damages under Ukrainian legislation are of compensatory nature.

According to Article 225 of the Commercial Code of Ukraine, damages subject to compensation to the injured party shall include:

- value of lost, damaged or destroyed property;
- additional expenses (penalties paid by the injured party, cost of additional works, additional materials etc.) borne by the injured party as a result of breach of the obligations by the other party;
- lost profit which the injured party could rely on in case of due performance by the other party;
- material compensation of moral damages in cases contemplated by law.

7. EVIDENCE

7.1 Are there any rules regarding the disclosure of documents in litigation? What documents must the parties disclose to the other parties and/or the court?

According to Article 43 of the Commercial Procedure Code of Ukraine, parties and other persons participating in a court proceeding must substantiate their claims and objections by evidence submitted by them to the court. Providing any evidence, as a general rule, is considered the right of parties/participants, but not an obligation (unless the court demands particular evidence from a certain participant of the proceeding or from a third person). The court may (but is not obliged) to request certain evidence upon a motion of a party to the proceeding, which motion must indicate (i) description of the evidence, (ii) circumstances preventing the requesting party from submitting the evidence itself, (iii) grounds to assume that a particular person requires evidence, and (iv) the circumstances of the case which the requested evidence may prove. Should the court demand provision of evidence, failing to comply with such enactment may result in a fine on the person who is demanded to provide the evidence. However, in practice the courts very seldom exercise the right to impose such fines. The court must consider the dispute based on the evidence available in the court dossier, regardless whether the demanded documents are provided or not.

The documents attached to the statement of claim by the claimant as proof of the claim shall be dispatched to the defendant(s). All other evidence (submitted in the course of the trial) must be filed with the court only (in court hearings, or through post, or through court chancery). However, the parties are authorized to familiarize themselves with the documents contained in the case dossier, both in the hearings and at any time out of the hearings.

7.2 Are there any rules allowing a party not to disclose a document such as privilege? What kinds of documents fall into this rule?

As noted above, not-disclosing of evidence is the right of the relevant party/participant to the proceeding, unless the court specifically demands provision of a given evidence. Non-disclosure of documents as privileged is not provided for by Ukrainian laws; all types of documents are treated equally.

7.3 How do witnesses provide facts to the court, through oral evidence or written evidence? Can the witness be cross-examined on their evidence?

Generally, Ukrainian commercial court procedure does not refer to the term 'witness'. The relevant rules of the Commercial Code of Ukraine envisage that certain 'officials, employees' may participate in the court proceeding if they are summoned by court to give explanations on questions occurring in the course of the court proceedings. Effectively, such explanations are similar to witness testimony. A person so summoned provides these facts in oral form within a court hearing. The court may request that such person provides a written brief of his oral statement but only after such oral statement is heard. Questioning by the parties is possible only by the court's discretion. Commercial courts rather rarely use questioning of officials and employees, and cases are normally considered based on documents and explanations of the parties' representatives.

7.4 What are the rules pertaining to experts?

According to Article 41 of the Commercial Procedure Code of Ukraine, an expert may be ordered by the court for elucidation of issues occurring in the course of resolution of a commercial dispute, which requires special knowledge. Participants of the court proceeding have the right to propose the questions to be considered by the expert, though the final scope of the expertise is in the court's discretion. Legal questions, in particular, compliance of legal acts with the rules of law or legal assessment of parties' actions, may not be put into expertise (Item 2 of Resolution of the Plenum of the Higher Commercial Court No. 4 dated 23 March 2012).

The expertise shall normally be ordered to be carried out by specialized state institutions (research departments of Ministry of Justice of Ukraine, of Ministry of Health Care, of Ministry of Internal Affairs, of Defence Ministry, of Security Service, of Border Guard Service). For some types of expertise (other than are required to be mandatorily carried out by specialized state institutions), the court may involve other specialists with relevant expert knowledge.

8. OTHER LITIGATION PROCEDURE

8.1 How does a party appeal a judgment in large commercial disputes?

A party to the proceeding has the right to appeal the decision of the court of first instance in the court of appeals. The term for filing the appeal is ten (10) days of declaration of the court's decisions (or of the date of execution of the full text of a decision, if only the resolutive part was declared in the hearing). The court of appeals must re-consider the case and verify the legality and soundness of the decision of the court of first instance. New evidence may be submitted only subject to the substantiation of the impossibility of presenting respective documents to the court of first instance.

The court of appeal has the right:

- to leave the decision of the commercial court of the first instance without change, and the appeal without satisfaction;
- to cancel the decision of the court of the first instance, fully or in part, and to pass a new judicial act on the case;
- to repeal the decision, fully or in part, and to stop legal proceedings on the case, or to leave the statement of claim without consideration, fully or in part;
- to change the decision.

The resolution of the commercial court of the appellate instance enters into legal force as of the day of its adoption (i.e., the decision becomes enforceable).

Decisions of the commercial court of first instance and the ruling of the arbitration court of appeal may be appealed fully or in part in cassation proceedings in the Higher Commercial Court of Ukraine. A cassation appeal may be filed within twenty days of the day of entry of the appellate court's resolution. The court of cassation appeal does not retry the case or re-evaluate the evidence, but deals only with issues of law.

The court of cassation appeal has the right:

- to leave the decision of the commercial court of first instance and/or the resolution of the court of appeals without amendment and leave the cassation appeal without satisfaction;
- to repeal the decision of the court of first instance and/or the resolution of the court of appeals fully or in part and to pass a new judicial act;
- to cancel the decision of the court of first instance and/or the resolution of the court of appeals fully or in part, and to return the case for new consideration to the corresponding commercial court whose decision or resolution is cancelled or amended;
- to cancel the decision of the court of first instance and/or the resolution of the court of appeals fully or in part, and to terminate the proceedings or to leave the lawsuit without consideration;
- to amend the decision of the court of first instance and/or the resolution of the court of appeals;
- to maintain one of previous decisions/resolutions.

The resolution of an arbitration court of the cassation instance comes into legal force as of the day of its adoption.

The Supreme Court of Ukraine may review the commercial court's decisions after their review in cassation upon a party's appeal, only on the following grounds:

- Different decisions of cassation courts concerning the same rules of material law, which caused different decisions in similar legal relationships;
- Different of cassation courts of same rules of procedural law – in case of appealing a court resolution impeding the progress of a proceeding or a breach of the rules of jurisdiction;

- Non-conformity of a cassation court decision with formal position of the Supreme Court;
- Breach of international obligations of the state of Ukraine, as determined by an international institution having jurisdiction.

8.2 Are class actions available in your jurisdiction? Are there other forms of group or collective redress available?

No class actions are available in Ukraine. Several actions may be combined into one proceeding by the court if the parties coincide, or in corporate disputes, if the claims are interrelated based on the grounds for the claim and provided evidence.

8.3 How are costs awarded and calculated? Does the unsuccessful party have to pay the successful party's costs? What factors does the court consider when awarding costs?

According to Article 44 of the Commercial Procedure Code of Ukraine, the court-related costs (*sudovi vytraty* in Ukrainian), which may be awarded as a result of the case consideration, include:

- Court fees,
- The price of the court expertise,
- Costs relating to the examination of evidence at their location;
- The cost of translation services,
- The fees of an advocate (but not legal fees of any lawyer/attorney/representative other than a Ukrainian licensed advocate);
- Other costs relating to consideration of the case (*in practice, rarely awarded*).

The court in its decision must state how the costs are to be allocated. The general rule is that the costs shall be borne by the parties *pro rata* to the amount of claims satisfied by court.

8.4 How is interest on costs awarded and calculated?

Interest on costs is not provided for by Ukrainian laws.

8.5 What are the procedures of enforcement for judgments within your jurisdiction?

An effective court judgement shall be enforced through the State Enforcement Service of Ukraine in accordance with the Law "On the Enforcement Procedure". The enforcement shall be performed by the state executive officer in accordance with the resolutive part of the court decision. In order to commence the state procedure, a separate document has to be issued by the court (order of execution, *sudovyi nakaz* in Ukrainian). In case of awards of a monetary nature, the enforcement shall invite the arresting of assets of the debtor and sale of such assets by the enforcement officer. Funds on account of the debtor (if any) shall be foreclosed in the first place.

We note that recent changes to the Law of Ukraine "On the Enforcement Procedure" introduced the possibility of performing enforcement of court decisions through private bailiffs. These provisions become effective in January 2017.

9. CROSS-BORDER LITIGATION

9.1 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

The Law of Ukraine "On International Private Law" provides that the parties to a contract may choose the governing law to the contract, as long as there is a 'foreign element' (the most prevailing criterion is availability of a non-Ukrainian party to the contract). Ukrainian courts have to apply the law chosen by the parties, save for certain exceptions:

- Evasion of law (Article 10 of the Law of Ukraine "On International Private Law") – if an agreement or other actions of participants of the relationships were aimed at governing their relations by the laws other than the ones which should be defined according to the provisions of law, the court shall apply the relevant laws, not the laws chosen by the parties;
- Public order (Article 12 of the Law of Ukraine "On International Private Law") – rules of foreign law shall not be applicable if such application causes consequences incompatible with public order of Ukraine;
- Mandatory rules (Article 14 of the Law of Ukraine "On International Private Law") – mandatory rules of Ukrainian law shall apply regardless of the governing law chosen by the parties.

9.2 Do local courts enforce choice of law clauses in contracts? Are there any areas of law that override a choice of law clause?

Generally, Ukrainian courts have to accept all claims submitted to them and comply with formal requirements, regardless of the choice of law by the parties to the agreement in question, and apply the chosen law in considering the dispute. The meaning of foreign law shall be ascertained by the court using documents submitted by the parties, and the court may apply for formal clarifications through the Ministry of Justice of Ukraine. If the meaning of foreign law rules is not ascertained within a reasonable amount of time, the court shall apply Ukrainian laws.

9.3 What are the rules of service in your jurisdiction for foreign parties serving local parties? Are these rules of service subject to any international agreements ratified by your jurisdiction?

Ukraine is a party to The Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used to effect service in Ukraine.

The Ministry of Justice of Ukraine and the local departments of the Ministry of Justice are designated as the Central Authority for the purposes of Articles 2, 6 of The Hague Service Convention, as well as the authority competent to receive documents transmitted by consular channels, pursuant to Article 9 of The Hague Service Convention. Ukraine joined The Hague Service Convention with a reservation that means service – as per Article 10 of The Hague Service Convention – shall not be applied in the territory of Ukraine (direct service through post/mail, service through court officers).

9.4 What procedures must be followed when a local witness is needed in a foreign jurisdiction? Are these procedures subject to any international conventions ratified by your jurisdiction?

Ukraine is a party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which contains a procedure that can be used to take evidence from a witness in Ukraine.

9.5 How can a party enforce a foreign judgment in the local courts?

A judicial award issued by a foreign court (a state court of a foreign country; other bodies of a foreign state which are competent to settle civil or commercial cases) may be recognized and enforced in Ukraine only on the basis of an international treaty ratified by the Ukrainian parliament or, in absence of such treaty, on the grounds of a reciprocity principle. A Ukrainian court is required to presume that such a principle exists, unless proved otherwise. While we are aware of the recent Ukrainian court practice of enforcement based on reciprocity principle in Ukraine, the reciprocity principle is not a developed concept under Ukrainian law, thus non-enforcement of a court judgement in the absence of a bilateral treaty is possible.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 What are the most common ADR procedures in large commercial disputes? Is ADR used more often in certain industries? To what extent are large commercial disputes settled through ADR?

Arbitration (either international or domestic) is the most common ADR procedure in large commercial disputes in Ukraine. Other ADR types (such as mediation) are rarely applied in Ukraine.

International arbitration is more common in cross-border transactions (with the forum more convenient for the non-Ukrainian party).

10.2 How do parties come to use ADR? Is ADR a part of the court rules or procedures, or do parties have to agree? Can courts compel the use of ADR?

Usually parties come to use ADR based on the relevant arbitration clause in their contract.

Availability of an arbitration clause does not prevent filing a lawsuit with a Ukrainian court of law, however the court must direct the parties to arbitration if the agreement in question is agreed to be settled in arbitration by the parties and either party requests arbitration prior to the party's first submission to the court on the merits.

10.3 What are the rules regarding evidence in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

The rules of evidence, as well as the protection or confidentiality of the proceeding, shall be either stipulated in rules of a particular arbitration institution or established by arbitration (in case of *ad-hoc*). The Law of Ukraine "On International Commercial Arbitration" basically only states that the authority of the arbitral court shall extend to admissibility, relevance, significance and importance of evidence.

10.4 How are costs dealt with in ADR?

As a general rule, arbitration costs are allocated based on the parties' agreement, or in accordance with the *pro rata* principle depending on the volume of granted and rejected claims. The rules of the arbitration institution may provide different costs allocation rules.

10.5 Which bodies offer ADR in your jurisdiction?

At present, there are plenty of institutional arbitrations in Ukraine, however, one of them is known better than others - The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce (http://arb.ucci.org.ua/icac/en/icac.html).

10.6 Are there any current proposals for dispute resolution reform in your jurisdiction?

Court system reform is ongoing in Ukraine; though, the above-mentioned issues seem to be here to stay.

THE AMERICAS


Cour suprême
du Canada

Canada

Michael Schafler &
Ara Basmadjian

1. OVERVIEW

1.1 Overview

Canada is a confederation of ten provinces and three territories, each with a separate and independent judicial system. While the province of Québec operates under the *Civil Code of Québec*, SQ 1991, c 64, the legal system in every other province and territory is based on the British common law tradition. The court rules and the administration of justice, including alternative dispute resolution (ADR) procedures, are under provincial or territorial control. The procedural rules can differ significantly but the judicial process in each jurisdiction ends with a provincial or territorial court of appeal.

The final arbiter of all litigation is the Supreme Court of Canada, a federal institution, which decides appeals from decisions of the provincial and territorial courts of appeal, and from the Federal Court of Appeal. Therefore, the remedies available across Canada are similar.

Recent trends in dispute resolution

Decreased procedural entitlements in civil disputes. Since 2010, a number of provinces (including Ontario, Alberta and British Columbia) have implemented significant changes to their rules of civil procedure intended to promote the resolution of civil disputes in a less expensive, time-consuming and complex manner. Such reforms include:

- Narrowing the scope of documentary discovery.
- Reducing the permitted time for conducting oral discoveries.
- Expressly adopting the principle of proportionality in discovery.
- Introducing increased oversight of litigation plans by the court.
- Increasing the amount that can be claimed in Small Claims Court proceedings.

On 20 February 2014, the Québec National Assembly adopted Bill 28, which established the new *Code of Civil Procedure*, CQLR, c C-25.01. The *Code of Civil Procedure* intends to make the civil justice system more accessible and is buttressed by the principles of proportionality and co-operation.

In particular, the *Code of Civil Procedure*:

- Authorizes greater involvement of the courts in the case management process.
- Requires the parties to file a "case protocol" indicating the number of pre-trial examinations that they intend to conduct and the number of experts that they plan to call.
- Increases the amount that can be claimed in an action before the Small Claims Court.
- Encourages the use of joint expert witnesses.
- Permits judges to consider abuse of procedure or undue delay when apportioning costs between the parties.
- Supports the use of information technology to avoid unnecessary travel.

Québec's *Code of Civil Procedure* came into force on 1 January 2016.

Mandatory ADR. Most jurisdictions now require certain ADR procedures (such as mandatory settlement conferences) as a part of the judicial process. For example, in Ontario, some actions are subject to mandatory mediation within 180 days after the filing of the first defense. Alberta's new rules require parties to engage in a dispute resolution process before they can obtain a trial date from the court. In Québec, the new *Code of Civil Procedure* requires parties to consider ADR before resorting to the court system. In addition, some provincial law societies now require lawyers to consider the use of ADR in every dispute and to inform their clients, if appropriate, of available ADR options.

Continued deference to arbitration clauses. Courts continue to defer to the parties' contractual choices with respect to arbitration, except in narrow circumstances (for example, when expressly overridden by consumer protection legislation as in *Seidel v Telus Communications Inc.*, 2011 SCC 15).

Heightened concern about the independence of experts. In recent years, Canadian courts have made a number of pronouncements regarding the independence of expert witnesses. The Ontario Court of Appeal has been particularly

active, issuing a number of decisions (*Carmen Alfano Family Trust v Piersanti*, 2012 ONCA 297 and *Moore v Getahun*, 2015 ONCA 55) that have tightened the rules governing such witnesses. The trend seems to be towards excluding expert testimony where bias or lack of independence can be shown, away from the previous approach that focused on the weight to be given to such evidence. More recently the Supreme Court of Canada handed down two decisions (*White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 and *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16) confirming Ontario's approach on a national level.

Class action trilogy increases anti-competitive exposure. In *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57, *Sun-Rype Products Ltd. v Archer Daniels Midland Company,* 2013 SCC 58 and *Infineon Technologies AG v Option consommateurs,* 2013 SCC 59, the Supreme Court of Canada established that indirect purchasers (that is, consumers who did not purchase products directly from the price fixer but who purchased them indirectly from a reseller or other intermediary) have a right of action against the alleged price fixer at the top of the distribution chain. Parties that engage in anti-competitive conduct now face potential class proceedings from both direct and indirect purchasers thereby expanding the scope of their liability.

Supreme Court of Canada delivers landmark decisions on summary judgment motions. In January 2014, the Supreme Court of Canada released its reasons for decision in *Hryniak v Mauldin,* 2014 SCC 7 and *Bruno Appliance and Furniture, Inc. v Hryniak,* 2014 SCC 8, which expanded the scope of summary judgment motions. The effect of these decisions is a fundamentally altered outlook on summary judgments. Indeed, the Supreme Court rejected the "full appreciation test" adopted by the Court of Appeal for Ontario in *Combined Air Mechanical Services Inc. v Flesch,* 2011 ONCA 764 in favor of a less rigid and more pragmatic analysis. While Rule 20 of Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194 was in issue, the decisions will have significant implications on all Canadian jurisdictions with similar mechanisms.

Court of Appeal for Ontario revisits limitation period for secondary market securities class actions and limits common law negligent misrepresentation class actions. In *Green v Canadian Imperial Bank of Commerce,* 2014 ONCA 90, the Court of Appeal for Ontario determined that its earlier decision in *Sharma v Timminco,* 2012 ONCA 107 was incorrect and held that the three-year limitation period for securities class actions will be suspended when a representative plaintiff pleads the statutory cause of action, the facts on which the claim is based, and the intention to seek leave. Although the Court of Appeal made it easier for plaintiffs to bring securities class actions under the secondary market liability provisions of the Ontario *Securities Act*, RSO 1990, c s.5, Part XXIII.1, it imposed a significant limit on common law negligent misrepresentation claims. The Court of Appeal held that common law negligent misrepresentation claims could not be certified as class actions on the basis of "fraud on the market" or "efficient market" economic theories. As a result, the question of individual reliance cannot be supplanted by the notion of inferred group reliance except in very limited circumstances. This is significant because the statutory regime imposes limits on damages for responsible issuers, directors, officers and others (except in the case of fraud). For years, plaintiffs sought to avoid these damages caps by pursuing common law claims. The Court of Appeal has now limited the ability of plaintiffs to pursue such claims.

Supreme Court of Canada holds that contractual interpretation involves question of mixed fact and law. Until the Supreme Court's decision in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, there had been some doubt as to the appropriate appellate standard of review regarding contractual interpretation. Historically, courts had viewed this as a question of law, thus attracting a correctness standard. More recent cases (albeit not uniformly) had adopted a "contextual" approach that sometimes meant that the issue was one involving mixed fact and law and a more deferential "reasonableness" approach. In *Sattva*, the Supreme Court clarified that contractual interpretation "involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." Consequently, appellate courts should now generally defer to trial judges in cases of contractual interpretation, unless the specific issue can be characterized as a pure question of law. The further implication of *Sattva* may be that it will be more difficult to appeal commercial arbitral awards, in that such appeals are generally restricted to questions of law (unless the parties' arbitration agreement provides otherwise). The Supreme Court adopted a contextual approach that focuses on the surrounding circumstances of the contract. The surrounding circumstances should consist only of objective evidence of the underlying facts at the time the contract was made. The Supreme Court also confirmed that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction."

Supreme Court of Canada recognizes general organizing

principle of good faith in the performance of contracts. In the landmark decision of *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognized an organizing principle of good faith that underlies and manifests itself in contractual performance. Parties must perform their contractual obligations honestly and reasonably. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. The *Bhasin* case will have significant implications on the law of contracts in Canada as parties will now have to consider whether they are properly discharging their duty of good faith when performing their obligations under a contract.

2. LITIGATION

2.1 Court system

Superior courts

The superior courts of each province or territory hear small and large commercial disputes. However, the relevant provincial superior court can decline to hear a matter if it has no "real and substantial connection" to the forum chosen by the claimant.

The provincial and territorial superior courts are the:

- Supreme Court of British Columbia.
- Court of Queen's Bench (Alberta).
- Court of Queen's Bench for Saskatchewan.
- Court of Queen's Bench of Manitoba.
- Superior Court of Justice (Ontario).
- Superior Court (Québec).
- Court of Queen's Bench of New Brunswick.
- Supreme Court of Nova Scotia.
- Supreme Court of Prince Edward Island.
- Supreme Court of Newfoundland and Labrador, Trial Division.
- Supreme Court of Yukon.
- Supreme Court of the Northwest Territories.
- Nunavut Court of Justice.

The superior courts of each province and territory also include a court of appeal to which appeals of first instance judgments are made.

Claims relating to the right to commence a claim for damages against the federal government can be brought in any provincial superior court.

Federal courts

Headquartered in Ottawa, the trial division of the Federal Court and the Federal Court of Appeal are statutory courts, each with limited jurisdiction. The federal government appoints judges from the provincial bars. Both courts sit on a regular basis in the major urban centers.

The trial division has concurrent first instance jurisdiction with the provincial and territorial superior courts to hear all claims by and against the federal government, and matters between private parties involving navigation, shipping and admiralty. It also has first instance jurisdiction to hear:

Cases between private parties involving conflicting applications for:

- patents;
- copyright;
- trade-marks; or
- industrial designs.

All cases in which it is sought to:

- challenge any patent of invention; or
- alter the register of copyrights, trade- marks or industrial designs.

The Federal Court of Appeal hears appeals from the Federal Court and has original jurisdiction in judicial reviews of federal administrative tribunals.

Tax Court of Canada

The Tax Court of Canada is a federal court to which companies and individuals can appeal government tax decisions. Most appeals made to the Tax Court relate to income tax, sales tax or employment insurance. The Federal Court of Appeal has exclusive jurisdiction over appeals from the Tax Court.

Toronto's Commercial List

Commercial disputes are put on the Commercial List and dealt with expeditiously by judges experienced in these types of disputes. The Commercial List was established more than 20 years ago by a Practice Direction under the *Ontario Rules of Civil Procedure*.

The matters eligible for the Commercial List include proceedings relating to:

- The *Canada Business Corporations Act*, RSC 1985, c C-44 (CBCA) and *the Ontario Business Corporations Act*, RSO 1990, c B.16 (OBCA).
- The Securities Act, including takeover and issuer bids.
- Insolvency matters, including winding-up and applications under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA) (the Canadian equivalent to Chapter 11 in the US) and matters relating to *the Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA).
- Any other commercial matters that a judge presiding over the Commercial List directs to be listed. In making this determination, the judge will consider the matter's complexity in terms of procedure, subject matter and number of parties and whether it is commercial in nature (*Maple Valley Acres Ltd. v Canadian Imperial Bank of Commerce* (1992), 13 CPC (3d) 358).

Montreal's Commercial Division

The Commercial Division of the Québec Superior Court is Montreal's version of the Commercial List.

The Commercial Division's jurisdiction is broader than that of the Commercial List and includes proceedings relating to the following federal and provincial statutes:

- Statutes of Canada:
  - *CBCA;*
  - *CCAA;*
  - *BIA;*
  - *Winding-Up and Restructuring Act*, RSC 1985, c W-11;
  - *Bank Act*, SC 1991, c 46;
  - *Farm Debt Mediation Act*, SC 1997, c 21; or
  - *Commercial Arbitration Act*, RSC 1985, c 17 (2d Supp).
- Statutes of Québec:
  - *Code of Civil Procedure*:
    - Article 946.1 (homologation, that is, approval of an arbitration award); or
    - Article 949.1 (recognition and execution of an arbitration award rendered outside Québec).
  - *Business Corporations Act*, CQLR c S-31.1;
  - *Winding-Up Act*, CQLR c L-4;
  - *Securities Act*, CQLR c V-1.1; or
  - *An Act Respecting the Autorité des Marchés Financiers*, CQLR c A-33.2 (Financial Markets Authority).

The Commercial Division also hears cases that are considered by the judge to be commercial in nature.

2.2 Pre-action conduct

While the courts do not generally impose any rules in relation to pre-action conduct, changes have recently taken place in some provinces. In Ontario, certain actions are subject to mandatory mediation within 180 days after the filing of the first defense. While these mediations are treated as without prejudice settlement discussions, failure to attend can result in severe consequences, including pleadings being struck out or the action being dismissed.

In Alberta, parties must engage in a mandatory dispute resolution process before they can obtain a trial date from the court. This requirement, which can be waived by the court, can be satisfied through dispute resolution methods such as mediation or arbitration, or through a judicial dispute resolution process that allows a judge to facilitate a resolution for the parties.

Notwithstanding the general lack of court-imposed rules, as a self-governing profession, the provincial law societies' rules of professional conduct generally address the pre-trial conduct of lawyers. For example, the ethics rules of the Nova Scotia Barristers' Society require lawyers to:

- Encourage the client to compromise or settle whenever it is reasonably possible.
- Discourage the client from commencing useless legal proceedings.
- Consider the use of ADR for every dispute.

Failure to honor these obligations can result in a finding of professional misconduct. Therefore, a growing number of lawyers attempt pre-action facilitations or mediations and the early exchange of documents and other information.

2.3 Typical proceedings

Starting proceedings

In the common law jurisdictions, depending on the relevant court rules, a claim can be started by issuing one of the following:

- A writ of summons.
- A statement of claim.
- A notice of action.
- A notice of application describing the claim.
- A similar initiating document describing the basis of the claim (for example, a notice of civil claim in British Columbia).

In Québec, a proceeding is commenced through an originating application.

Notice to the defendant and defense

A defendant is generally given notice of the claim by being served personally. In Ontario, the claim must be served on the defendant within six months of being issued, and most other jurisdictions have similar limitations. In British Columbia, the claim must be served within one year.

The defendant must deliver the statement of defense within a prescribed period of time (unless he wishes to challenge the court's jurisdiction or bring other procedural applications). The period of time varies by province, and by the jurisdiction in which the defendant is served. For example, under Ontario's *Rules of Civil Procedure* a defendant served:

- In Ontario has 20 days to deliver a statement of defense.
- Elsewhere in Canada or in the US has 40 days to deliver a statement of defense.
- Anywhere else has 60 days to deliver a statement of defense.

In practice, extensions of the time limits are freely granted where prejudice would not result.

A defendant may also file a counterclaim, cross-claim or third party claim to join all necessary issues and parties. There are a number of procedural and substantive rules (including time limits) governing all pleadings and defendants should consult the applicable provincial rules of court for details. In addition, a defendant wishing to challenge the claim on jurisdictional grounds must usually do so by an application before the delivery of a defense or any other step that could be construed as accepting the jurisdiction of the court.

If the defendant fails to deliver a statement of defense in time, the claimant can obtain default judgment. However, default judgments can usually be set aside on terms prescribed by the court.

Subsequent stages

After the pleadings stage, the parties:

- Agree to a written discovery plan.
- Exchange documents.
- Conduct examinations for discovery (and other non-party examinations if necessary, for example through letters of request).
- Engage in interlocutory applications (if required).
- Conduct some form of mediation (the requirements vary by province).
- Attend a pre-trial judicial conference.
- Failing settlement, proceed to trial.

2.4 Limitation periods

Each province and territory within Canada has its own limitation periods for different categories of claims. Several of the common law provinces, including Ontario, have adopted a basic limitation period of two years for claims in contract and tort, subject to discoverability. Ultimate limitation periods vary widely across jurisdictions, ranging up to 30 years (and certain claims are not subject to any ultimate limitation period).

In Québec, specific enactments establish various limitation periods (known as prescriptions), but generally claims for infringements of personal rights must be brought within three years.

Given the variance between Canadian jurisdictions, and the complex nature of limitations statutes, local counsel should be consulted.

2.5 Confidentiality

Generally, all cases, whether civil or criminal, must be heard in open court. However, in certain exceptional cases, the court can hold a hearing in private if either:

- The presence of the public would make the administration of justice impracticable.
- There is a need to safeguard social values of extreme importance, such as the protection of the innocent.

A party may also obtain a sealing order to protect sensitive trade and other information where it can be established that an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation, and where the salutary effects of the confidentiality order, including

the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression (*Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41). However, there has been a recent trend toward making it more difficult to obtain a sealing order.

2.6 Class actions

Class action litigation is common, particularly in British Columbia, Ontario, Saskatchewan and Québec (following a series of Supreme Court decisions in 2001 establishing a framework for class action litigation in all Canadian jurisdictions). Nine of Canada's ten provinces have class proceedings legislation (the sole exception being Prince Edward Island, where class action litigation can be commenced based on the Supreme Court decisions). In particular, in relation to actions based on alleged breaches of securities laws, all provinces now have legislation intended to protect purchasers of securities in the event of material misrepresentation, both for primary market and secondary market transactions.

Ontario, Québec, Alberta, Manitoba, Nova Scotia, Saskatchewan and the Federal Court all follow an opt-out model. In British Columbia, Newfoundland and New Brunswick, class members resident in the province may elect to opt out, but members outside the province must specifically opt in to the action.

To commence class action litigation, a party must obtain court-approved certification. While the specific provisions may vary between jurisdictions, there are generally five criteria that must be satisfied to certify a class action:

- The pleadings disclose a cause of action.
- There is an identifiable class of two or more persons.
- The claims of the class members raise common issues.
- A class action is the preferable procedure for resolution of the dispute.
- There is a valid representative plaintiff.

In the *Pro-Sys, Sun-Rype* and *Infineon* trilogy, the Supreme Court of Canada confirmed that the evidentiary burden on plaintiffs at the certification stage remains relatively low.

Once a class action is certified, the litigation continues with a representative plaintiff acting on behalf of the entire class. While the rules of court apply, class action legislation gives the courts broad powers to avoid or modify the traditional procedures to better suit the nature of a class action.

Both Ontario and Québec have set up funds to assist with the financing of class actions. In Ontario, the Class Proceedings Fund provides financial support for claimants' disbursements and indemnifies the claimant against adverse cost awards, but does not pay ongoing solicitors' fees. In Québec, the fund can assist with legal fees as well as disbursements.

Private third-party funding arrangements have also been approved by the courts. However, agreements have been rejected where they place no cap on the potential amounts which the funding body could receive.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Rights of audience/requirements

Any lawyer licensed to practice law in a Canadian province or territory is granted audience rights in:

- His or her jurisdiction.
- The federal courts.
- The Supreme Court of Canada.

Additionally, the National Mobility Agreement (NMA) facilitates temporary and permanent mobility of lawyers between the nine common law provinces. In 2013, the law societies agreed on a new mobility agreement (NMA 2013) that will permit Canadian lawyers to transfer between provinces with ease, regardless of whether they were trained in a common law or civil law system, including transfers between Quebec and other provinces.

The Territorial Mobility Agreement (TMA) facilitates permanent mobility to the three territories. Lawyers who meet the criteria under the NMA or TMA are generally permitted to practice law in an unrestricted manner in the new jurisdiction. The Territorial Mobility Agreement 2013 (TMA 2013), which imports the provisions of the NMA 2013, will allow the transfer of lawyers between the territories and Québec. The TMA 2013 is expected to come into force once implemented by each law society.

Québec has not implemented the NMA. However, the Québec Bar Association (*Barreau du Québec*) introduced a new membership category, Canadian Legal Advisor, to permit

eligible lawyers from other Canadian provinces and territories to practice federal law, public international law, and the law of their home jurisdiction in Québec. The Québec Mobility Agreement (QMA) and Addendum affords eligible Québec lawyers the same privilege in other provinces and territories.

Once it is in force, the NMA 2013, will replace the QMA and the Addendum. However, before it can come into force it must be implemented by each provincial law society. As of 26 March 2015, the NMA 2013 has been approved by all jurisdictions, but has not yet been formally implemented.

Foreign lawyers

Generally, foreign lawyers cannot practice Canadian law in Canada without a license. In some provinces, such as Ontario and Alberta, a foreign lawyer can obtain status as a "foreign legal consultant", enabling him or her to give legal advice in that province relating to the law of the foreign jurisdiction. However, this does not authorize foreign lawyers to represent clients before the local courts or tribunals. In Québec, a foreign lawyer may apply for either a temporary mobility permit to practice in the province for a specific case, or for a temporary practice permit. The latter must be renewed annually and is usually limited to certain areas of law, among other conditions.

3.2 Rules of service for foreign parties

Canada is a party to The Hague Convention *of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)*, which contains a procedure that can be used to effect service in Canadian jurisdictions. Where the proceedings are to be served under this convention, the party seeking service can submit a request to either the Federal Central Authority in Ottawa or the appropriate provincial or territorial Central Authority. The Central Authority transmits the request to competent authorities who serve the documents.

However, The Hague *Service Convention* process is cumbersome and more direct means of service are usually available. Each Canadian jurisdiction (provincial, territorial and federal) sets its own rules regarding the service of judicial documents. In the circumstances, the most practical way of serving foreign documents in Canada is to retain local counsel to ensure that local requirements are strictly complied with. In many cases, the following methods of service are available:

- Forwarding duplicate sets of the documents in English directly to the sheriff in whose jurisdiction service must be effected. If serving in Québec, the documents should be forwarded to the sheriff (*huissier*) and a French translation should be included.
- Retaining a licensed private process server.
- Sending the documents by International Registered Mail.

3.3 Forum selection in a contract

Canadian courts generally enforce forum selection clauses unless there is a strong cause for the agreement to be overridden. Canadian courts interpret "strong cause" strictly and its use is usually confined to issues relating to breaches of public policy (which the courts define narrowly).

If there is ambiguity as to whether the clause applies to a particular dispute, the Canadian court carefully analyses the nature of the claims and defenses. The forum selection clause is inapplicable if the court determines that the claim is either:

- Not contractual by nature.
- Insufficiently connected with the underlying contract.

For example, despite a forum selection clause in favor of the state of Texas, the Court of Appeal for Ontario ruled that Ontario had jurisdiction over a claim based on breach of fiduciary duty and conspiracy because the claims were not arising "out of or in connection with" Texas (*Matrix Integrated Solutions Ltd. v Naccarato,* 2009 ONCA 593).

3.4 Choice of law in a contract

Parties are free to agree on the applicable substantive law.

A court respects the governing law expressed by the parties in a contract, provided the choice of the selected law is:

- *Bona fide* (that is, the parties have chosen a legal system with which the transaction has a connection).
- Legal (that is, not prohibited by any legislation or illegal in itself. For example, Ontario provides that all family law arbitrations in Ontario must be conducted only in accordance with Canadian law).
- Not excluded by a public policy reason.

In limited circumstances, such as consumer protection and personal property security (the taking of security over chattels and other personal property), statutory provisions can apply irrespective of the parties' choice of law.

The procedural law of the chosen forum applies regardless of the choice of law in the contract.

3.5 Gathering evidence in a foreign jurisdiction

Canada is not a party to The Hague Convention *of 7 October 1972* on the *Taking of Evidence Abroad in Civil or Commercial Matters* (Hague Evidence Convention).

A foreign request to take evidence from a witness in Canada should take the form of a written request from the foreign court (letters of request). The Canada *Evidence Act*, RSC 1985, c C-5 (CEA) and the provincial evidence acts prescribe a procedure by which foreign requests for judicial assistance can be enforced (see for example section 46 of the CEA).

The basis of the concept of international judicial assistance is the comity of nations (*Zingre v The Queen et al.*, [1981] 2 SCR 392). Before an order giving effect to such a foreign request will be made, the evidence must establish that the:

- Evidence sought is relevant.
- Evidence sought is necessary, either for the purposes of discovery or trial.
- Evidence is not otherwise attainable.
- Order sought is not contrary to public policy.
- Documents sought are identified with reasonable specificity.
- Order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried there.

Once a request has been enforced, although the procedural rules of the examination are governed by the foreign proceeding, the substantive legal requirements are those of Canada (for example, the laws of privilege).

3.6 Enforcing a foreign judgement in local courts

General principles

Enforcement of foreign judgments is a matter of provincial law, although the Supreme Court of Canada has provided general directions in this area (*see below*).

There is no uniform legislative scheme. Saskatchewan and New Brunswick are the only provinces that have adopted uniform foreign judgment enforcement legislation.

Under the Saskatchewan statute, the *Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121, registration of the foreign judgment in Saskatchewan courts is the simplest method to enable local enforcement to enforce a judgement, provided all the requirements of the legislative scheme are met.

Under the New Brunswick statute, the *Foreign Judgments Act*, RSNB 2011, c 162, a court in New Brunswick will recognize the jurisdiction of a court of a foreign country only if the defendant is ordinarily resident in that country at the time of commencement of the action or if the defendant submitted to that jurisdiction.

Where there is no such legislation, such as in Ontario, enforcement is usually achieved by commencing an action on the foreign judgment. Canadian courts usually treat such proceedings as actions on a simple contract debt and it may be advisable to proceed by way of summary judgment. If the court finds in the judgment creditor's favor, the resulting judgment can be enforced as any other judgment of that province.

To enforce the foreign judgment, the judgment creditor must satisfy the real and substantial connection test developed by the Supreme Court of Canada (*Morguard Investments Ltd. v De Savoye, [1990]* 3 SCR 1077 and *Beals v Saldanha,* 2003 SCC 72). The test imposes a low threshold, involving a fact-specific inquiry as to whether there was a real and substantial connection between the foreign jurisdiction and the persons, events and circumstances that led to the foreign judgment. If this test is met, and the judgment is final and conclusive, the court considers whether enforcement in Canada should be denied on the basis of any of the following defenses:

- Fraud.
- Denial of natural justice.
- Public policy.

Generally speaking, as long as the judgment is not ineligible (such as, for example, maintenance orders), the judgment will be enforced if the statutory criteria are met. Registration of the judgment will be refused if, for example, the:

- Judgment has already been satisfied.
- Judgment was obtained by fraud.
- Judgment is not enforceable in the territory of origin.

Once registered, the judgment will be of the same force and effect as a judgment of that province.

Enforcement of UK judgments

All provinces except Québec permit the enforcement of a UK judgment under a summary application process.

4. EVIDENCE

4.1 Fact witnesses

Oral evidence
Witnesses of fact generally give oral evidence at trial and are subject to direct examination, cross-examination and re-examination. In some proceedings, fact witnesses are permitted to give evidence by way of witness statement, subject to a limited right of cross-examination.

4.2 Expert witnesses

Appointment procedure
Either party can retain an expert or, uncommonly, the court can appoint an expert to assist it in its determination of complex issues. In British Columbia, experts can be jointly appointed by two or more parties. In some regulatory proceedings and in the Federal Court, "hot-tubbing" is now employed, whereby opposing experts testify together on one panel and are then cross-examined. It is believed that this procedure helps narrow the issues and permits the adjudicator to better understand where the experts differ, and why.

Role of experts
Whether appointed by a party or the court, an expert's role is to assist the court in reaching its determination. An expert must not lose objectivity or become partisan or the court is likely to disregard his or her opinion. This common law rule was recently codified in Ontario.

Right of reply
The report of an expert witness who will give evidence at trial must generally be delivered according to a timetable prescribed by the local rules of court (or as agreed by the parties). This must be followed by a responding expert's report and any necessary supplementary reports. If time limits are not met, the expert can testify only with leave of the trial judge.

In Alberta, as of 2010, experts can be examined on their reports by adverse parties during the discovery process, either on agreement or by court order. The evidence of the expert is treated as if it was the evidence of an employee of the party intending to rely on it, and must be adopted by the party.

Fees
The retaining party pays the expert's fees. These may be recoverable by a successful party as part of a costs award. If the court has appointed the expert, their fees may be recoverable from any number of parties, depending on the circumstances. For example, the debtor generally pays a court-appointed monitor in restructuring proceedings under the *CCAA*, subject to the court's discretion. If an inspector is appointed under the *CBCA, OBCA* or other similar legislation, the fees are paid by the company or entity whose oppressive conduct resulted in the appointment order.

4.3 Documentary disclosure

Generally, any document in a party's possession, control or power that is relevant to any matter in issue in the case must be disclosed during the discovery process. Recent developments in disclosure include:

- British Columbia. As of 2010, the scope of disclosure in British Columbia has been narrowed to all documents in a party's possession or control that could be used by any party to prove or disprove a material fact, as well as all other documents to which a party intends to refer at trial. Under the continuing disclosure obligation, newly acquired information and documents must be disclosed immediately. Failure to produce a relevant document can attract serious penalties, such as the claim or defense being struck out.
- Manitoba. As of April 2012, Manitoba implemented a new rule for expedited actions for claims not exceeding C$100,000. The rule narrows the scope of disclosure in expedited actions in a manner similar to the British Columbia reforms and introduces proportionality as a guiding principle in the disclosure process. The proportionality principle directs the court, in determining whether a party must produce a document, to consider the proportional relationship between the time, expense and prejudice associated with the request and the complexity, importance and amount in issue in the proceedings.
- Nova Scotia. In 2009, Nova Scotia instituted the first Canadian civil procedure rule specifically directed at disclosure of electronic information; this rule was based on the Sedona Canada Principles Addressing Electronic Discovery (Sedona Canada Principles).
- Ontario. As of 2010, parties in Ontario must agree to a written discovery plan setting out various items such as the intended scope of documentary and oral discovery, and dates for the delivery of documents. Parties must consult the Sedona Canada Principles and should consider whether the scope of requested production is proportional to the issues being litigated.
- Alberta. Beginning in 2010, parties in Alberta who are involved in complex cases must set out a litigation plan that establishes, among other things, a protocol for

the organization and production of documents.

4.4 Privileged documents

Privileged documents

Privilege is recognized as a substantive rule, rather than simply an evidentiary or procedural rule. In civil litigation, the primary classes of privilege are:

- Lawyer-client privilege (also known as legal advice privilege), which extends to confidential communications between a lawyer and his client for the purpose of giving or receiving legal advice.
- Litigation privilege, which extends to confidential documents created for the dominant purpose of actual or contemplated litigation.

These classes of privilege extend to in-house lawyers, provided the confidential documents are for the purpose of litigation or legal advice rather than for business.

Other categories of privilege include:

- Confidential communications within certain special relationships, such as between a doctor and patient. These communications may in rare circumstances be afforded a "case-by-case" privilege if the prescribed legal test is met (*Slavutych v Baker et al.,* [1976] 1 SCR 254).
- Communications in furtherance of settlement. Privilege may attach to such communications but will be lost if, for example, the existence or interpretation of a settlement agreement is subsequently in issue.

The client can elect to waive privilege in relation to a particular document, but this may allow the opposite party to inspect any other document that is related to the document over which privilege has been waived.

Other non-disclosure situations

Privilege is generally the only ground on which disclosure of relevant documents can be refused. In some provinces disclosure may be resisted on the basis that the request is abusive or disproportionate, however such arguments will prevail only in extreme cases (in relation to proportionately).

Where disclosure is ordered, courts are prepared to order remedies in appropriate circumstances to protect against the harm that may result from the disclosure of confidential and other protected information.

5. REMEDIES

5.1 Dismissal of a case before trial

An application can be brought for judgment in favor of the defendant on an application based only on the allegations contained in the claim, if the court is satisfied that the claim fails to set out a reasonable cause of action. However, these applications are rarely successful, since the threshold test (that it is plain and obvious that the claim will fail at trial) is very high. Even if the court is inclined to grant judgment, it will typically give the unsuccessful party time to amend its claim.

In addition, the rules of court in all provinces and territories other than Québec allow for a form of summary judgment, under which a claim may be expeditiously disposed of without a full trial. Under Ontario's recently amended rule, the court may grant summary judgment if it considers that there is no genuine issue requiring a trial with respect to a claim or defense. The determination is based on a consideration of affidavit evidence, examination transcripts and, in some cases, oral testimony. This new rule permits the judge to weigh evidence, evaluate credibility and draw inferences from the evidence.

In *Hryniak v Mauldin,* 2014 SCC 7 and *Bruno Appliance and Furniture, Inc. v Hryniak,* 2014 SCC 8, the Supreme Court of Canada established the following new approach to summary judgment:

- Without employing his or her fact-finding powers (Rule 20.04(2.1)) or exercising his or her discretion to hear oral evidence (Rule 20.04(2.2)), the judge must first determine if there is a genuine issue requiring a trial. No genuine issue exists if the summary judgment process provides the judge with the evidence necessary to fairly and justly determine the dispute and if summary judgment is a timely, affordable and proportionate procedure.
- If there appears to be a genuine issue requiring a trial, the judge must determine if the need for a trial can be avoided by hearing oral evidence or using his or her fact-finding powers. These powers are presumptively available to be exercised unless their use is contrary to the interests of justice; that is, the powers may be used "if they will lead to a fair and just result and serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole".
- Although the decision to use the powers conferred by

Rules 20.04(2.1) and 20.04(2.2) is discretionary and attracts deference on appeal, summary judgment is mandatory where there is no genuine issue requiring a trial.

The Supreme Court held that there will be no genuine issue requiring a trial when "the judge is able to reach a fair and just determination on the merits on a motion for summary judgment".

A fair and just determination is only possible when the process:

- Allows the judge to make the necessary findings of fact.
- Allows the judge to apply the law to the facts.
- Is a proportionate, more expeditious and less expensive means to achieve a fair result.

The summary judgment motion is now seen as a "significant alternative model of adjudication" in Canada.

5.2 Interim or interlocutory injunction before trial

Availability and grounds

There are two types of injunctions available before trial (or before the determination of the issues on their merits):

- Interim injunction. This is generally only granted for a very brief period until an application for an interlocutory injunction is made.
- Interlocutory injunction. This is intended to preserve the status quo or to enjoin certain conduct until the court determines the parties' rights.

The test for any injunction in Canada is essentially the same. As prescribed by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1 SCR 311* (RJR-MacDonald), the court must be satisfied that:

- There is a serious question to be tried.
- The applicant will suffer irreparable harm if the injunction is not granted.
- The balance of convenience favors granting the injunction.

In general, the party seeking the injunction must give an undertaking to pay any damages suffered by the other party if that party ultimately succeeds in having the injunction set aside.

Prior/same-day notice

An interim injunction can be obtained without prior notice to the other party and can be granted on the same day if the matter is urgent.

Mandatory injunctions

Mandatory interim injunctions are available but less common, as the imposition of an obligation to act positively shifts the balance of convenience against granting the injunction (*RJR-MacDonald*). In general, Canadian courts are also more reluctant to grant any injunctive orders that will require judicial supervision.

5.3 Interim attachment orders

Availability and grounds

There are a variety of interim attachment orders available, including specific pre-judgment attachment orders (also referred to as pre-judgment garnishment). These are available in Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan and the Yukon. Generally, this order permits the attachment of all sources of income from a debtor to a creditor to the extent necessary to satisfy the amount of the creditor's claim. A creditor can make an application to the court for an attachment order where legal proceedings have commenced or are imminent. In Saskatchewan, The Enforcement of Money Judgments Act, SS 2010, c E-9.22, which came into force in 2012, removes pre-judgment garnishment from the interim attachment orders available in that province.

Before granting a pre-judgment attachment order, the court must be satisfied that there are reasonable grounds to believe that the debtor is dealing with his, her or its exigible (able to be charged) property in a manner that is likely to seriously hinder the creditor's enforcement of a judgment.

The following remedies, although not express attachment orders, are also available to preserve or gain access to assets under a defendant's control:

- Mareva injunction. This is the well-known interim freezing injunction that restrains the defendant from disposing of or dealing with specific assets pending the determination of a legal action.
- Anton Piller order. This permits a claimant to enter the defendant's premises to preserve relevant materials or to obtain evidence that might otherwise be destroyed. It is sometimes colloquially referred to as a civil search warrant.
- Possession order. This allows for the interim possession of

identified goods taken or retained in breach of a proven prima facie right to possession.

- Certificate of pending litigation. This is registered on title to land where the claimant appears to have a reasonable case and an interest in land is claimed.

To obtain a Mareva injunction a claimant must:

- Make full and frank disclosure of all material matters in his knowledge.
- Give particulars of his claim against the defendant, stating the grounds and the amount of his claim.
- Provide some grounds for believing that the defendant has assets.
- Provide some grounds for believing that there is a risk of the assets being dissipated or removed from the jurisdiction of the court.
- Give an undertaking as to damages.

In relation to the other interim orders (*see above*), a claimant must also both:

- Show that there is a risk of dissipation of the assets.
- Meet similar criteria, including relating to the protection of any privileged information.

To obtain a certificate of pending litigation, the claimant must demonstrate that the litigation involves a claim which, if substantiated, would adversely affect the defendant's interest in the property. This could relate to a direct ownership claim or, for example, an agreement by the defendant to sell an interest in the land to a third party.

Prior/same-day notice

Attachment orders are frequently sought without notice, for fear that relevant evidence could be destroyed or assets put beyond the courts' reach. However, a without notice order is only granted where the claimant has demonstrated that it is necessary in the interests of justice to proceed in the absence of the responding party. In without notice proceedings, disclosure obligations are stringent and if the applicant withholds any, even marginal, material information, the order will be set aside. The courts presume that the opposing party should be notified.

Main proceedings

If the main proceedings are in a foreign jurisdiction, the claimant can apply to a Canadian court for an injunction over the defendant's Canadian assets, to support those foreign proceedings.

Preferential right or lien

Attachment does not create a preferential right or lien.

Damages as a result

The claimant is liable if it is later proved that the order should not have been granted. An undertaking to that effect is a usual requirement to obtain the initial order. The claimant may also be liable for substantial costs if the attachment order is set aside.

Security

On an application for any interim injunction or mandatory order the claimant must, unless the court orders otherwise, undertake to comply with any order concerning damages that the court makes if it decides that both the:

- Granting of the order has wrongfully caused damage to the responding party; and
- The claimant ought to compensate the respondent.

In certain cases, for example relating to a foreign claimant, the undertaking may be required to be supported by security.

5.4 Other interim remedies

Anti-suit injunction

Where proceedings have been commenced in a foreign court (or, in rare cases, before they have been commenced), the defendant may apply to a Canadian court to restrain the claimant (in the foreign court, the defendant in the Canadian court) from continuing the lawsuit.

The Supreme Court of Canada has developed a test to determine the circumstances in which a Canadian court should order this remedy (*Amchem Products Inc. v British Columbia (Workers' Compensation Board),* [1993] 1 SCR 897). Generally, an anti-suit injunction should be heard in Canada only after the applicant has first exhausted all means available in the foreign proceeding to have it terminated. The general test is that an anti-suit injunction will not be granted in Canada if the foreign court assumed jurisdiction over the defendant on a basis consistent with Canadian *forum non conveniens* principles. However, the injunction will be issued if the:

- Assumption of jurisdiction was inconsistent with those principles.
- Defendant would suffer an injustice outweighing the harm to the claimant in being deprived of the right to litigate in the foreign jurisdiction.

Norwich order

This is an order for pre-action discovery of a third party to further a potential claim (for example fraud or internet libel), where the claimant is unable to determine who may be liable unless the third party (such as a financial institution or internet service provider) discloses the necessary information.

The applicant must satisfy all of the following criteria (*GEA Group AG v Ventra Group Co.*, 2009 ONCA 619):

- The applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim.
- The applicant has established a relationship with the third party from whom the information is sought that establishes that the third party is somehow involved in the acts complained of.
- The third party is the only practicable source of the information available.
- The third party can be indemnified for costs to which the third party may be exposed because of the disclosure.
- The interests of justice favor obtaining the disclosure.

5.5 Remedies at trial

The courts generally have jurisdiction to order any remedy that is just, whether it is based on the common law, equity or statute.

The following remedies are typically available:

- Damages. These can include the following types of damages:
  - compensatory;
  - aggravated;
  - exemplary; and
  - punitive.
- Specific performance.
- Declaration (a formal statement by the court on the rights of interested parties or the construction of a document).
- Rectification (an equitable remedy which corrects a contract in accordance with the parties' prior agreement).
- Permanent injunctions.
- Foreclosure (an order preventing a mortgagor from redeeming the equity of redemption).
- The imposition of a constructive trust (to the effect that the defendant holds an asset in trust for the claimant).

5.6 Security for costs

Provincial and territorial civil procedure rules typically permit the defendant to apply to the court for an order for security for costs, if any of the prescribed criteria are met. For example, in Ontario the criteria are:

- The claimant is ordinarily resident outside Ontario.
- The claimant has another proceeding for the same relief pending in Ontario or elsewhere.
- The defendant has an order against the claimant for costs in the same or another proceeding that remains unpaid in whole or in part.
- The claimant is a corporation or a nominal claimant, and there is good reason to believe that the claimant has insufficient assets in Ontario to pay the defendant's costs.
- There is good reason to believe that the action is frivolous and vexatious, and that the claimant has insufficient assets in Ontario to pay the defendant's costs.
- A statute entitles the defendant to security for costs.

6. FEES AND COSTS

6.1 Legal fees

Hourly billing is the predominant legal fee structure. Fees are not fixed by law. In Toronto, the top commercial litigators charge between C$850 and C$950 per hour. In other commercial centers, such as Vancouver, Calgary and Montreal, the hourly rates can be slightly lower. However, the market is highly competitive and alternative arrangements are becoming increasingly common. These include:

- Contingency fees (that is, an agreement where the lawyer only receives a fee if the client wins).
- Fixed (task-based) fees.
- Discounted rates.

6.2 Funding and insurance for costs

Funding

Commercial litigation is generally funded by the parties, although occasionally third parties may fund the costs of litigation. A number of proceedings have been commenced in the name of failed corporations by entities who invested in

the companies (whether through debt or equity transactions) at distressed levels. The investors typically fund this litigation. More recently, lenders have begun to offer loans at steep rates to claimants who would otherwise not be able to afford the litigation.

Insurance

There are many different types of insurance pools (for example, products liability, professional negligence, director and officer liability). However, most of these insurance regimes exclude coverage for intentional misconduct.

6.3 Cost award

A successful litigant is usually entitled to receive his or her costs of the proceeding (including appeals) from the unsuccessful party on the basis of either:

- Partial indemnity. A successful party will still have to pay a significant part of its own legal fees.
- Substantial indemnity. Available in limited circumstances, this represents a higher scale of costs and goes much further towards providing full indemnity for litigation costs.

The calculation of costs varies by province. In some provinces, calculating the quantum of costs is simply a matter of applying a tariff system. In others, it is at the court's discretion. In British Columbia, the new rules (effective 2010) limit the costs that can be recovered on certain types of actions claiming C$100,000 or less.

In *Boucher v Public Accountants Council (Ontario) (2004),* 71 OR (3d) 291, the Court of Appeal for Ontario held that "overall [...] the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant". In determining what is "fair and reasonable", the Court of Appeal indicated that the "expectations of the parties" is a relevant factor.

When a Canadian court awards costs on a discretionary basis, in addition to the results of the proceeding and any pre-trial offers to settle, some of the other factors it may consider include:

- The amount claimed and the amount recovered in the proceedings.
- The apportionment of liability.
- The complexity of the proceedings.
- The importance of the issues.
- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings.
- A party's denial of, or refusal to admit, anything that the court considers should have been admitted.
- Whether any step in the proceeding was:
  - improper, vexatious or unnecessary; or
  - taken through negligence, mistake or excessive caution.

Pre-trial offers to settle play a role in costs awards in most provinces. These offers must not be disclosed to the court until after the disposition of the case on its merits. Typically, the defendant is liable to pay an increased costs award in respect of the claimant's legal costs incurred after the date of the offer, where both:

- The claimant's offer is not accepted.
- The claimant obtains a judgment that is at least as favorable as the offer.

Similarly, where a defendant's offer is not accepted and the claimant obtains a judgment that is not more favorable than the offer, the defendant is entitled to a costs award from the claimant in respect of costs incurred after the date of the offer.

6.4 Cost interest

Generally, post-judgment interest on costs orders is awarded at a rate prescribed by regulation, calculated from the costs order's date. However, courts retain discretion to:

- Disallow post-judgment interest.
- Vary the rate of interest.
- Allow interest for a shorter period where it is considered just to do so.

7. APPEAL

7.1 Appeal

Which courts

Appeals of first instance judgments (but not necessarily interim decisions) are made to the provincial court of appeal. Generally, final decisions can be appealed as of right, while interim decisions usually require leave to appeal. Appeals from provincial appellate courts are taken, with leave, to the Supreme Court of Canada. For leave to be granted in the latter case,

the appeal must involve an issue of national importance.

Grounds for appeal

In *Housen v Nikolaisen*, 2002 SCC 33, the Supreme Court of Canada set the following standards for appellate review:

- Questions of law will be reversed if they are incorrect.
- Questions of fact can only be reversed if the trial judge made a palpable and overriding error.
- For mixed questions of fact and law (that is, applying a legal standard to a set of facts), the standard of correctness applies where the trial judge's error can be attributed to the application of an incorrect legal standard, a failure to consider a required element of a legal test, or similar error in principle. However, if the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be reversed unless there was a palpable and overriding error.

Time limit

The time limit for bringing an appeal varies by province and by type of appeal, and therefore local counsel should always be consulted. For example, in Ontario the time limits for the service of a notice of appeal or motion for leave to appeal are as follows:

- For an appeal from an interlocutory order, within seven days after the making of the order appealed.
- For an appeal requiring leave, within 15 days.
- For an appeal as of right, within 30 days.
- For an appeal from the court of appeal to the Supreme Court of Canada requiring leave, within 60 days.
- For an appeal from the court of appeal to the Supreme Court of Canada in which leave is not required or has been granted, within 30 days.

8. Enforcement of judgment

8.1 Enforcement of judgment

A judgment can be enforced in a number of ways, the most common of which are:

- Garnishment of a debtor's wages. This ensures payment is made directly to the judgment creditor, subject to various exemptions.
- A writ of seizure and sale filed with the sheriff (a court official). This provides a notice to any potential purchaser of property owned by the debtor that a judgment creditor both has an interest in the property and is entitled to the proceeds of its sale in the amount of the judgment. This is subject to the rights of any secured creditors and other creditors who may also have an interest in the property.
- An examination in aid of execution. This can provide information about assets against which a judgment can be enforced.
- The oppression remedy. In some limited circumstances, the oppression remedy may be available to enforce an award against a company or individuals who have taken improper steps (for example, by stripping assets).

The judgments of the common law provinces and territories are enforceable in other common law provinces and territories under specific reciprocal enforcement of judgments legislation. If the requirements of that legislation are met, the out-of-province judgment may be registered and treated as if it were a judgment of that province.

Judgments from Québec are not automatically enforceable in other Canadian provinces and vice versa. In these circumstances, the judgment creditor must bring an application on the judgment to enforce it.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

The most commonly used ADR procedures are:

- Negotiation.
- Mediation.
- Arbitration.

Negotiation and mediation are generally more informal, confidential processes, where the information exchanged is not compellable in litigation. Arbitration is generally more structured and follows either court-like rules or rules of a respected arbitration body, at the election of the parties.

ADR is often used in the real estate, labor and employment, investment, construction and energy sectors, but is increasingly popular among all kinds of businesses.

9.2 Costs in ADR

Generally, the parties agree in advance on the disposition of costs in ADR, failing which each side bears its own costs.

In the case of arbitration, in the absence of agreement, the arbitral tribunal must enforce the costs rules applicable to the arbitration (for example, the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA)).

9.3 ADR and the court rules

Mandatory mediation is imposed in some court proceedings. In addition, it is common for parties to engage in pre-trial settlement conferences as part of the court process. In large commercial cases, it is common to conduct mediations without the court's involvement.

In Alberta parties must engage in a mandatory dispute resolution process before they can obtain a trial date from the court.

9.4 Evidence in ADR

In relation to arbitration proceedings, the parties generally agree in advance how evidence will be given. In the absence of agreement, the arbitral tribunal determines the procedures to be followed, including the rules of evidence (which may be similar to those of the courts).

Other forms of ADR usually do not involve giving evidence. If they do, in mediation for example, disclosure of any information acquired during the process is generally prohibited in unresolved disputes.

Arbitration and mediation are generally regarded as confidential. However, if the parties apply to court at any point during the process, the fact of the arbitration proceedings will become public. The nature of the proceedings may also become public depending on the nature of the application.

9.5 ADR reform

Three provinces (Ontario, Alberta and British Columbia) have recently undergone reforms of their civil justice systems, and a fourth, Québec, has adopted an overhaul of its rules of civil procedure scheduled to come into force sometime this year (2015).

Ontario

In Ontario, the new rules came into force on 1 January 2010 with the primary objective of increasing access to justice. Moreover, the reforms also resulted in new rules that require the extent of pre-trial discovery to be proportional to the amount in issue and the complexity of the case.

Key elements of the reform included:

- A more achievable standard and reduced costs disincentive for summary judgment applications.
- The express adoption of the guiding principle of proportionality.
- Increased monetary jurisdiction for:
  - small claims (up to C$25,000); and
  - simplified procedure actions (up to Can$100,000).
- Decreased scope of documentary production.
- Decreased length of oral discovery (the general rule is seven hours in total per party).

Alberta

In Alberta, the new rules came into force on 1 November 2010, to address the perceptions that the court system was difficult to use, time consuming and cost prohibitive, and that the rules of court were out of date and not consistently applied or enforced.

Key elements of the reform included:

- Mandatory alternative dispute resolution before a trial date can be set.
- The establishment of two separate litigation management systems:
  - for simple cases, parties are required to complete the steps of litigation (including ADR) within a reasonable time considering the nature of the action;
  - for complex cases, parties must create a formal complex case litigation plan which contains a timeline and agreed-upon protocol for the organization and production of records.
- Examination for discovery of adverse parties' experts in some circumstances.
- Service of all documents, other than commencement documents, can now be effected by electronic means.

British Columbia

In British Columbia, the new rules came into force on 1 July 2010 with the objective of securing the just, speedy and inexpensive determination of proceedings on their merits, in ways that are proportionate to the amount in dispute, the importance of the issues and the complexity of the proceedings.

Key elements of the reform included:

- The establishment of trial management conferences for all actions to be conducted, if practicable, by the judge who will preside at trial.
- Strict limits on recoverable costs in fast-track litigation cases (generally actions for C$100,000 or less).
- The ability for a judge to order the use of a joint expert witness.
- A narrowed scope of documentary production.
- A decreased length of oral discovery (capped at seven hours per party).

Québec

On 20 February 2014, the Québec National Assembly adopted Bill 28, which established the new *Code of Civil Procedure*. This new code is intended to achieve a more accessible, simpler, less costly and more user-friendly civil justice system.

In particular, the *Code of Civil Procedure*:

- Authorizes greater involvement of the courts in the case management process.
- Requires the parties to file a "case protocol" indicating the number of pre-trial examinations that they intend to conduct and the number of experts that they plan to call.
- Increases from Can$7,000 to Can$15,000 the amount that can be claimed in an action before the Small Claims Court.
- Encourages the use of joint expert witnesses.
- Permits judges to consider abuse of procedure or undue delay when apportioning costs between the parties.
- Supports the use of information technology to avoid unnecessary travel.

Enforcement of a foreign judgment

All provinces except Québec have enacted reciprocal enforcement legislation in respect of UK judgments. Judgments from other jurisdictions can be sued upon in local courts and are frequently enforced provided they satisfy the "real and substantial connection" test and other requirements.

Limitation periods

Each province and territory has a separate regime for limitation periods. In several provinces including Ontario, the general limitation period for claims in tort and contract is 2 years. Limitation period triggers vary by province and territory. Generally speaking, limitation periods typically begin when the claim was discovered or ought to have been discovered (but there are many exceptions, for example for civil liability claims under securities legislation).

9.6 ADR organizations

There are a number of Canadian arbitration bodies that handle large commercial arbitrations. However, parties also commonly use the processes of international institutional arbitration bodies, such as the:

- ICC.
- ICDR.
- International Institute for Conflict Prevention and Resolution (CPR).
- London Court of International Arbitration (LCIA).

Many prominent Canadian lawyers are on the arbitration panels for these and other similar bodies. Within Canada, some of the better-known organizations are the:

- Canadian Commercial Arbitration Centre (CCAC) (*www.ccac-adr.org*).
- British Columbia International Commercial Arbitration Centre (BCICAC) (*www.bcicac.com*).
- ADR Institute of Canada, Inc (*www.adrcanada.ca*).
- ADR Chambers of Canada (*www.adrchambers.com*).

Columbia

Andrés Fernández de Soto

1. OVERVIEW

1.1 Overview

Colombia´s judicial system follows the civil law tradition and therefore, the *Civil and Commercial Codes* are applied and enforced by the local courts throughout the territory. These courts are known as municipal and circuit civil courts, and they are competent to hear commercial disputes based on territorial jurisdiction and the quantum of the disputes. There are also Superior Tribunals that act as appellate courts, meaning that they decide appeals filed against rulings of circuit and municipal judges, as well as annulment recourses against arbitral awards. Finally, the Civil Chamber of the Supreme Court of Justice is the highest judicial authority for commercial cases, reviewing cassation complaints, as well as revision recourses brought against awards rendered by domestic tribunals, or against rulings that decide annulment recourses filed against domestic awards.

Arbitration is also commonly used to resolve commercial disputes in Colombia, with over 330 arbitration centers authorized to manage these types of proceedings. Based on the volume of cases and the value of the claims, the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá and the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellin, are considered to be the main arbitration centers in the country. The Colombian Arbitration Statute has also established separate regimes for domestic and international arbitrations that are seated in Colombia. The regime for domestic arbitrations draws heavily from the rules for ordinary civil procedure, while the international arbitration section follows the UNCITRAL model law.

Recent trends in dispute resolution

Law 1564 of 2012 whereby the *General Procedural Code* was issued, entered into force in its entirety on January 1st, 2016. The *General Procedural Code* completely transformed the model of civil procedure, from a written to an oral, hearings-based procedure. Hence, there is an expectation that procedures will now be more efficient and that the court system will be able to resolve a greater amount of disputes.

Mandatory ADR.

Pursuant to Law 640 de 2001, in most civil and commercial cases, the parties will have to try a conciliation as a pre-requisite to initiate the proceedings.

2. LITIGATION

2.1 Court system

Courts that are competent to hear large commercial cases are usually circuit civil courts, as they have been assigned claims with a quantum that exceeds 40 minimum wages or approximately COP$27,578,160 million (US$9,000), according to article 25 of the General Procedural Code. Likewise, regarding civil and commercial cases, the Civil Chamber of the Superior Tribunals act as second instance bodies and the Civil Chamber of the Supreme Court of Justice reviews cassation complaints related to those disputes.

In Colombia, there is one judicial circuit per province. Thus, there are 32 judicial circuits and the same amount of Superior Tribunals. These tribunals have three magistrates and a plenary, criminal, labor and civil chamber. On the other hand, the Supreme Court has nine justices in total and the same number of chambers as the Superior Tribunals.

2.2 Pre-action conduct

In most civil and commercial cases, depending on the type of judicial process that has to take place, the parties will have to try a conciliation as a pre-requisite to initiate the proceedings. Hence, pursuant to article 35 of Law 640 of 2001, a conciliation has to take place for an administrative, labor, family of civil action to proceed. Consequently, if the parties do not attempt a conciliation, their law suit will not be admitted by the court. However, there are some exceptions to that rule, such as when interim measures are requested or there is no knowledge of the defendant's residence or location

If one or both of the parties fail to appear at the conciliation hearing, said conduct will be held against them during trial and additionally, they will be fined with up to two minimum wages (COP$1,378,908).

2.3 Typical proceedings

Once the law suit has been admitted by the judge that is competent to hear the case, the claimant has to subpoena the defendant. After the defendant receives said communication, they are given a time limit to appear before the court and be personally notified of the decision regarding the admission of the claim. If the defendant fails to appear, a writ of summons will be sent (by the claimant) so that they are duly notified that a claim has been filed against them and that it has been admitted by the court.

After the defendant has been given notice of the claim, they must deliver a statement of defense within a specified period of time, depending on the type of procedure (20 days in most commercial cases). They may also file a counterclaim or a third-party claim, propose preliminary exceptions to the claim (if they proceed the judge may rule without the need to have further hearings) or simply remain silent. The claimant will also have the opportunity to submit a response to the statement of defense, particularly to the assertions attacking the merits of the claim, also known as *"excepciones de mérito"*.

Therefore, when the above statements and responses have been filed, the court must summon the parties to a hearing. The General Procedural Code requires that two hearings take place to resolve a case: An initial hearing and an evidentiary and judgment hearing. However, the initial hearing can be postponed or suspended, and the evidentiary hearing can last several months (until all of the evidence is heard). In the initial hearing, the judge can try a conciliation between the parties, hear the evidence required to decide on the preliminary exceptions to the claim, perform a direct examination of the parties (In Colombia, both parties and witnesses may be questioned during the trial), determine the issues of the dispute, and review the legality of the proceedings up until that point, to be able to correct any irregularities and avoid future nullities. Consequently, if no further evidence needs to be heard, the judge may deliver his or her ruling after hearing closing arguments. If the hearing does continue, the judge will decide on the evidence that is admissible and that will be heard during the evidentiary and judgement hearing.

At the end of the initial hearing, the court will set a date for the evidentiary and judgement hearing. During this proceeding, all of the evidence will be heard, including expert witness statements, witness statements, cross-examination of the parties and the production of documents. Finally, each of the parties will make their closing arguments for twenty minutes each, and the judge will deliver his or her ruling. If it is not possible for them to deliver a judgement at that point, they may indicate the scope of their judgement and deliver a written judgment during the next ten days.

2.4 Limitation periods

In Colombia, there are various limitation periods, which vary depending on the type of action being initiated. Therefore, while executive civil actions must be brought within five years, ordinary civil actions must be brought within ten years. These periods of time begin to run from the moment the obligation becomes due. However, there are various rules found in the *Civil and Commercial Codes* that provide specific limitation periods known as prescriptions, which vary depending on the right to be enforced. For example, actions for the protection of rights of possession have to be initiated within a year; challenging decisions of the General Meeting of a corporation has to be done within two months of the meeting; actions on cheques expire in six months; claims due to hidden defects of the item have to be made in six months; claims regarding insurance contracts have a two and a five-year limitation period, and claims derived from a commercial agency contract have to be made within five years.

2.5 Confidentiality

Generally speaking, Colombian laws require that civil and criminal trials hearings are conducted in public. Nevertheless, pursuant to article 3 of the General Procedural Code, "proceedings must be conducted orally and in public, except when they have been authorized to be in writing or are protected by reserve." Also, the judge is allowed to limit the assistance of third parties to the hearing, when he or she considers it necessary to do so.

In civil and commercial cases, reserved proceedings tend to be those where fundamental constitutional rights may be compromised if a public hearing takes place. For instance, the right to privacy, to a good name and whenever trade secrets, professional secrecy and matters of national security are involved.

In punitive procedures held before an administrative authority, such as disciplinary, fiscal and even antitrust related matters (restrictive trade practices investigations), documents, records and even hearings may be reserved.

In criminal cases, judges may hold private hearings if they consider that an open court may put the victims, witnesses, experts and others who are participating, in danger.

2.6 Class actions

Class action litigation is expressly authorized in Colombia. It has a constitutional source and is regulated by law 472 of 1998. For a group to have legal standing in this kind of action, it must be comprised of at least 20 individuals who meet uniform conditions in regards to the same set of facts that caused the damages regarding which they seek compensation. The individuals can be determined or determinable and the law establishes mechanisms for the incorporations of other individuals to the original group.

One attorney can represent all the members of the group but, if they have appointed different attorneys, they will be organized in a committee. The attorney appointed by the majority of individuals, or the one that the committee designates, shall represent this committee.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Rights of audience/requirements

Any lawyer licensed to practice law in Colombia is granted audience rights in any court or before any judicial authority in the national territory.

The requirements to practice law in Colombia are found in Decree 196 of 1971, which establishes that a person has to be duly registered as a lawyer. To be able to register, it is mandatory to hold an undergraduate degree in Law that has been legally recognized by the Colombian State.

Foreign lawyers

Generally speaking, foreign lawyers cannot practice law in Colombia without a license. Nevertheless, there are three ways that they may be authorized to do so. The first one involves completing law school in Colombia. The second option is by validating their foreign law degree and the third, by working in partnership with Colombian offices that have lawyers certified to practice law in the country.

In the event that a foreign lawyer is domiciled outside Colombia, he or she should be registered in the National Registry of Lawyers and request for a professional license to be issued. If they do not have a Colombian law degree, they must validate their foreign degree by completing studies in certain topics, like constitutional and administrative law. This may be done either by attending a Colombian University with a law program that has been duly registered or by passing the Higher Education Quality Examination (*ECAES*).

3.2 Rules of service for foreign parties

Colombia is a party to The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used to effect service in Colombia. Where the proceedings are to be served under this convention, the party seeking service can submit a request to the *Ministerio de Relaciones Exteriores - Dirección de Asuntos Migratorios, Consulares y Servicio al Ciudadano*, who acts as central authority for the implementation of the convention. The central authority transmits the request to competent authorities who then serve the documents.

If the document cannot be served pursuant to The Hague Service Convention, the foreign authority requesting service must submit a letter rogatory to a judicial authority in Colombia, through diplomatic means. Once the local authority receives the letter rogatory, it will serve the document in accordance with the applicable local procedure.

3.3 Forum selection in a contract

Jurisdiction in Colombia is a matter of law that the parties to a contract cannot modify. If a given dispute falls within the jurisdiction of a local court, it will claim jurisdiction regardless of the choice of jurisdiction made by the parties.

3.4 Choice of law in a contract

The choice of the governing law of a contract is a valid choice and will be honored in a suit brought in the courts of Colombia, subject to the proof of the applicable provisions of the governing law in the manner provided for in the General Code of Procedure and solely to the extent that the provisions of said law do not contravene the public policy of Colombia.

3.5 Gathering evidence in a foreign jurisdiction

Colombia is a party to The Hague Convention *of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)*. Therefore, in order to take evidence in Colombia, foreign judicial authorities shall issue a Letter of Request requesting a Colombian judicial authority to take the witness' testimony. The Letter of Request shall be submitted through the Colombian Ministry of Foreign Affairs, and must specify the following:

- The authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- The names and addresses of the parties to the proceedings and their representatives, if any;
- The nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- The evidence to be obtained or other judicial act to be performed.

Also, when appropriate, the Letter of Request shall include:

- The names and addresses of the persons to be examined;
- The questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- The documents or other property, real or personal, to be inspected;
- Any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- Any special method or procedure to be followed under Article 9 of The Hague *Evidence Convention*.

3.6 Enforcing a foreign judgement in local courts

The Civil Chamber of the Supreme Court has jurisdiction to award recognition of foreign judgments through exequatur proceedings. The Supreme Court will grant recognition to a foreign judgment if:

- There exists legal or diplomatic reciprocity between Colombia and the country where the judgement was rendered, as per the mutual recognition of judgments;
- The foreign judgment does not relate to *in rem* rights vested in assets located in Colombia;
- The foreign judgment does not contravene or conflict with Colombian laws relating to public order other than those governing judicial procedures;
- The foreign judgment is final (*res judicata*) and not subject to appeal or judicial challenge;
- A duly certified and legalized copy of the judgment has been presented;
- The foreign judgment does not refer to any matter upon which Colombian courts have exclusive jurisdiction;
- No proceedings are pending in Colombia with respect to the same cause of action, and no final judgment has been awarded in any proceeding in Colombia on the same subject matter and between the same parties; and
- The defendant was served in accordance with the law of the foreign jurisdiction and had an opportunity to present its case.

Regarding the enforcement of foreign arbitration awards, Colombia is a signatory of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

4. EVIDENCE

4.1 Fact witnesses

Witnesses of fact in Colombia give oral evidence.

At the beginning of the hearing the judge will ask the witness some specific personal information, including: (i) name; (ii) age; (iii) domicile; (iv) profession; (v) education level; (vi) current occupation; and (vii) if there is any reason that may affect its impartiality. Then the judge will ask specific questions. The party that requested the witness may formulate questions, and then the party against whom the evidence is being presented can also question the witness.

Furthermore, the parties will have one extra round of questions in the examination to clear or refute what the witness has stated. The judge can ask questions at any time.

4.2 Expert witnesses

Appointment procedure

The party that intends to rely on an expert's report must retain the expert directly and submit the report to the Court within its opportunity to file or request evidence. National courts will appoint experts *ex officio* only when necessary to clarify the facts of the dispute.

Role of experts

Experts' reports serve to verify relevant facts that require special scientific, technical or artistic knowledge. No experts are admitted regarding matters of domestic law.

Right of reply

The party against whom an expert's report has been produced can controvert the report by questioning the expert at a hearing, presenting a rebuttal expert's report, or both. If the expert is summoned to a hearing, the court and the parties will be entitled to question him/her.

Fees

The retaining party pays the expert's fees. These may be recoverable by a successful party as part of a costs award. If the court has appointed the expert, it will set a provisional fees and expenses amount which must be deposited by the parties on a pro-rata basis.

4.3 Documentary disclosure

Under Colombian law there is no disclosure; each party can reveal whichever documents it desires to the court. However, via *exhibición de documentos* a party may ask the judge to require the other party to submit certain documents. In this case the requesting party must state: (i) the facts that he wants to prove with such documents; (ii) that the other party has the documents; (iii) which documents are requested; and (iv) the relation of the documents with the alleged facts.

The judge will decide whether or not to hear such evidence. If he decides to hear it, the other party will have the opportunity to oppose. Ultimately the judge will decide whether or not the requested documents must be submitted.

If a party that has been ordered to submit certain documents fails to do so, the judge will recognize that the facts that the other party wanted to prove with the document have been established.

4.4 Privileged documents

Privileged documents

Privilege is recognized as substantive, rather than simply an evidentiary or procedural rule. In civil litigation, the primary classes of privilege are:

- Lawyer-client privilege, which extends to confidential communications between a lawyer and his client for the purpose of giving or receiving legal advice.
- Confidential communications within certain special relationships, such as between doctor and patient, or a priest and a confessor.

Some public documents such as intelligence communications and bank-documents are subject to privilege.

Other non-disclosure situations

If the requesting party fails to comply with the requirements set forth under article 266 of the *General Code of Procedure* the judge will refrain from ordering the submission of such documents.

5. REMEDIES

5.1 Dismissal of a case before trial

The *General Code of Procedure*, enacted by Law 1564 of 2012 establishes in its article 100 that the defendant may file in a separate written submission from the answer to claimant's claim, its *excepciones previas* (a written submission requesting the judge end the procedure before a full trial).

The sole grounds under which the aforementioned request can be brought to court are;

- Lack of jurisdiction;
- The existence of an arbitration agreement;
- Lack of existence of claimant or defendant;
- Lack of legal capacity or if one of the parties was not duly represented in court;
- Lack of formal and/ or informal requirements of the claim;
- If the heir, marital, estate curator, or manager status of claimant and/or defendant, when required, has not been proven;
- If the procedure under which the claim is being processed is not the one established under the law;
- If there is a pending lawsuit between the same parties and regarding the same matter;
- If all claimants and/or defendants are not present in the proceeding;
- If the communications to other parties that are required by law to be notified have not been sent; and
- If the defendant has not been notified of the decision regarding the admissibility of the claim.

The applicable procedure is as follows;

- The defendant has to file the *excepciones previas* at the same time as the answer to the claimant's claim in a separate written submission;
- The written submission must include all the evidence that the defendant has regarding its allegations, and the request for further evidence if needed;
- The claimant will have three days to answer that written submission, or to rectify the claim if needed;
- The judge will decide upon the *excepciones previas* that do not require the hearing of evidence before the initial hearing, and if one of them that impedes the continuation of the proceeding is proven, or when a rectification of the claim required was not performed, it will terminate of the proceeding and it will return the claim to claimant. If the hearing of evidence is required the judge will hear it in the initial hearing and in the same hearing it will decide upon the matter.

- The consequence of declaring the *excepciones previas* will vary depending on the ground under which it was filed. For instance, if the ground that succeeded was the lack of jurisdiction the judge will send the file to the judge who has jurisdiction and all the procedure until then will remain valid, generally, however, the proceeding will end before a full trial.

5.2 Interim or interlocutory injunction before trial

Interim measures can be ordered in civil procedure and both in domestic and international arbitration proceedings in Colombia.

In general, interim measures in civil proceedings (different from collection proceedings, which allow the freezing and seizure of assets), are limited to the registration of the complaint in the registrar's office and seizure of movable assets when the proceedings relate to *in rem* rights. In tort and contractual liability procedures, available interim measures are limited to the registration of the complaint in the registrar's office where assets of the defendant are registered. Assets subject to registration in Colombia are: i) real estate property; ii) automobiles and motorcycles; and iii) ships and aircrafts. After a first instance ruling that is favorable to the plaintiff is rendered, such plaintiff would be entitled to request the attachment and seizure of the assets affected with the registry of the complaint.

In contentious administrative proceedings, i.e., judicial proceedings in which a State entity acts as a party, interim measures are more strictly regulated than in civil proceedings and the available interim measures are: i) an order to maintain the *status quo* or to reestablish an existing situation; ii) an order to suspend an administrative proceeding; iii) an order to adopt an administrative decision, or the construction or demolition of a construction; and iv)issuance of orders to the parties, or the imposition of obligations on the parties.

In addition to the foregoing, article 590 of the arbitral statute contains a broad and general provision, which entitles judges to order any other interim measure that is deemed reasonable to protect the right subject to controversy, prevent its violation, avoid damages, cease existing affectations or guarantee the effectiveness of the claims. These types of measures are referred to as *innominate* measures, as they are not specifically listed in the General Code of Procedure itself.

Innominate interim measures are to be based on judge's analysis of: i) the interest of the requesting party on the order; ii) the existence of a threat to the concerned right (*periculum in mora*); iii) the likelihood of success on the merits of the case (*fumus boni iuris*); and iv) the necessity, effectiveness and proportionality of the measure. In any case, the judge is allowed to order a measure that is different and less burdensome than the one requested by the claimant, if it so deems appropriate. The judge may determine, *sua sponte* or upon a party's request, the duration, amendment or cessation of the interim measures. Finally, as a condition for the order of these interim measures the claimant is required to grant security in an amount equivalent to the 20% of the estimated claims, or any other sum, as determined by the judge, in order to guarantee the payment of the damages that may be caused by the performance of the measures.

The defendant can request to modify or impede the interim relief sought by claimant. A sum to grant security in favor of claimant will be set up by the judge.

Interim relief can be requested and decided before notifying the defendant.

5.3 Interim attachment orders

As to the grounds to grant interim relief please see question above.

The freezing of assets is subject to the following specific rules:

- This interim relief can be requested in the claim and can be decided prior notification of the defendant;
- The freezing of assets subject to registry will be sent to the correspondent authority;
- A copy of the certificate with the annotation will be sent to the judge;
- The freezing of assets which are not subject to registry will be performed with the seizure;
- The Colombian Constitution and some specific laws regulate which assets are not subject to freezing.

The seizure of assets is subject to the following specific rules:

- In the judicial decision that grants this interim relief a time and place will be set up for a *secuestre* (person who will guard the assets) to attend;
- The parties can mutually agree to designate the *secuestre;*
- Prior to delivering the assets to the *secuestre* a minute must be executed with the state of the assets;
- The *secuestre* must guard the assets' safety;
- If the assets seized are sums of money the judge will order it deposited in a bank;
- A party can oppose the seizure of assets.

The freezing and seizure of assets can be removed, among others, when:

- The party which requested the interim relief requests it;
- If the claim is withdrawn;
- If the defendant grants security to impede the interim relief sought by the claimant;
- If the proceeding against claimant ends;
- If there is a prior freezing or seizure of the same assets.

In foreclosure proceedings, the freezing and seizure of assets are subject to the following rules:

- Interim relief can be requested in the claim;
- The judge can limit the interim relief to what he deems necessary; the value of the assets frozen or seized cannot exceed double the claim;
- The defendant can request the judge order a security of 10% of the value of the claim in order for possible damages against the defendant by the interim relief to be covered;
- The defendant can request to apply the interim relief against some of his assets in order to free others;
- The defendant can request the judge abstain from granting interim relief, or cancel it with security of the amount claimed plus an additional 50%.

5.4 Other interim remedies

No anti-suit injunction exists in Colombia.

Innominate interim measures were only recently created by the *General Code of Procedure*. These measures broaden the scope of interim reliefs; however, attorneys and judges are still reckoning the scope of what can be requested before a final trial.

5.5 Remedies at trial

The courts have jurisdiction to order any remedy which will fully compensate the claimant. The following remedies are typically available:

- Damages. These can include the following types of damages:
  - Material damages, which subdivide into:
    - Actual loss;
    - Loss of profit;
  - Non-material damages, which subdivide into:
    - Moral damages;
    - Health damages;
    - Protection of fundamental rights (Mainly for human rights violations)
- Specific performance.
- Declaration (a formal statement by the court on the rights of interested parties, which can include an equitable remedy which corrects a contract in accordance with the parties' prior agreement).
- A foreclosure proceeding will begin with a judicial decision and end with the payment of what is owed by the defendant.

There are no punitive damages under Colombian law.

5.6 Security for costs

In civil procedure. a defendant cannot order for the claimant to provide security for its costs. On a general basis, the costs will be fixed at the end of the proceedings and will be borne by the losing party. The judge however can determine for the costs to be divided by the parties when success was divided.

In domestic arbitration, the costs of the arbitration proceeding are fixed by the arbitral tribunal at an early stage of the proceedings and unless the parties pay them at the outset, the arbitration will not take place and the arbitration agreement will expire. This makes the securement of the payment of fees unnecessary.

6. FEES AND COSTS

6.1 Legal fees

Article 93 of the Code of Civil Procedure provides that lawyers should abide by the fees determined by the bar associations which have been previously approved by the Ministry of Justice. Therefore, through Administrative Resolution 20 of 1992, the Ministry of Justice and the National Bar Association (*Corporación Colegio Nacional de Abogados*) approved the minimum legal fees that lawyers may charge depending on their fields of practice.

Lawyers in Colombia use different systems to charge fees. One of them is simply to charge a flat rate for their legal

services, which will depend on the type of case, the time it may take to render the services, the value of the assets involved, amongst other factors. Particularly, the National Bar Association suggests that when a flat rate is agreed to, the client should pay 50% of the value when they grant the power of attorney, 20% once the trial stage is over and the remaining 30%, when the procedure is over.

Moreover, lawyers may charge a percentage over the value of the assets associated with the case. It is also possible to charge a contingency fee, where a percent of the proceeds is paid only upon the successful completion of the case. It is important to point out that in Colombia, there is rule setting a limit to contingency fees.

Also, there may be hybrid arrangements that may involve a flat rate combined with a percentage or with a contingency fee applied to the proceeds of the case. Finally, some lawyers or firms may prefer to charge an hourly rate, which may vary depending on the lawyer that will be assessing the client.

6.2 Funding and insurance for costs

Funding
Commercial litigation is generally funded by the parties. Initially, they will have to pay for, among other things, lawyers' fees, notary expenses, certificates issued by local authorities, expert witness fees, and post security when seeking interim measures. Furthermore, these expenses will increase if the dispute is submitted to arbitration. Also, the defeated party has to pay for its own litigation costs as well as for the other party's.

On the other hand, assigning a claim or the bare right to litigate is a way for third parties to fund litigation. Hence, they will pay to obtain a right that is uncertain, as it depends on the trial's end result.

Insurance
In Colombia, insurance companies offer different types of polices, including professional negligence insurance for lawyers, director and officer liability and judicial guarantees, like surety insurance.

6.3 Cost award

Pursuant the *General Code of Procedure*, the unsuccessful party is required to pay all the costs of the proceedings. The costs include the expenses of the proceeding, such as experts' and other professionals' fees, and a sum determined by the court, paid to support the successful party legal representation's fees (*agencias en derecho*). In determining the amount of the *agencias en derecho*, the court is required to take into account the limits set from time to time by the Superior Council of the Judiciary and the nature, quality and duration of the representation, the amount of the claims and any other special circumstances.

6.4 Cost interest

Costs awarded accrue default interests at a rate of 6% per annum.

7. APPEALTop

7.1 Appeal

Which courts
Appeals of judgments in large commercial disputes are heard by the Court of Appeals of the relevant circuit judicial circuit. All first instance judgments (final decisions on the claims or defenses) are subject to appeal by any party. The aim of the appeal is to have the concerned decision revised by the superior of the court that issued it, only in regards to the objections made by the appellant.

Appeal of judicial decisions that are not judgments is restricted to specific kinds of decisions, laid down in article 321 of the *Colombian General Code of Procedure*.

Grounds for appeal
Colombian law does not specify grounds for appeal. The court hearing the appeal is entitled to perform an *ex novo* review of both the facts and the law applied by the first instance court, limited to the specific challenges raised by the appellant.

Time limit
If the decision is delivered in writing, the parties to the process are entitled to appeal it within the three days following its service. If the appealed decision is a judgment, the appellant is required to state briefly the reasons of its challenge.

If the decision is not a judgment, the appeal must be presented along with the arguments that support it, within the three days following its service.

If the decision is issued and served within a hearing, the appeal must be presented in the same hearing, immediately after the decision is issued. If the appealed decision is a judgment, the appellant is required to state briefly the reasons of its challenge within the 3 days following the date of the hearing.

If the appealed decision is not a judgment, the appellant can present the arguments in favor of the appeal in the same hearing, or within the following three days.

For judgments, the first instance court will submit the file docket to the Court of Appeals, which will decide on the admissibility of the appeal and, in case the appeal is admissible, set a hearing to listen to the parties' arguments and decide the appeal.

For other decisions, the first instance court will receive the parties' arguments and then submit the file docket to the Court of Appeals, which will decide in writing, without further evidence.

Generally, unless otherwise stated, the filling of an appeal against a decision does not suspend the effects of the concerned decision.

8. ENFORCEMENT OF JUDGMENT

8.1 Enforcement of judgment

A local judgment can be enforced through a collection action before the same court that issued it. If the winning party so requests, the court will issue an order of payment (*mandamiento ejecutivo*) against the other party.

The collection action is carried out pursuant to the general rules of collection. However, the defendant can only argue the expiry of the obligation as a defense after the judgment was issued.

The claimant is entitled to request the attachment of the assets of the debtor. In case the debtor fails to abide by the order of payment, and its defenses are rejected, the court will order the sale in public auction of the attached assets. The enforced obligation will be paid with the proceeds of such auction.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

The main ADR methods used in Colombia are conciliation and arbitration. ADR methods are particularly popular in the infrastructure industry. Further, more than 50 percent of large commercial disputes are settled through ADR methods, primarily through arbitration.

9.2 Costs in ADR

The *Arbitration Statute* is silent as to how a tribunal is to allocate costs and expenses derived from arbitration or *amiable compositeur* proceedings. Conciliation costs are usually assumed by the summoning party.

9.3 ADR and the court rules

Conciliation forms part of the majority of court procedures in Colombia. In fact, attempting conciliation is a prerequisite that plaintiffs must comply with before they file for most court proceedings.

Furthermore, during most court proceedings judges are expected to encourage the parties to resolve their differences through conciliation.

9.4 Evidence in ADR

Regarding domestic arbitration proceedings, the parties are expected to submit or request evidence with the filing of their claim/response. The tribunal then decides on the admission or rejection of said evidence, and can order the taking of any additional evidence it deems necessary. The same process applies to *amiable compositeur* proceedings.

With respect to other ADR methods such as conciliation, evidence is limited to the documents submitted by the summoning party, and any other documents produced during the conciliation hearing.

According to Article 76 of Law 23 of 1991, conciliation proceedings are confidential, and any document produced during the latter cannot be used against any of the parties in subsequent judicial proceedings.

By contrast, evidence or any document produced during domestic arbitration proceedings can be "transferred" into any other arbitration or court proceeding. The only requirement is that the "transferred" evidence was produced in the former proceeding by request of the party against whom it is now being presented, or that said party had the opportunity to contradict the evidence in question when it was first produced.

9.5 ADR reform

There are no foreseeable reforms concerning dispute resolution in Colombia. The new Colombian *Arbitration Statute* and *Public Procurement Law* came into force on the year 2012, while the Colombian *General Code of Procedure* came into force on January 1, 2016.

9.6 ADR organizations

There are several well-known institutions that offer ADR services in Colombia.

With respect to conciliation in which a public entity is involved, proceedings usually take place before the "Procuraduría General de la Nación", a public entity in charge of guarding fundamental rights and disciplining public employees. Regarding private matters, several institutions offer conciliation services such as Universities, Chambers of Commerce and public entities.

Most arbitration proceedings take place in arbitration centers operated by Chambers of Commerce. Most recently, several specialized arbitration centers have been gaining popularity, such as the Superintendency of Corporation's Arbitration Center, which specializes in corporate matters.


THE·TRUE·ADMINISTRATION·OF·JUSTICE·IS·THE

United States

Tami Azorsky, Sandra Hauser, Roger Heidenreich

1. OVERVIEW

1.1 What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

The United States is a federal system, with a central federal government and individual governments for each of the fifty states. Each state has its own complete judicial system (referred to as state courts) as does the United States itself (referred to as federal courts). While the state of Louisiana operates, in part, under the Napoleonic Code, the legal system in every other state is based on the British common law tradition.

Although there are differences between the federal courts and the various state court systems, they share common characteristics. Each judicial system has a number of courts of original jurisdiction, in which cases are originally filed and tried. Each system also has a smaller number of intermediate appellate courts. These courts hear appeals from the trial courts. Each court system also has a supreme court, which hears appeals from the appellate courts and is the final arbiter of litigation in the respective system.

Recent trends in dispute resolution

Decreased procedural entitlements in civil disputes. The federal court system recently implemented changes to the rules of civil procedure that are intended to promote the resolution of civil disputes in a less expensive, time-consuming and complex manner and introduce a principle of proportionality in discovery.

Mandatory ADR. Most jurisdictions do not require certain ADR procedures (such as mandatory settlement conferences) for large commercial disputes as a part of the judicial process.

2. COURT LITIGATION

2.1 What limitation periods apply to bringing a claim and what triggers a limitation period?

Each state within the United States has its own limitation periods for different categories of claims. Similarly, Federal claims have their own limitation periods. Ultimate limitation periods vary widely across jurisdiction.

Given the variance between jurisdictions within the United States, and the complex nature of limitations statutes, local counsel should be consulted.

2.2 What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

State courts

The state courts of each state hear small and large commercial disputes that fall within their jurisdiction. The state court systems also include one or more courts of appeal which may review judgments of the first level court.

Federal courts

The federal trial courts in the federal system hear small and large commercial disputes that fall within their limited jurisdiction. The federal trial courts have concurrent first instance jurisdiction with the state courts in the state the federal court sits to hear all claims by and against the federal government, and matters between private parties involving navigation, shipping and admiralty. The federal trial courts also have first instance jurisdiction to hear cases between private parties involving conflicts for patents; copyright; or federal trade marks. Finally, the federal trial courts have first instance jurisdiction to hear any federal question and any dispute between citizens of different states.

There are intermediate federal courts of appeal that hear appeals from the federal trial courts.

2.3 Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Generally, lawyers are admitted or may apply to be admitted in the state courts that they are licensed by and in the federal courts sitting in that state. Non-resident lawyers who are admitted in a different state may apply for admission to practice on a temporary basis in courts located in states where they are not licensed (referred to as pro hac vice admission).

Generally, foreign lawyers cannot practice law in the United States if they are not licensed by either a state or a federal bar.

3. FEES AND FUNDING

3.1 What legal fee structures can be used? Are fees fixed by law?

Hourly billing is the predominant legal fee structure. Fees are not fixed by law.

Alternative arrangements are becoming increasingly common. These include:

- Contingency fees (that is, an agreement where the lawyer only receives a fee if the client wins).
- Fixed (task-based) fees.
- Discounted rates.

3.2 How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

Commercial litigation is generally funded by the parties although occasionally third parties may fund the costs of litigation.

Insurance

There are many different types of insurance (for example, products liability, professional negligence, director and officer liability). However, most of these insurance policies exclude coverage for intentional misconduct.

4. COURT PROCEEDINGS

4.1 Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

Generally, all cases, whether civil or criminal, must be heard in open court. However, in certain exceptional cases, the court can limit access to proceedings.

In most jurisdictions, a party may also request a sealing order to protect sensitive trade and other information where it can be established that an order is needed to prevent serious risk to an important interest, including a commercial interest.

4.2 Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

Courts in the United States do not generally impose any rules in relation to pre-action conduct. However, given the variance between jurisdictions within the United States, local counsel should be consulted.

4.3 What are the main stages of typical court proceedings?

The main stages of a court litigation are:

- commencement of proceedings and pleadings for civil actions. A claim is typically initiated by filing a written complaint with a summons. This would be followed by service on the defendant and the defendant either filing an answer, which may include a counterclaim, a cross-claim (against another named defendant), or claims against other non-parties (third-party claim, e.g., indemnity), or filing a motion challenging the validity of the complaint or other procedural defects;
- pre-trial conferences for case management and directions;
- discovery (written and deposition), including expert disclosure and discovery;
- filing and resolution of dispositive motions (if any);
- final pre-trial conference and resolution of evidentiary motions (if any);
- trial or hearing; and
- judgment.

5. INTERIM REMEDIES

5.1 What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

In most jurisdictions, a party may move to dismiss a case based on the allegations of the initial pleading or other procedural defects, including: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (6) failure to join a required party.

Even if the court dismisses a claim based on the pleadings, it will typically give the unsuccessful party leave to amend its claim.

In addition, in most jurisdictions, parties may move for summary judgment, under which a claim may be disposed of without a full trial if the court determines that there is no genuine dispute of material fact requiring a trial with respect to a claim or defense. The determination is based on a consideration of affidavit evidence, deposition testimony, and other written discovery responses.

5.2 Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The civil procedure rules in the United States' court system typically do not permit a defendant to apply to the court for an order for security for costs. Most jurisdictions, however, have a procedure where a party who obtains a final judgment may seek or obtain a bond or other form of security if the judgment is appealed.

5.3 What are the rules concerning interim injunctions granted before a full trial?

Availability and grounds

In most jurisdictions, there are two types of injunctions available before trial (or before the determination of the issues on their merits):

- **Interim or Temporary injunction**. This is generally only granted for a very brief period until an application for an interlocutory injunction is made. An interim injunction can typically be obtained without prior notice to the other party and can be granted on the same day if the matter is urgent.
- **Interlocutory or Preliminary injunction**. This is intended to preserve the status quo or to enjoin certain conduct until the court determines the parties' rights.

Each state within the United States has its own standard for evaluating and granting injunctions. Similarly, Federal courts have their own standard. Although typically similar, given the variance between jurisdictions within the United States, local counsel should be consulted.

In general, in most jurisdictions, the party seeking the injunction may be required to pay any damages suffered by the other party if that party ultimately succeeds in having the injunction set aside.

5.4 What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

There is no standard process in the United States. The United States does not utilize some of the orders commonly recognized by some other jurisdictions (e.g., Mareva injunction, Anton Piller order, or Norwich Pharmacal order). Rather, in the United States, a party likely has to move for a preliminary injunction or temporary restraining order to preserve assets and the status quo pending final resolution of a dispute. A party seeking such an injunction may have to post a surety bond. Given the variance within the United States, local counsel should be consulted.

5.5 Are any other interim remedies commonly available and obtained?

Other than described above, no.

6. FINAL REMEDIES

6.1 What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

The courts generally have jurisdiction to order any remedy that is just, whether it is based on the common law, equity or statute. The following remedies are typically available:

- Damages. These can include the following types of damages:
  - compensatory;
  - aggravated;
  - exemplary;
  - punitive.
- Specific performance.
- Declaration (a formal statement by the court on the rights of interested parties or the construction of a document).
- Reformation (an equitable remedy which corrects a contract in accordance with the parties' prior agreement).
- Permanent injunctions.
- Foreclosure.
- The imposition of a constructive trust (to the effect that the defendant holds an asset in trust for the claimant).

7. EVIDENCE

7.1 What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

Generally, any document in a party's possession, custody, or control that is relevant to any matter in issue in the case may be required to be disclosed during the discovery process. Cases in federal courts have mandatory initial disclosure requirements that parties must adhere to. Many, but not all, states also have mandatory initial disclosure requirements.

7.2 Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Each state within the United States has its own standard for privilege. Similarly, Federal courts have their own standard. Given the variance between jurisdictions within the United States, local counsel should be consulted. In general, privilege is recognized as a substantive rule, rather than only an evidentiary or procedural rule. In civil litigation, the primary typical classes of privilege are:

- Attorney-client privilege, which extends to confidential communications between a lawyer and client for the purpose of giving or receiving legal advice.
- Work-product protection, which extends to confidential documents created for the purpose of or in anticipation of actual or contemplated litigation.

In most jurisdictions, these classes of privilege extend to in-house lawyers, provided the confidential documents are for the purpose of litigation or legal advice rather than for business.

Other categories of privilege or limits on disclosure that may be recognized by jurisdictions in the United States include:

- Confidential communications within certain special relationships, such as between a doctor and patient or between spouses.
- Communications in furtherance of settlement. Confidentiality may attach to such communications but will be lost if, for example, the existence or interpretation of a settlement agreement is subsequently in issue.
- Statutory limits on or required process for disclosure of personal information, such as financials or medical history.

7.3 Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Witnesses of fact generally give oral evidence at trial and are subject to direct examination, cross-examination and re-examination. In some proceedings, such as for summary judgment, fact witnesses are permitted to give evidence by way of affidavit or declaration.

7.4 What are the rules in relation to third party experts?

Either party can retain an expert or, uncommonly, the court can appoint an expert to assist it in its determination of complex issues.

Experts serve to provide opinion on matters that require scientific, technical, or other specialized knowledge. Whether retained by a party or appointed by the court, an expert's role is to assist the court or jury in reaching its determination.

Each state and federal court system have their own rules for expert opinion disclosure. Given the difference between jurisdictions within the United States and between state and federal courts, local counsel should be consulted. Generally, however, the opinion of an expert witness who will give evidence at trial must disclosed according to a timetable prescribed by the local rules of court or court order (or as agreed by the parties). This is typically followed by the disclosure of a responding expert's opinion and any necessary supplementary or rebuttal opinions.

The retaining party pays the expert's fees. These may be recoverable by a successful party as part of a costs award in some jurisdictions.

8. APPEALS

8.1 What are the rules concerning appeals of first instance judgments in large commercial disputes?

Each state and federal court system have their own rules for appeals. Given the difference between jurisdictions within the United States and between state and federal courts, local counsel should be consulted. Generally, however, appeals of first instance judgments (but not necessarily interim decisions) are made to the applicable court of appeal and must be made within a defined timeframe. Generally, final decisions can be appealed as of right, while interim decisions usually require leave to appeal. Appeals from appellate courts are taken, with leave, to a supreme court. Standards for appellate review vary, including differences based on what the underlying issue is, the stage of proceedings, and whether the issue is a question of law or fact.

9. CLASS ACTIONS

9.1 Are there any mechanisms available for collective redress or class actions?

Class action litigation is common in the United States at the state and federal level. Once a class action is certified, the litigation typically continues with a representative plaintiff or representative plaintiffs acting on behalf of the entire class. Given the variance between jurisdictions within the United States, local counsel should be consulted.

10. COSTS

10.1 Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

Each state and federal court system have their own rules for costs. Cost awards do not include attorneys' fees unless fee awards are specified by a statute or by contract between the parties. Given the difference between jurisdictions within the United States and between state and federal courts, local counsel should be consulted. For example, a successful litigant in federal court may be awarded costs pursuant to statute at the discretion of the court. In some states, the award of costs pursuant to statute may be mandatory.

10.2 Is interest awarded on costs? If yes, how is it calculated?

Generally, if awarded, post-judgment interest on costs would be awarded at a rate prescribed by statute, calculated from the costs order's date.

11. ENFORCEMENT OF A LOCAL JUDGMENT

11.1 What are the procedures to enforce a local judgment in the local courts?

Each state within the United States has its own procedures for enforcing local judgments. Similarly, the Federal system has its own procedures for enforcing local judgments. Given the variance between jurisdictions within the United States, local counsel should be consulted.

12. CROSS-BORDER LITIGATION

12.1 Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

Parties are typically free to agree on the applicable substantive law. But each state within the United States has its own standards for evaluating and enforcing choice of law provisions. Similarly, the Federal courts have their own standards for evaluating and enforcing choice of law provisions, which may also be governed by the state the court sits in. Given the variance between jurisdictions within the United States, local counsel should be consulted.

12.2 Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Courts in the United States generally enforce forum selection clauses. But each state within the United States has its own standards for evaluating and enforcing forum selection clauses. Similarly, the Federal courts have their own standards for evaluating and enforcing forum selection clauses, which may also be governed by the state the court sits in. Given the variance between jurisdictions within the United States, local counsel should be consulted.

12.3 If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

The United States is a party to the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), which contains a procedure that can be used to effect service in the United States.

However, the Hague Service Convention process is cumbersome and more direct means of service are usually available. Each jurisdiction in the United States (state and federal) sets its own rules regarding the service of judicial documents. The most practical way of serving foreign documents in the United States is typically to retain local counsel to ensure that local requirements are strictly followed.

12.4 What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

The United States is a party to the Hague Convention of October 7, 1972 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), which contains a procedure that can be used to take evidence from a witness in the United States.

Additionally, Section 1782 of Title 28 of the United States Code ("Assistance to foreign and international tribunals and to litigants before such tribunals") provides a statutory procedure for a party to a legal proceeding outside the United States to apply to an United States court to obtain evidence for use in the non-United States proceeding.

12.5 What are the procedures to enforce a foreign judgment in the local courts?

There is no uniform legislative scheme, though many jurisdictions in the United States have adopted uniform foreign judgment enforcement legislation. Under such legislative procedure, if the judgment meets the statutory criteria and is recognized, the judgment will be of the same force and effect as a judgment of that state. Recognition and enforcement, however, involve separate proceedings. A moving party must first obtain recognition of a foreign judgment and then may begin enforcement proceedings. Even if a foreign judgment is recognized, a party generally may raise defenses against enforcement, including lack of due process, violation of public policy of the state in which enforcement is sought, or that the judgment was obtained by fraud. Given the variance between jurisdictions within the United States, local counsel should be consulted.

13. ALTERNATIVE DISPUTE RESOLUTION

13.1 What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

The most commonly used ADR procedures are:

- Negotiation.
- Mediation.
- Arbitration.

Negotiation and mediation are generally more informal, confidential processes, where the information exchanged is not compellable in litigation. Arbitration is generally more structured and follows either court-like rules or rules of a respected arbitration body, at the election of the parties.

ADR is increasingly popular among all kinds of commercial disputes.

13.2 Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

Mandatory mediation is imposed in some court proceedings. But given the variance between jurisdictions within the United States, local counsel should be consulted. It is also common for parties to engage in pre-trial settlement conferences as part of the court process. In large commercial cases it is common to conduct mediations without the court's involvement.

13.3 How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

In relation to arbitration proceedings, the parties generally agree in advance how evidence will be given. In the absence of agreement, the arbitral tribunal determines the procedures to be followed, including the rules of evidence (which may be similar to those of the courts).

Other forms of ADR usually do not involve giving evidence. If they do, in mediation for example, disclosure of any information acquired during the process is generally prohibited in unresolved disputes.

Arbitration and mediation are generally regarded as confidential. However, if the parties apply to court at any point during the process, the fact of the arbitration proceedings will become public. The nature of the proceedings may also become public depending on the nature of the application.

13.4 How are costs dealt with in ADR?

Generally the parties agree in advance on the disposition of costs in ADR, failing which each side bears its own costs.

In the case of arbitration, in the absence of agreement, the arbitral tribunal must enforce the costs rules applicable to the arbitration organization.

13.5 What are the main bodies that offer ADR services in your jurisdiction?

There are a number of arbitration bodies within the United States that handle large commercial arbitrations. However, parties also commonly use the processes of international institutional arbitration bodies, such as the:

- ICC.
- ICDR.
- International Institute for Conflict Prevention and Resolution (CPR).
- London Court of International Arbitration (LCIA).

Within the United States, some of the better-known organizations are:

- the American Arbitration Association (AAA); and
- the Forum, formerly known as the National Arbitration Forum (NAF).

14. PROPOSALS FOR REFORM

14.1 Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

There are no substantial pending proposals for dispute resolution reform at this time.

ASIA

China

Jiangtao Ma, Dao Rina, Zou Zhiqiang & Zhu Yongrui

1. OVERVIEW

1.1 Overview

Court services are the most common choice in most cases while arbitration has been thriving in recent years. Mediation can happen in or out of court or arbitration proceedings with the judges or arbitrators as mediators, who may continue with the original proceedings where mediation fails.

2. LITIGATION

2.1 Court system

All courts at all levels have a civil division that hears commercial disputes and the trial level is decided by the amount in dispute and its complexity and importance. The exception is that there are IP Courts in some cities trying IP cases.

2.2 Pre-action conduct

There are no rules imposed on parties for pre-action conduct.

2.3 Typical proceedings

The main stages of typical court proceedings:

- trigger of proceedings by Claimant presenting Claim Form,
- defendant's Pleading,
- disclosure,
- hearing (opening statement, pleading, cross examination, debate, closing statement), and
- delivery of judgment.

2.4 Limitation periods

Time limitation is two years from either the date the breach of contract/tort actually occurred or the date when the party was aware of or should have been aware of the occurrence of such breach of contract/tort.

The time limitation discontinues where the claimant brings its claims against the defendant. Bodily injury and product liability have a one year limitation.

2.5 Confidentiality

Court proceedings are public unless privacy, commercial secrets, or state secrets are involved.

2.6 Class actions

Pursuant to Article 55 of the Civil Procedure Law of the People's Republic of China (2012 Amendment), for conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

All lawyers have the rights of audience. No further qualification is needed for appearing in higher courts even the Supreme Court. Foreign lawyers may not conduct any cases in a Chinese court.

3.2 Rules of service for foreign parties

A foreign national, a stateless person or a foreign enterprise or organization which needs to be represented by a lawyer in instituting or responding to an action in a people's court must retain a lawyer of the People's Republic of China. Where a foreign national, a stateless person or a foreign enterprise or organization without a domicile within the territory of the People's Republic of China needs to be represented by a lawyer or any other person of the People's Republic of China in an action, the power of attorney posted or forwarded from outside the territory of the People's Republic of China is valid only after it has been legalized by a notary office in the home country and authenticated by the Chinese embassy or consulate stationed in that country or has undergone the legalization formalities prescribed in the relevant treaty concluded by the People's Republic of China and that country.

Where there is any discrepancy between an international treaty concluded or acceded to by the People's Republic of China and this Law, the provisions of the international treaty shall prevail, except clauses to which the People's Republic of China has declared reservations.

3.3 Forum selection in a contract

According to Article 34 of the Civil Procedure Law of the People's Republic of China (2012 Amendment), local courts will respect the choice of jurisdiction in a contract. Parties to a dispute over a contract or any other right or interest in property may, by a written agreement, choose the people's court at the place of domicile of the defendant, at the place where the contract is performed or signed, at the place of domicile of the plaintiff, at the place where the subject matter is located or at any other place actually connected to the dispute to have jurisdiction over the dispute, but the provisions of this Law regarding hierarchical jurisdiction and exclusive jurisdiction shall not be violated.

3.4 Choice of law in a contract

Local courts respect the choice of governing law in a foreign-related contract. Contract Law of PRC and Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships may also apply.

3.5 Gathering evidence in a foreign jurisdiction

According to article 277 of Civil Procedure Law in the People's Republic of China,

- The request for the providing of judicial assistance shall be effected through channels provided in the international treaty concluded or acceded to by the People's Republic of China. In the absence of such a treaty, it shall be effected through diplomatic channels.
- A foreign embassy or consulate accredited to the People's Republic of China may serve documents on its citizens and make investigation and collection of evidence among them, provided that the law of the People's Republic of China is not violated and no compulsory measures are taken.
- Except for the conditions provided in the preceding paragraph, no foreign organization or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents, make investigation or collect evidence within the territory of the People's Republic of China.
- The major Conventions signed by China include The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

3.6 Enforcing a foreign judgement in local courts

The following conditions are required in the process of recognition and enforcement of foreign judgments in China:

- The state of the court in which the judgment is made, has entered into a treaty or shared a mutually beneficial relationship with China.
- China and the foreign countries are parties to a Multilateral Convention.
- There is no convention or bilateral treaty between China and the foreign countries, but there is a reciprocal relationship.
- The judgment or ruling made by a foreign court for which ratification and enforcement is applied or requested must be a legally effective judgment.
- Where there is a need to enforce a finding made by a foreign court, an enforcement order shall be issued and enforced pursuant to the relevant provisions of Civil Procedure Law in the People's Republic of China.
- Where the People's Court deemed that the basic principle of the laws of the People's Republic of China or the sovereignty, security or public interest of the State is violated, the judgment or ruling made by the foreign court shall not be ratified and enforced.

4. EVIDENCE

4.1 Fact witnesses

Witnesses shall appear in court to testify and answer questions put to them by the parties in cross-examination. The judge and the parties to a case may question witnesses who are called. No witness may sit in on the court hearing. No witness may be present when another witness is being questioned. Where it deems it to be necessary, the people's court may allow witnesses to cross-examine each other. Evidence shall not be used independently as a basis for confirming the facts of any case, if the testimony of a witness who fails to appear in court to give evidence.

4.2 Expert witnesses

There are mainly two types of third party experts in the Civil Procedures of PRC: 1) experts; 2) persons with expertise.

Experts: Pursuant to Article 76 of Civil Procedure Law of the People's Republic of China (2012 Amendment), a party may

apply to the people's court for identification regarding a specialized issue for ascertaining the facts of a case. Where a party applies for identification, the parties on both sides shall determine a qualified identification expert by consultation; or if such consultation fails, the people's court shall specify one for them.

Where no party applies for identification but the people's court deems it necessary to conduct identification regarding a specialized issue, the people's court shall employ a qualified identification expert to conduct identification.

Persons with expertise: In accordance with Article 79 of Civil Procedure Law of the People's Republic of China (2012 Amendment), a party may apply to the people's court for notifying a person with expertise to appear in court to offer an opinion regarding an identification opinion issued by an identification expert or regarding a specialized issue.

The application shall be made to the people's court before the expiry of the time limit for adducing evidence. One to two persons with expertise could be brought in front of the court if the application is approved. Persons with expertise can act on behalf of the parties to cross-examine the expert opinions or propose opinions on the specialized issues involved in the facts of a case, and such opinions proposed by persons with expertise in court on the specialized issues shall be deemed as statements of the parties. Persons with expertise may not participate in court hearing activities other than those on the specialized issues.

4.3 Documentary disclosure

The parties must submit a statement of claim, a subject qualification, and an instrument of evidence. Where no evidence is produced or the evidence produced is insufficient to support the claims made, the party that bears the burden of proof shall bear any unfavorable consequences.

4.4 Privileged documents

A contract may classify documents as privileged, but in the process of litigation documents relating to the case should be disclosed. Some civil cases, such as divorce cases or cases involving commercial secrets may be heard in private sessions if the parties concerned so request.

5. REMEDIES

5.1 Dismissal of a case before trial

Dismissal of a case is a negative evaluation of the party's right. The people's court considers if the plaintiff's claim has no factual basis or legal basis, so their request will not be supported. The defendant must defend himself before the expiration of the defence period to clarify his opinions on the plaintiff's claim and the facts and reasons, to request that the court rejects the plaintiff's claim.

Rejection is after receiving the plaintiff's complaint, the people's court in accordance with the law to the case review, found that the plaintiff did not prosecute rights, ruling in accordance with legal procedures shall be rejected. After rejection of the decision is legally effective, the people's court must entertain the lawsuits filed in conformity with the provisions of law if the party initiates a lawsuit again.

5.2 Interim or interlocutory injunction before trial

Civil Procedure Law of the People's Republic of China (Revised in 2012); Article 100: In the event that the judgment on the case may become impossible to enforce or such judgment may cause damage to a party because of the conduct of the other party to the case or because of any other reason, the people's court may, upon the request of the said party, order the preservation of the property of the other party, specific performance or injunction. In the absence of such a request, the people's court may also, where it deems necessary, order property preservation measures.

When a people's court adopts any preservation measure, it may order the applicant to provide security; where the party refuses to provide such security, the court shall reject the application.

When a people's court receives an application for preservation in an emergency, it shall decide within 48 hours after the receipt of the application; if the court accepts the application, such measures shall come into force immediately.

Trademark Law of the People's Republic of China (Revised in 2013); Article 66: In order to stop trademark infringing activities, a trademark registrant or an interested party may, prior to filing a lawsuit, apply to the People's Court for evidence preservation when such evidence may be destroyed or lost or become unobtainable in the future.

Copyright Law of the People's Republic of China (Revised in 2010); Article 50: A copyright owner or copyright-related rights holder who has evidence showing that another person is infringing or is about to infringe such rights and that failure to immediately halt such conduct would result in damage to his lawful rights and interests that would be difficult to remedy may apply to a people's court for an injunction against the conduct

concerned and a property preservation order prior to instituting an action.

Patent Law of the People's Republic of China (Revised in 2008); Article 66: In the event that a patentee or any interested party has evidence proving that another party is infringing or intends to infringe upon the patent right in question and that any such infringement would cause irreparable damage if prompt action is not taken to curb such an infringement, the patentee or interested party may, before filing a legal action, request a people's court to take measures to order the cessation of the relevant acts of infringement.

5.3 Interim attachment orders

Where an interested party whose legitimate rights and interests, due to an emergency, would suffer irreparable damage if the party fails to petition for property preservation promptly, may, before instituting a lawsuit or applying for arbitration, apply to the people's court at the locality of the property, the domicile of the party on which the application is made, or the people's court with jurisdiction over the case, for the property preservation measures. The applicant shall provide security for such application; where the party fails to provide such security, the court shall reject the application. Where the applicant fails to institute a lawsuit, or fails to apply for arbitration in accordance with the law within 30 days after the people's court adopts preservation measures, the people's court shall revoke the preservation order. Preservation shall be limited to the scope under the application or to the property related to the case in question.

5.4 Other interim remedies

The civil procedure law provides for preliminary execution in article 108-106. Upon the request of a party, a people's court may make a ruling for preliminary execution in the following cases:

- those involving claims for overdue alimony, maintenance, child support, pensions for the disabled or the family of the deceased, or medical expenses;
- those involving claims for remuneration for labour; and
- those involving urgent circumstances that require preliminary execution.

5.5 Remedies at trial

Compensatory: Where either party to a contract fails to perform the contractual obligations or its performance of the obligations does not meet the terms of the contract, thereby causing losses to the other party, the amount of compensation for losses shall be equal to the losses caused by breach of contract, including benefits receivable after the performance of the contract, provided that it shall not exceed the probable losses caused by breach of contract which was foreseen or ought to have been foreseen by the breaching party at the time of conclusion of the contract.

Punitive: *Law of the People's Republic of China on the Protection of Consumer Rights and Interests (Revised in 2013):* Business operators engaged in fraudulent practice in providing goods or services shall, on the demand of the consumers, increase the compensations for their losses; the increased amount of the compensation shall be three times the costs that the consumers paid for the goods purchased or services received.

Interpretation of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Contracts for the Sale and Purchase of Commodity Housing. Where the vendor, when concluding a contract for sale and purchase of a commodity house, is under specific circumstances, resulting in the invalidity, cancellation or rescission of the contract, the purchaser may request that the money already paid to purchase the house be refunded, along with interest thereon, and that compensation be paid for any loss suffered, and may also request that the vendor be liable to pay compensation of no more than the amount of money already paid to purchase the house.

Food Safety Law of the People's Republic of China (Revised in 2015). Where producers produce food not meeting the food safety standards or traders operate the food not meeting the food safety standards that they have knowledge of, consumers may also, in addition to the compensation for losses, require producers or traders to pay compensation equal to ten times of the price or three times of the losses.

5.6 Security for costs

In litigation proceedings, the plaintiff pays litigation fees first advances, the court will decide that the litigation fee shall be borne by the losing party. But the cost of lawyer fees shall be borne by the parties separately. In arbitration, one party may request the other party bear their own costs of participating in the arbitration, including attorney fees. But whether in litigation or arbitration, parties cannot apply guarantee of litigation costs.

6. FEES AND COSTS

6.1 Legal fees

Chinese lawyers charge their clients by two means, a lump sum or hourly rate. The guidance of lawyer fees stipulated by local government is binding, lowering certain ways to charge such as maximum hourly rate, capped amount for certain cases, conditional fees, among others.

6.2 Funding and Insurance for Costs

Clients pay legal costs and lawyer fees themselves. Only some are entitled to legal aid. A third party may fund litigation and insurance may be used to provide surety for a party's Property Preservation (e.g. Freezing Order) application.

6.3 Cost award

According to Article 29 of Measures on the Payment of Litigation Costs, the litigation costs shall be borne by the party that loses the lawsuit, unless the party that wins the lawsuit bears the costs at his free will. Where the party concerned partially wins the lawsuit and partially loses it, the people's court may, at its discretion, decide on the amounts of litigation costs to be borne by the parties respectively. Where the parties to a joint lawsuit lose the lawsuit, the people's court shall, on the basis of the interest relationship with the object of lawsuit, decides on the amounts of litigation costs to be borne by the parties respectively.

The litigation costs shall be paid by the loser unless the winner is willing to make a payment. If the plaintiff wins the case, the litigation costs shall be paid by the defendant. The people's court shall refund to the plaintiff the litigation costs which it charges in advance, and then directly charge the defendant for the litigation costs unless the plaintiff is willing to bear the litigation costs or agrees to let the defendant make a payment to it directly. If the party concerned refuses to pay the litigation costs, the people's court shall enforce the court decision.

6.4 Cost interest

Courts do not generally award cost interests.

7. APPEAL

7.1 Appeal

According to Civil Procedure Law of the People's Republic of China (2012 Amendment), a party shall have the right to file an appeal with the people's court within 15 days from the date of service of the written judgment; a party shall have the right to file an appeal with the people's court within 10 days from the date of service of the written ruling.

An appellant shall submit a written appeal through the original trial people's court and provide copies of it according to the number of the opposing parties or the representatives of the opposing parties. Where a party appeals directly to a people's court of second instance, the people's court of second instance shall, within five days, transfer the written appeal to the original trial people's court.

In principle, the people's court of second instance shall form a collegial bench to try an appeal case in a court session. The people's court of second instance may try an appeal case in its own courtroom or at the place where the case occurred or where the original trial people's court is located.

Where an appellant requests withdrawal of its appeal before the people's court of second instance pronounces its judgment, the people's court of second instance shall issue a ruling on whether to grant such a request.

The judgments and rulings of a people's court of second instance shall be final.

8. ENFORCEMENT OF JUDGEMENT

8.1 Enforcement of judgment

Pursuant to the Civil Procedure Law of the People's Republic of China (2012 Amendment), an effective civil judgment or ruling or the property portion of a criminal judgment or ruling shall be enforced by the people's court of first instance or the people's court at the same level as the people's court of first instance at the place where the property under enforcement is located.

Other legal instruments enforced by a people's court as prescribed by law shall be enforced by the people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property under enforcement is located.

Where a people's court fails to conduct enforcement within six months after receiving a written application for enforcement, the applicant for enforcement may apply for enforcement to the people's court at the next higher level. Upon examination, the people's court at the next higher level may order the original people's court to conduct enforcement within a certain time limit or decide to conduct enforcement by itself or order another people's court to conduct enforcement.

Enforcement shall be conducted by enforcement personnel. When taking enforcement measures, the enforcement personnel shall produce their credentials. After completion of enforcement, the enforcement personnel shall prepare enforcement transcripts, to which the relevant persons on the site shall affix their signatures or seals. A people's court may, as needed, establish an enforcement department.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR Procedures

Mediation and Arbitration are the two important methods of ADR which are mostly used in large commercial disputes in China. These ADR forms are generally applied to civil and commercial disputes as well as contract disputes of relatively small subject amounts.

According to the statistics reported by People's Court Daily, in the first season of 2015, a total of 3085 civil and commercial cases in the second intermediate people's court of Shanghai have been closed through mediation or reconciliation thus the proportion is 21.43%. Such an ADR form integrates the people's mediation, administrative mediation and judicial mediation together; consequently reducing the burden of litigants.

9.2 Costs in ADR

In terms of costs dealt with in ADR, when the case is closed through mediation, its acceptance fee should be reduced to half of the applicable rate.

While in arbitration, costs are regulated by Measures on Arbitration Fees to be Charged by Arbitration Commissions Article 4 that a specific standard of fees for accepting arbitration cases shall be determined by the arbitration commission within a range as described in the Fee Schedule for Accepting Arbitration Cases. And Article 9 the arbitration fees shall, in principle, be borne by the losing party; if a party partially wins and partially loses the case, the arbitration tribunal shall determine the proportion of arbitration fees to be borne by each party according to the liability of each party.

9.3 ADR and the court rules

Pursuant to Civil Procedure Law in the People's Republic of China, when adjudicating civil cases, the people's courts may mediate the disputes according to the principles of voluntariness and lawfulness; if a mediation agreement cannot be reached, the courts should render judgments in time.

Therefore, ADR is not an enforced procedure in every proceeding. In most cases, ADR forms, especially the mediation, would apply only when both parties agree. As stated in article 122 of Civil Procedure Law in the People's Republic of China, where a civil dispute lawsuit lodged by a litigant with a People's Court is suitable for mediation, mediation shall be carried out first, except where the litigant refuses mediation.

9.4 Evidence in ADR

In respect of submitting evidence in ADR, there is no need for litigants to submit evidence specifically for the mediation process. While in arbitration, pursuant to Arbitration Law of the People's Republic of China Article 43, parties shall provide evidence in support of their own arguments. The arbitration tribunal may, as it considers necessary, collect evidence on its own.

Regarding protecting evidence from disclosure in ADR, Article 67 of Provisions of the Supreme People's Court on Evidence in Civil Proceedings in Litigation regulates the acknowledgement by a party of a case fact for the purposes of reaching a mediation agreement or amicable settlement shall not be used as the evidence against him in the subsequent litigation.

In general, ADR is confidential. According to Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China Article 146, during the hearing of a civil case by the competent people's court, the mediation process shall not be made public, unless public disclosure is agreed by the parties concerned.

The contents of a mediation agreement shall not be made public, unless the competent people's court deems public disclosure genuinely necessary for the purpose of protecting national interests, public interests and the legitimate rights and interests of others.

The person presiding over mediation and all mediation participants shall keep confidential the mediation process and

the State secrets, trade secrets, personal privacy and other information not suitable to be disclosed that come to their knowledge during the mediation process, unless such process and information shall be disclosed for the purpose of protecting national interests, public interests and the legitimate rights and interests of others.

While the Arbitration Law of the People's Republic of China Article 40 also states, arbitration shall be conducted *in camera*. If the parties agree to public arbitration, the arbitration may be public unless State secrets are involved.

9.5 ADR reform

Reform on dispute resolution mechanisms has been an issue of high priority for China's judiciary. In April 2015, Qiang Zhou, President of the Supreme People's Court, when attending the seminar on promoting national courts diversified dispute resolution mechanisms, emphasized that six changes are to be made:

- To transform the platform on litigation-mediation docking from a single planed conjunctive-oriented one into a multi-dimensional service-oriented one.
- To transform the mechanism on litigation-mediation docking from a unilateral exporting one into a bilateral interacting one.
- To transform the approach on coping with litigation/mediation docking subjects from a key-breaking-through one into an outright launching one.
- To transform the protocols on performing litigation-mediation docking from a scattered differentiated one into a systematically integrated one.
- Into To transform the ways of developing specialized individuals on handling dispute resolution from an experience based one to a profession based one.
- To transform the mechanism on performing mediation within courts from an extensive one to an intensive one.
- The aforementioned proposals are being actively implemented.

9.6 ADR organizations

Currently, ADR services are mainly offered by the People's Mediation Committee, Arbitration Tribunals, People's Courts, Local Police Stations, Primary Government and the Committee of Labor Intercession in Chinese jurisdiction.

Hong Kong

Keith Brandt

1. OVERVIEW

1.1 Overview

The most common dispute resolution methods to settle large commercial disputes in Hong Kong are litigation and arbitration.

Litigation

Litigation of commercial disputes is the judicial process of bringing a civil action between the parties in dispute in the courts of law. Civil actions for large commercial disputes will often be heard in the Court of First Instance of the High Court. Appeals and any questions of law that the Court of First Instance may have will be heard by the Court of Appeal of the High Court, and the Court of Final Appeal is the final appellate court in Hong Kong.

In contrast with other forms of dispute resolution methods, judges have the power to make court orders (interlocutory and final) against the parties and related third parties.

Arbitration

Parties to a large commercial dispute may also prefer to resolve their dispute by arbitration as it provides the benefits of confidentiality, flexibility, and cost- and time-efficiency, etc. Arbitration is a consensual and confidential dispute resolution process where parties agree to submit their dispute to one or more independent arbitrator(s) to be resolved through an adversarial or inquisitorial process. The arbitral tribunal will render a final and binding enforceable award. Arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong), which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985.

In order for arbitration to take place, the parties must agree to arbitrate their dispute. Often times, this is done by a prior agreement in the form of an arbitration clause when entering into a contract. If a related dispute subsequently arises, the parties will be bound by the arbitration clause to take their dispute to an (or a panel of) arbitrator(s), and only in exceptional circumstances will the Hong Kong courts be willing to deviate from honouring the intention of the parties to arbitration and to hear such a dispute.

2. LITIGATION

2.1 Court system

In Hong Kong, large commercial disputes are usually brought in the Court of First Instance of the High Court (CFI). Appeals from CFI are heard in the Court of Appeal (a division of High Court), and from there to the Court of Final Appeal subject to satisfaction of certain criteria.

There is no limit over the civil jurisdiction of the CFI although claims falling below HK$1 million are usually brought in the lower court, the District Court. Common types of civil proceedings in the CFI are as follows:

- Breach of contract;
- Tort;
- Admiralty;
- Bankruptcy and company winding-up;
- Mortgage;
- Hire-purchase
- Construction;
- Real property and mortgage actions; and
- Intellectual property.

Certain types of disputes, such as probate proceedings, bankruptcy and winding-up proceedings, are specifically allocated to particular judges to hear.

There are also specific lists for certain types of proceedings. These include:

- A Commercial List for banking, insurance and general financial disputes;
- A Construction and Arbitration List for construction disputes or arbitration issues which require the supervisory jurisdiction of the CFI;
- An Admiralty list for Admiralty actions (whether *in rem* or *in personam*);
- An Employees' compensation list for employees' compensation matters;
- Equal opportunities list for equal opportunities claims; and
- Personal injuries list for personal injury matters.

2.2 Pre-action conduct

Under the Civil Justice Reform, the CFI is granted the power to take the parties' pre-action conduct into consideration when assessing costs. The CFI may order that a party indemnifies the other party if it considers that a party has acted unreasonably. By way of example, in personal injury cases, this would include any unreasonable failure of a party to engage in mediation and

the claimant's failure to serve the proposed defendant(s) a letter of claim (Pre-Action Protocol in Practice Direction 18.1).

2.3 Typical proceedings

The main stages of typical court proceedings are outlined as follows:

- Filing of a writ of summons, an originating summons or motion, or a petition by the claimant
- Filing of defense or counterclaim (if applicable) by the defendant
- Filing of a rely to defense or a defense to the counterclaim by the claimant
- Making full disclosure of documents for discovery by both parties
- Case management hearing / seeking directions for future conduct of the proceedings
- Mediation (albeit voluntary)
- Exchange of witness statements and, if applicable, the filing of experts' reports
- Case management conference
- Pre-trial review
- Trial

2.4 Limitation periods

The Limitation Ordinance (Cap. 347 of the Laws of Hong Kong) governs the law on limitation periods for actions to be brought in Hong Kong. The following time limits can only be extended in exceptional circumstances (e.g. if the plaintiff was mentally incapacitated for a certain period of time, whereby the time limit only begins to run *after* the he/she has recovered from the mental illness).

Contract

The limitation period for bringing an action based in contract is 6 years from the date of the breach of contract. If the contract is made in the form of a deed, the limitation is 12 years from the date of breach.

Tort

The limitation period for bringing an action based in tort is generally 6 years from the date of the breach or when some damage occurs as a result of the wrongful act.

However, an action in relation to personal injury is subject to a 3-year limitation period, whilst an action for employee's compensation or work-related injuries is subject to an even shorter limitation period of 2 years from the date of the accident causing the injury.

Actions to recover land

The limitation period for bringing an action to recover land is 12 years (or 60 years if the claim is against the Hong Kong Government) from the date the right accrued.

Fraudulent breach of trust

No limitation period shall apply to an action based on fraudulent breach of trust by a beneficiary under a trust.

Claims subject to international conventions

The limitation period for bringing claims which are subject to certain international conventions will vary depending on the specific limitation periods imparted by the articles in relevant conventions.

For example, the Warsaw Convention, being an international convention regulating liability for international carriage of persons, luggage or goods performed by aircraft for reward, stipulates there to be a 2-year limitation period for bringing any related claim from the date of arrival at the destination or the date on which the aircraft ought to have arrived or the date on which the carriage stopped (Article 29 of the Warsaw Convention).

The Hague-Visby Rules, being a set of international rules for the international carriage of goods by sea, stipulates that there is a limitation period of 1 year from the date of delivery of the goods or the date when they should have been delivered.

Such limitation periods provided in the international convention or rules take precedence over the relevant general rules in Hong Kong courts as the forum court.

Enforcement of judgments

The limitation period for making an application for registration of a domestic judgment with the Hong Kong courts is 12 years from the date of the judgment (Limitation Ordinance, Cap. 347 of the Laws of Hong Kong).

The limitation period for making an application for registration of a foreign (excluding PRC) judgment with the Hong Kong courts is 6 years from the date of the judgment (Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap. 319 of the Laws of Hong Kong).

The limitation period for making an application for registration of a PRC judgment with the Hong Kong courts is 2 years

from date of the judgment (Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap. 597 of the Laws of Hong Kong).

Enforcement of arbitral awards

The limitation period for making an application to enforce a domestic, PRC or foreign arbitral award is 12 years from the date of the arbitral award (Limitation Ordinance, Cap. 347 of the Laws of Hong Kong).

2.5 Confidentiality

Commercial disputes are usually tried in open court. However, hearings relating to following claims or disputes are generally held in private:

- Intellectual property;
- Without notice (ex parte) applications for injunctions or orders of a restraining or compulsory nature;
- Trusts;
- Obtaining evidence for foreign courts;
- Some applications for bankruptcy and company winding-up;
- Matrimonial matters;
- National security;
- Guardianship of children; and
- Matters relating to infants or mentally incapacitated persons.

Moreover, confidentiality in arbitration-related court proceedings is usually preserved, except when the court orders these proceedings to be heard publicly on the application of a party or if the court is satisfied that those proceedings should be heard in public.

Save and except that the writ of summons filed in a civil action (together with the Statement of Claim, if indorsed) is publicly accessible, pleadings and other documents filed in the court proceedings are not available for public inspection save with leave of the Court, which is only granted in exceptional circumstances.

2.6 Class actions

Representative proceedings

Where numerous persons have the same interest in any proceedings, one or more of them can, as representatives, represent all the persons or all except one or more of them (RHC O.15 r.12(1)). Representatives can bring proceedings or act as a defendant in proceedings (RHC O.15 r.12(3)). A judgment in representative proceedings is binding and enforceable against a party to the proceedings, but leave of the Court of First Instance is required in enforcing the judgment against a represented person who is not a party to the proceedings (RHC O.15 r.12(3)).

Absence of a class action regime in Hong Kong

The rule on representative proceedings is the only mechanism for dealing with multi-party proceedings in Hong Kong as of now. In view of the narrow scope of representative proceedings, the Law Reform Commission has proposed a class action regime for Hong Kong and recommended its introduction.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Rights of audience

The legal profession in Hong Kong is divided into two different streams - barristers and solicitors. Since June 2012, solicitors of at least 5 years post-qualification experience (2 of which must be in Hong Kong) with regular court advocacy experience and satisfying prescribed criteria may apply to be 'solicitor-advocates'. Barristers admitted to the Hong Kong bar and solicitor-advocates enjoy full rights of audience in all courts in Hong Kong, including the CFI, the Court of Appeal and the Court of Final Appeal.

Solicitors holding valid practicing certificates who are not solicitor-advocates have limited rights of audience before the courts. They have rights of audience in the lower courts such as the Magistrates Courts and the District Court. They have no right of audience before the CFI except for hearings in chambers or before Masters.

Foreign lawyers

In general, foreign lawyers do not have rights of audience in the Hong Kong courts. In certain circumstances, overseas barristers may be granted limited rights with leave of court to conduct a specific case.

3.2 Rules of service for foreign parties

Effecting service

There are four main methods of serving originating process in Hong Kong:

- Personal service;
- Service by registered post;
- Service by inserting, through the defendant's letter box, a copy of the writ enclosed in a sealed envelope addressed to the defendant; and
- If the defendant is a limited company, service by posting it or leaving it at its registered office.

Originating process can also be served in accordance with the provisions of a contract, given that the contract provides that the Hong Kong courts have jurisdiction to hear and determine any action in respect of the contract and specifies how an originating process may be served on a party or a person on its behalf.

Party to international agreements

Since PRC has resumed the exercise of sovereignty over Hong Kong from 1 July 1997, Hong Kong remains a party to the HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention) as part of China. As such, service can be effected under The Hague Service Convention by sending the proceedings together with a written request from the relevant authority in the originating jurisdiction to the Chief Secretary for Administration of Hong Kong Special Administrative Region.

3.3 Forum selection in a contract

The Hong Kong courts generally respect the parties' express choice of jurisdiction in a contract.

However, the Hong Kong courts may also claim jurisdiction over a dispute, despite the choice of jurisdiction, in certain circumstances, including where the:

- defendant is domiciled or ordinarily resident within Hong Kong;
- contract that is the subject of the dispute was made in Hong Kong;
- breach of contract took place in Hong Kong; and
- whole subject matter of the action is land or movable properties situated in Hong Kong.

Where another jurisdiction is distinctly more appropriate (*forum conveniens*), the Hong Kong courts can decline jurisdiction to determine the matter, and stay or even strike out proceedings.

3.4 Choice of law in a contract

Hong Kong courts will generally respect the parties' express choice of governing law in a contract, except where:

- mandatory provisions to a rule of Hong Kong law apply such that the contracts are governed by Hong Kong law regardless of the express wording of the contract. Such mandatory provisions are applied in areas including the sale of goods and supply of services, employment, real estate, insolvency and bankruptcy, and financial services regulation;
- it is contrary to Hong Kong public policy. However, domestic public policy only plays a minor role, except where it has been codified in specific statutory provisions;
- the choice of law is not bona fide and legal under the laws of any jurisdiction, for instance, where the choice is made involuntarily under misrepresentation or fraud; and
- it is made with the intention of evading the law of the jurisdiction:
  - with which the contract has its most substantial connection; and
  - which, but for the express choice of law, would have invalidated the contract or been inconsistent with it.

3.5 Gathering evidence in a foreign jurisdiction

Where the witness is willing to attend the proceeding to give evidence, there is no prohibition or restriction to the taking of evidence from the witness in Hong Kong for use in existing proceedings in a foreign court.

Nevertheless, if a witness is unwilling to give evidence, the foreign court must issue a letter of request to the Hong Kong courts. There are also circumstances in which the Hong Kong courts will render assistance to foreign courts by ordering the taking of evidence within the jurisdiction, which are set out in Part VIII of the Evidence Ordinance (Cap. 8 of the Laws of Hong Kong).

The application has to be made *ex parte*, as supported by an affidavit exhibiting the letter of request and explaining the issues in the foreign proceedings and the evidence to be sought. The Hong Kong courts will ordinarily grant the application insofar as it is proper, practicable and permissible under Hong Kong law.

Concerning criminal matters, Hong Kong is party to a number of multilateral agreements, including:

- the Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971;
- the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973;
- the International Convention Against the Taking of Hostages 1979;
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;
- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988;
- the Convention on the Safety of United Nations and Associated Personnel 1994;
- the International Convention for the Suppression of Terrorist Bombings 1997
- the International Convention for the Suppression of the Financing of Terrorism 1999;
- the United Nations Convention against Transnational Organized Crime 2000;
- the United Nations Convention against Corruption 2003; and
- the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004.

Parties to these Conventions may seek assistance in the taking of oral evidence from Hong Kong in accordance with the requirements under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525 of the Laws of Hong Kong).

3.6 Enforcing a foreign judgement in local courts

Enforcement of a foreign judgment (other than judgments from mainland China)

There are two main methods of enforcing a foreign judgment in the Hong Kong courts. Judgments from Mainland China are enforced pursuant to a separate regime.

The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319 of the Laws of Hong Kong): The Foreign Judgments (Reciprocal Enforcement) Ordinance provides for enforcement by registration of judgments from superior courts in designated countries, which have reciprocal arrangements with Hong Kong regarding the enforcement of judgments. Designated countries include Austria, Australia, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka.

A judgment creditor with a judgment from the designated countries may apply to the Court of First Instance for registration of the judgment. This is an *ex parte* paper application. Upon satisfaction of the requirements under the Ordinance, the judgment would be registered in Hong Kong and enforceable as if it were a Hong Kong judgment, subject to any application by the judgment debtor to set aside the registration.

At common law. Alternatively, in particular where the Ordinance does not apply, a judgment made by a competent foreign court (which may or may not be of a common law jurisdiction) for a fixed sum of money may be enforced by bringing Hong Kong court proceedings upon the foreign judgment. The judgment creditor may apply for summary judgment in those proceedings, by showing that the foreign judgment is final and conclusive upon the merits of the claim. In Hong Kong, a judgment in default may be considered final and conclusive if the judgment debtor was properly served but chose not to enter into appearance or defend.

However, a foreign judgment cannot be enforced or recognized in Hong Kong in circumstances where the restrictions contained in the Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance (Cap. 46 of the Laws of Hong Kong) apply.

Enforcement of judgment from Mainland China

The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the Laws of Hong Kong). 2008: The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the Laws of Hong Kong) provides for the registration and enforcement of judgments in certain courts of mainland China in Hong Kong. This gives effect to "The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned" signed between the two jurisdictions. The Arrangement applies only to money judgments obtained from disputes arising from civil or commercial contracts where (1) the parties have agreed in writing that the Mainland or Hong Kong courts (as appropriate) have *exclusive* jurisdiction to resolve any dispute arising out of the contract and (2) they are final and conclusive,

which may be deemed by appropriate certifications issued by the Chinese courts. The process of registration is similar to that under the Foreign Judgments (Reciprocal Enforcement) Ordinance. Once registered, the judgment may be enforced as if it were a Hong Kong judgment.

At common law. Whilst in principle Mainland Chinese court judgments may also be enforced under common law in Hong Kong, it has been held that such judgments have failed to satisfy the 'final and conclusive' requirement because of the Mainland's trial supervision system. In *Chiyu Banking Corp Ltd v Chan Tin Kwun*, [1996] 2 HKLR 395 for instance, it was held that the Mainland judgment at issue was not final and conclusive because the protest procedure had been invoked and there was a possibility that the judgment may be altered by the court pronouncing it upon re-trial. Conceivably the problem may not arise in respect of judgments issued by the Supreme People's Court from which further appeal is not possible. As such, in circumstances when enforcement under the Mainland Judgments (Reciprocal Enforcement) Ordinance is not viable, any recognition and enforcement procedure at common law must be considered on a case by case basis.

4. EVIDENCE

4.1 Fact witnesses

Oral evidence and written evidence

As a general rule, all facts must be proved by a witness attending trial to give evidence, with the parties exchanging written statements of the witnesses of fact on whose evidence they intend to rely at trial beforehand. A witness will not, without the court's leave, be allowed to give evidence at trial where a witness statement has not been served beforehand (O.38 r.2A(10)).

However, written evidence is in the form of an affidavit sworn by the witness instead of a witness statement in some circumstances.

Right to cross-examine

The Court of First Instance (CFI) will generally direct that the witness statement will be the witness's evidence in chief. The opposing party can then cross-examine the witness on matters relevant to the proceedings. After cross-examination, the witness can be re-examined by the party calling him, but such re-examination is only limited to matters arising out of the cross-examination.

In addition, the unavailability of witnesses for cross-examination has implications on the admissibility of evidence, as the associated witness statement(s) would be considered 'hearsay evidence'. In civil proceedings, hearsay evidence is generally admissible, although a party can apply to call witnesses for cross-examination (section 47,48 of the Evidence Ordinance (Chapter 8 of the laws of Hong Kong)). In criminal proceedings, however, if a witness is not available for cross-examination, the witness statement is generally not admissible as a hearsay evidence, unless it falls within one or more common law exceptions to the rule. Statutory exceptions also exist, such as where the witness has died or is otherwise absent from Hong Kong (section 70 of the Evidence Ordinance).

4.2 Expert witnesses

Role of experts

The role of experts is to assist the court on matters arising from the proceedings that are within their expertise. Expert witnesses owe an overriding duty to the court to act independently and impartially, and they owe no duty to the party from whom they have received instructions or by whom they are paid (RHC O.38 r.35A).

Appointing an expert

Where expert evidence is required, the parties generally each appoint their own, individual experts. Except with the leave or permission of the Court of First Instance or where all parties agree, no expert evidence may be adduced (RHC O.38 r.36).

Parties may agree on the appointment of a single joint expert, although this is rare in large commercial disputes. Where such an agreement is reached, but the parties cannot agree on who should be appointed as the single joint expert, the court will assist by selecting an expert from a list prepared by the parties or by directing that the expert be selected in a particular manner.

A court expert may also be appointed, but this is again rare in practice. The choice of court expert must be agreed between the parties if possible. Otherwise, the expert will be nominated by the court.

Experts' right of reply

After the exchange of witness statements, expert reports are usually exchanged with a round of supplemental or reply reports. A "without prejudice" meeting of experts will usually be directed to identify those parts of their evidence that are not in issue (RHC O.38 r.38). The experts may prepare a joint statement detailing the matters agreed and not agreed, and

the underlying reasons for any non-agreement. At trial, experts are usually called to give oral evidence and be cross-examined.

Expert's fees

The party retaining the expert should pay the expert's fees. If a court expert is appointed, the parties are jointly and severally liable to pay the costs of that expert. However, an expert's fees may form part of the costs of a successful party that may be recovered from the unsuccessful party.

4.3 Documentary disclosure

Discovery

Discovery is the process whereby parties are required to disclose documents that are in existence and relevant to the issues in dispute. The discovery process aims at reducing surprises, enabling the parties to know the case they have to meet thus putting them on equal footing, and assisting with defining the real issues in dispute.

Each party has a continuing duty to disclose to the other parties all documents (whether favorable or unfavorable to its case) in its possession, custody or power that are relevant to the issues in dispute in the proceeding. 'Documents', for this purpose, cover written documents, photographs, audio or video tapes, or electronic data contained in any tapes, discs or other electronic means. Relevant documents are those which (*Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55):

- would be evidence for any issue in the case; or
- it is reasonable to suppose would contain information which may directly or indirectly enable the party seeking discovery to:
- advance his own case;
- damage the case of his opponent (includes documents that are damaging to one's own case); or
- may fairly lead to a train of inquiry which may have either of the above consequences.

The Rules of the High Court (Cap.4A) (RHC) set out detailed procedures for disclosure. There are two main categories of discovery:

Automatic discovery: After the close of pleadings, within 14 days, each party must prepare and submit a list of all documents relevant to the issues in dispute which are, or have been, in its possession, custody or power (including privileged documents) (RHC O.24 r.2(1)). Non-privileged documents must be available for physical inspection and copies must be provided on request. Privileged documents are not required to be produced. Parties can redact parts of the documents to be produced for inspection which are irrelevant or privileged.

Further and better discovery: The court may order any party to a cause or matter to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter (O.24 r.3).

Specific discovery: Upon application by any party, the court may order a party to disclose specific documents or classes of documents on the application of another party, if it can be shown that those documents are relevant and discovery is necessary for disposing fairly of the cause or matter, or saving costs (O.24 r.7,8).

Pre-action discovery: Before proceedings begin, discovery can also be ordered against a party who will be made a defendant to such proceedings, but the documents sought must be directly relevant to the matter in question (section 41 of the High Court Ordinance (Chapter 4 of the laws of Hong Kong)).

Third-party discovery: The court also has discretion to order discovery against a third party, provided that the proceedings have already begun (s.42(1) of the High Court Ordinance (Chapter 4 of the laws of Hong Kong)). This is usually used to obtain information against hospitals, insurance companies, banks, and so on.

4.4 Privileged documents

A party can claim for privilege on certain documents during discovery. Privileged documents, while must still be listed on the list of documents, cannot be inspected (RHC O.24 r.5(2)).

Legal professional privilege

At common law, legal professional privilege protects confidential information and communications between a lawyer and his client in his professional capacity. As a result, documents enjoying such privilege are immune to compulsory production in legal proceedings.

Generally, correspondence between a lawyer and their client are privileged and cannot be inspected or used in court proceedings unless the client consents or the privilege is waived. In particular, two main categories of legal professional privilege exist:

Legal advice privilege. This applies to communications between clients and their lawyers that have come into existence for the purpose of giving or receiving legal advice. The same privilege attaches to communications with in-house lawyers if the such communications relate to legal rather than administrative matters. Internal confidential documents of the client organization produced for the dominant purpose of obtaining legal advice are also protected (*Citic Pacific Limited v Secretary of Justice and Another* [2016] 1 HKC 157), or

Litigation privilege. This applies to communications passing between lawyers, clients and third parties where:

litigation was existing, contemplated or pending; and

the communications are made for the dominant purpose of obtaining legal advice or collecting evidence in respect of the case.

Without prejudice privilege

Under 'without prejudice' privilege, communications made in the course of a genuine attempt to resolve the dispute cannot be used in court. Whether there was a genuine attempt to settle depends on the surrounding circumstances at that time. The rationale of this privilege is to encourage parties to resolve disputes and reach settlement, by allowing them and their lawyers to speak openly and make concessions comfortably, since the relevant documents will not be used in court if the parties fail to settle.

Other non-disclosure situations

Documents relevant to issues in dispute are not privileged from production and inspection purely on the ground that they are confidential (*Mega Yield International Holdings Limited v Fonfair Company Limited*, [2011] HKCU 1795). However, the confidentiality of the communication may be relevant to other types of privilege, such as public interest privilege under RHC O.24 r.15. Self-incriminating documents are also exempt from production and inspection.

The Court of First Instance (CFI) can also impose certain conditions on the inspection of documents containing confidential information such as technical secrets.

5. REMEDIES

5.1 Dismissal of a case before trial

A party may apply for a case to be disposed of or dismissed in the following circumstances:

Default judgment: The claimant may seek judgment in default (i.e. a judgment in favor of his claim) if the defendant fails to acknowledge service of proceedings or file a defense within prescribed time frame. This involves a paper application and order by court.

Settlement or compromise of proceedings: At any stage of pending proceedings, the parties are allowed to settle or compromise all or any of the disputes between them on any terms and conditions on which they agree. In this case, they can file discontinuance of the proceedings by consent.

Summary judgment: If a statement of claim has been served on a defendant and that defendant has given notice of intention to defend, the plaintiff may apply for a summary judgment against that defendant without a trial on the basis that that defendant has "no defense" where the defense is not supported with reasonable grounds, concrete evidence or arguable points).

Determination of preliminary issue: A party may apply to the court for a determination of one or more preliminary issue(s), and the court has the power to make a decision on any such question or issue arising in a cause or matter which may substantially dispose of the cause or render the trial of the cause unnecessary altogether. In this case, the court may dismiss the action or give such other judgment or order.

Application to strike out:

A party may apply to strike out an action on the following grounds:

- there is no reasonable cause of action;
- the action may prejudice, embarrass or delay a fair trial;
- the action is of a scandalous, frivolous or vexatious nature; and
- the action is an abuse of the process of the court. This includes inexcusable non-compliance with a court order and inexcusable and inordinate delay which constitutes an abuse of the court's process (*Birkett v James* [1978] AC 297);

Courts are very careful in exercising its discretionary power in striking out an action and in practice will only strike out an action in the clearest of cases.

Save for default judgments, court applications may be made by summons supported by affidavit evidence. The respondent may file affidavit evidence in opposition, followed by applicant's affidavit evidence in reply, and substantive hearing. There is no requirement to file evidence if the application is on the basis that the case discloses no reasonable cause of action.

5.2 Interim or interlocutory injunction before trial

The rules for interim or interlocutory injunction are as follows:

- An application for an interim injunction must be made by motion or summons.
- The claimant should demonstrate that the case is not frivolous or vexatious and has a prospect of success (i.e. there is a serious question to be tried.)
- The balance of convenience lies in favor of granting the injunction. Relevant considerations may include (a) the relative strength of the parties' respective cases, (b) the significance of the preservation of the existing situation, and (c) whether damages are adequate to compensate the claimant. If damages are an adequate remedy for the plaintiff, the injunction will not be granted. Otherwise, if the court is satisfied that the defendant can be adequately protected by the giving of an undertaking as to damages by the claimant, an interim injunction will be granted.
- If the defendant willfully fails to comply with the terms of an injunction order, a sentence of imprisonment may be imposed.

5.3 Interim attachment orders

Freezing injunction (Commonly known as Mareva injunctions)
The CFI can grant interim injunctions to restrain a defendant from dealing with its assets in order to preserve assets pending judgment or a final order (i.e. a freezing injunction / Mareva injunction). According to Practice Direction 11.2 (Mareva Injunctions and Anton Piller Orders), the claimant must show that:

- The case has a prospect of success;
- The defendant has assets within Hong Kong;
- There is a real risk that the defendant may remove the assets from Hong Kong before judgment can be enforced;
- Judgment may not be enforceable in the future if the application is rejected and
- It is just and convenient to grant the injunction (*Narian Samtani v Chandersen Tikamdas Samtani* (HCA 496/2011)).

In order to prevent the abuse of the process of the court by the claimant, the claimant is required to give an undertaking that if the court later finds that the defendant or the other party has suffered a loss from the injunction, the claimant will follow any court order to compensate the defendant or that party (Practice Direction 11.1 (Ex Parte, Interim and Interlocutory Applications for Injunctions)).

Proprietary injunctions
A claimant may apply for a proprietary injunction. It is used to preserve assets over which a claimant has a proprietary claim. These assets can be turned over to the claimant if the claimant succeeds in the action.

The claimant who is seeking a proprietary injunction has to show:

- The property is *bona fide* the subject matter of the action (*Scott v Mercantile Accident Insurance Co* (1892) 8 TLR 320); and
- Something ought to be done for the security of that property (*Johnson v Tobacco Leaf Marketing Board* [1967] VR 427).

A significant difference between a proprietary injunction and a Mareva injunction is that the Mareva injunction enables the court to grant the claimant an interlocutory injunction restraining the defendant from disposing of, and even dealing with his assets, even though the claimant has no proprietary claim over the assets. When compared to a Mareva injunction, a proprietary injunction is easier to obtain, and it is unnecessary to prove the risk of dissipation of defendant's assets.

Section 21M of the High Court Ordinance
Under Section 21M, a claimant may obtain interim reliefs in Hong Kong in aid of foreign proceedings. It is no longer necessary for the plaintiff to have a claim for substantive relief in Hong Kong in order to claim an interim relief here (*JSC BTA Bank v Mukhtar Kabulovich Ablyazov* [2014] HKEC 296).

The court may appoint a receiver or grant interim relief in relation to proceedings which:

- Have been or are to be commenced in a place outside Hong Kong; and
- Are capable of giving rise to a judgment which may be enforced in Hong Kong.

Therefore, interim attachment orders to preserve assets pending judgment or a final order may be granted in aid of foreign proceedings.

5.4 Other interim remedies

Interlocutory injunctions
An application for an interlocutory injunction will often be made at the commencement of or during the course of proceedings, by way of motion or summons supported by an affirmation or affidavit setting out the relevant facts. Notice is served on the party against whom the order is sought. However, if the matter is urgent, the application may be made *ex parte* (i.e.

without notifying the defendant), in which the plaintiff must disclose to the court all important and relevant facts.

To obtain an interlocutory injunction, the applicant must establish the following:

- a *prima facie* case, meaning that "there is a serious question to be tried";
- that the balance of convenience is in favor of granting the relief, taking into account the following factors:
- whether irreparable harm will be suffered by the applicant if the relief is not granted;
- whether damages will be a sufficient remedy;
- whether the defendant will be in a position to pay damages if ordered;
- whether the defendant would be sufficiently compensated by the plaintiff's undertaking in damages if he succeeds;
- whether delay in making the application has or may prejudice the defendant; and
- whether interlocutory relief sought would overturn, or merely maintain the status quo; and
- that the applicant is prepared to give an undertaking in damages, and that they have the means to make good on that undertaking.

Evidence / asset preservation measures

The court can grant a Mareva injunction to preserve assets pending judgment or a final order (see Question 13).

Generally, mandatory injunctions (see Question 15) can be granted for the preservation and/or delivery of evidence provided the prerequisites are satisfied. In particular, to preserve the subject matter of a cause of action and related documents, the court can grant an Anton Pillar order, which is a mandatory injunction compelling the defendant to permit the plaintiff's representatives to enter his premises, search for and seize relevant documents and materials.

As Anton Pillar orders are considered draconian, the plaintiff when applying for the order has to satisfy the judge that:

- There must be a strong prima facie case of a civil cause of action;
- The danger to the plaintiff to be avoided by the grant of an order must be serious;
- The risk of destruction or removal of evidence by the defendant must be a good deal more than merely possible; and
- The harm likely to be caused by the execution of the order to the defendant and his business affairs must not be excessive or out of proportion to the legitimate object of the order.

It should be noted that an Anton Pillar order does not amount to a search warrant. The plaintiff cannot forcibly enter the premises if the defendant refuses entry.

The court also has the power to order samples to be taken of any property being the subject matter of the proceedings (RHC O.29 r.3). In the specific contexts, relevant authorities can also impose interim evidence preservation measures, for example:

- In arbitrations, the arbitral tribunal has power to make interim orders for the preservation of evidence that may be relevant and material to the resolution of the dispute (section 35 of the Arbitration Ordinance (Chapter 609 of the laws of Hong Kong));
- In investigations by the Competition Commission, it can take possession of documents found on premises that appear to be relevant documents (section 50 of the Competition Ordinance (Chapter 619 of the laws of Hong Kong)).

Interim payments

The plaintiff can apply for an interim payment, which involves the plaintiff paying a sum to the defendant before the conclusion of the case that will deducted from the eventual liability of the defendant. The plaintiff may apply for an interim payment when:

- The defendant has already admitted liability;
- The plaintiff has obtained judgment against the defendant but the amount of compensation is yet to be assessed by the court; or
- The plaintiff would obtain substantial judgment from the defendant if the action proceeded to trial, meaning that:
- The defendant has no arguable defence; or
- The defence is so shadowy that only a conditional leave to defend would be granted on application for summary judgment.

Specific discovery orders

The court can make various discovery orders in the interim (see Question 16).

In addition, the court can make a Norwich Pharmacal Order for discovery against an independent party before any proceedings. It is used to obtain the identity of wrongdoer, and

to trace funds and assets where needed. To apply for the order, the applicant must demonstrate that:

- There is cogent and compelling evidence to demonstrate that serious tortious or wrongful acts have been committed;
- It is clearly demonstrated that the order will or will very likely reap substantial and worthwhile benefits for the plaintiff;
- The discovery must not be unduly wide, in that the order must be specific and restricted to documents enabling the plaintiff to, for example, preserve or recover assets; and
- Finally, the interests of the plaintiff and the innocent wrongdoer must be weighed against each other.

5.5 Remedies at trial

There are two types of remedies, namely common law and equitable remedies. Depending on the nature of the claim, they may be granted pursuant to a successful claim.

Common law remedies

Damages: Damages are awarded to a successful plaintiff as compensation for harm sustained. Similar to other common law jurisdictions, damages follow the '*restitutio in integrum*' principle that damages should represent no more and no less than the plaintiff's actual loss. For example, damages awarded for breach of contract aim at putting the plaintiff in the same position they would be in had the contract been properly performed. Liquidated damages are available where the amount of claim is fixed and ascertainable (usually contractually); otherwise, the burden is on the plaintiff to quantify damages.

Damages are generally compensatory in nature, and exemplary or punitive damages are only awarded rarely and in very extreme circumstances. For example, where the court disapproves of the defendant's conduct, exemplary damages will be awarded as a means of deterrence.

Equitable remedies

Specific performance: An order for specific performance compels the party to whom the order applies to perform its obligations under the original contract or agreement, and according to the terms of the agreement. The remedy is only available where the contract can be carried into full and final execution. In deciding whether specific performance will be granted, the court will look at:

- whether a binding agreement between the parties exists;
- whether the defendant has breached or has threatened to breach the agreement; and
- whether or not damages would be an adequate remedy for such a breach.

However, even if all of the above criteria are satisfied, the court has discretion to refuse to grant specific performance, such as where the party seeking the order is also in breach of the agreement himself.

Injunctions: Apart from the interlocutory injunctions mentioned above, the plaintiff can seek a permanent injunction either compelling the defendant to take specified steps (called a "mandatory injunction") or restraining him from taking specified steps (called a "prohibitory injunction"). Unlike interlocutory injunctions, they will permanently bind the wrongdoer/defendant if granted by the court.

Declarations: A declaration involves the binding but non-coercive adjudication of certain legal issues by the court. A court may grant a declaration as to the proper construction of a contract, or a contractual term, an entitlement to property, or in regards to a right to revenue from property.

Other equitable remedies

Apart from the above, the court can also make:

- orders for an account of profits;
- orders for tracing and recovery of property from a trustee or a third party that was applied, transferred or received in breach of trust; and
- orders for the restitution of property in unjust enrichment claims; and so on.

5.6 Security for costs

The claimant may be ordered to give security for the defendant's costs of action if the court thinks it just in the following scenarios:

- The claimant is not ordinarily resident in Hong Kong;
- The claimant is a nominal claimant who is suing for the benefit of other person, and it is believed that he will not be able to pay the defendant's costs;
- The claimant's address is missing or incorrectly stated in the originating process;
- The claimant has changed his address during the course of proceedings in order to evade the resulting consequences; or
- The claimant is a limited liability company (whether local or overseas).

The court will take into consideration the following grounds when deciding whether to grant security for costs:

- whether the plaintiff's claim is bona fide and not a sham;
- whether the plaintiff has a reasonably good prospect of success;
- whether there is an admission by the defendants on the pleadings or elsewhere that money is due;
- whether there is a substantial payment into court or an "open offer" of a substantial amount;
- whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim;
- whether the plaintiff's want of means has been brought about by any conduct by the defendants, such as delay in payment or in doing their part of the work; and
- whether the application for security is made at a late stage of the proceedings.

It is worth noting that generally, a plaintiff will not be ordered to provide security for costs solely because of his insolvency.

6. FEES AND COSTS

6.1 Legal fees

Legal fees are predominately charged based on the amount of time spent by the lawyers and their respective hourly rates. Alternative fee arrangements such as "agreed fee" or "capped fee" bases are increasingly common in the competitive market. Fees are generally not fixed by law.

In contentious business, champerty and maintenance is illegal at common law and under section 101I of the Criminal Procedures Ordinance. These arrangements include including conditional or contingent fee arrangements that allow lawyers to take a portion of any compensation received or receive fees payable only if there is a favorable result.

6.2 Funding and insurance for costs

Funding of litigation

Litigation is usually funded by the parties themselves. While the general rule is that the successful party will recover a part of its legal costs from the unsuccessful party, CFI has discretion in awarding costs.

Third party funding

Third party funding of commercial disputes is currently not permitted as this may constitute champerty and maintenance. An exception to this rule is that third party funding is sometimes permissible in insolvency proceedings in order to allow liquidators to pursue different claims. In 2013, the Law Reform Commission of Hong Kong set up a sub-committee to review the current position relating to third party funding for arbitration, but no changes have yet been made.

Insurance

In Hong Kong, there is no common practice of insuring for litigation costs.

6.3 Cost award

General principles

Costs awards are in the court's discretion. However, costs generally follow the event (i.e. the unsuccessful party will be ordered to pay the successful party's costs) (RHC O.62 r.3(2)). The amount of costs payable is determined through the taxation process, which involves the Court of First Instance (CFI) assessing the costs claim of the successful party, unless the parties have agreed upon this. There are commonly three types of basis for taxation:

The party-and-party basis. This is the most common method of taxation, where the successful party recovers from the unsuccessful party all costs which were necessary to pursue or defend the action (RHC O.62 r.28(2)). Any doubt as to the costs' reasonableness is resolved in favor of the paying party.

The common fund basis. This is where a reasonable amount in respect of all costs reasonably incurred will be allowed (RHC O.62 r.28(4)). It is usually adopted due to some improper conduct of the paying party.

The indemnity basis. This is where all costs will be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred (O.62 r.28(4A)). The onus is on the paying party to show any unreasonableness in the taxation. It is only adopted when there is clearly some "special or unusual feature" in the case, such as where the case has been brought with an ulterior motive or for an improper purpose (*Real Gold Mining Ltd v Securities and Futures Commission,* [2011] 5 HKLRD 318).

Generally, in exercising its discretion on costs, the CFI will take into account factors such as:

the conduct of the parties before and during the trial;

the relative level of success of the parties;

any payment into court or settlement offers made.

Sanctioned offer / payment

At any time after the commencement of proceedings (RHC O.22 r.5(6)), any party can offer to settle the claim or part of it on less stringent terms than the pleaded case, in particular:

- Both the plaintiff and the defendant can make a sanctioned offer to the other party (RHC O.22 r.3,4); and
- The defendant can make a sanctioned payment into court (RHC O.22 r.3).

The implications of sanctioned offers and sanctions payments costs are as follows:

- When the plaintiff fails to do better than the sanctioned offer or sanctioned payment from the defendant, the plaintiff may be ordered to pay part of the defendant's costs and/or receives less cost awards (RHC O.22 r.33); and
- When the plaintiff does better than his own sanctioned offer or sanctioned payment, the defendant may be ordered to pay plaintiff's costs on a harsher basis (RHC O.22 r.24)

While Calderbank offers are still recognized in Hong Kong, their bearing on any costs orders has been limited to situations where sanctioned offers / payments are not possible, for instance, pre-litigation negotiations.

6.4 Cost interest

Interest accrues on costs as from the date of the order for costs at the rate prescribed in the High Court Ordinance, as may be amended from time to time.

Where an appellate court allows an appeal and reverses an order for costs, it is free to make any order as to the date from which interest will run that it considers just.

7. APPEAL

7.1 Appeal

The relevant courts handling the appeals of first instance judgments

Appeals from judgments of the Court of First Instance (CFI) lie to the Court of Appeal. No leave is required for appeal against a final judgment of the CFI generally. However, for appeals against interlocutory decisions of the CFI, leave is generally required.

Grounds for appeal

Appeals can be lodged against CFI judgments where:

- There is a question of fact. However, in practice the appellate courts are reluctant to reverse CFI judgments that are based on findings of fact, especially when they depended on the judge's view of the credibility of witnesses;
- There is new evidence; or
- New points of law have arisen.

Procedures on appeal

The party intending to appeal against a final judgment of a CFI judge must file a notice of appeal stating the grounds of appeal, within 28 days from the date of the judgment (RHC O.59 r.4(1)). For most interlocutory decisions of a CFI judge the time limit is 14 days from the decision (RHC O.59 r.2B). The respondent who contends the appeal lodges a Respondent's notice (RHC O.59 r.6).

8. ENFORCEMENT OF JUDGMENT

8.1 Enforcement of judgment

Oral examination will normally be held, upon an *ex parte* application by the winning party, to ascertain what assets a judgment debtor has. If available assets are identified, there are a number of options available to a party seeking to enforce a judgment debt, namely:

Garnishee order (RHC O.49): this is an order requiring a third party who owes money to the judgment debtor (called the 'garnishee') to pay the debt to the judgment creditor (called the 'garnishor'), instead of the judgment debtor.

Charging order (RHC O.50): a charging order absolute creates an equitable charge on the property of the judgment debtor to secure the payment of the judgment debt. It is often obtained over land, securities and other interests in property. If needed, an application for an order for sale of the charged property will follow, the proceeds of sale will be used to satisfy the judgment debt.

Writ of Fi Fa / execution (RHC O.46, O.47): this is an order used to enforce against goods, chattels and other property. The order requires a bailiff to seize such of the goods, chattels and other property of the judgment debtor and sell them to satisfy the judgment debt, any interest, the bailiff's fee and costs.

Winding up or bankruptcy proceedings: strictly speaking, this is not a method of enforcement. However, where a judgment debt is owed by an individual, bankruptcy proceedings can be initiated by a judgment creditor in an attempt to enforce

a judgment, since the judgment debtor's failure to pay the judgement debt may be evidence of insolvency.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

Arbitration

Arbitration is one of the main ADR methods used in Hong Kong to settle large commercial disputes. (See Question 1).

Other common forms of ADR are:

- Mediation (common in a wide range of commercial disputes)
- Conciliation (not as common in respect of commercial disputes and instead is common in discrimination and employment claims)
- Adjudication (common in construction and engineering disputes)
- Expert determination (common in technology-related contract disputes and also in resolving specific technical issues in a wide range of commercial contracts).

Mediation and conciliation

Mediation and conciliation entail the appointment of an independent person (mediator or conciliator) who assists and encourages the parties in reaching a negotiated settlement of a dispute. While similar, mediation may be considered more formal as parties would normally agree upon a set of mediation rules that govern the conduct of the mediation. There is no obligation on the parties to reach a settlement, nor does the mediator / conciliator have any power to impose any settlement. The role of the mediator / conciliator is rather to be facilitative and to encourage the parties to discuss the expectations and possibilities of reaching a mutually acceptable settlement before resorting to binding methods of dispute resolution such as arbitration or litigation. A negotiated settlement results in a legally binding agreement between the parties once put into writing and signed by the parties. The Civil Justice Reform encourages the use of mediation to resolve court disputes.

Adjudication and expert determination

In adjudication and expert determination, the adjudicator / expert appointed by the parties or pursuant to a contractually agreed appointment mechanism would receive parties' submissions (written or oral) and make a binding decision. The decision is enforceable as a contractual obligation against the party concerned.

9.2 Costs in ADR

In general, costs are dealt with as part of the settlement agreement between the parties, although the parties will typically agree to share the fees of the mediator and other expenses.

In arbitrations, the tribunal will normally decide which party is liable to pay the costs of the arbitration. The general rule is that the losing party is required to pay the winning party's costs in addition to their own.

Once an award of costs has been made, the parties may agree upon the sum to be paid to the party in whose favor the award was made. If they fail to reach an agreement, the party whose costs are to be paid may submit its bill of costs to a court for "taxation".

9.3 ADR and the court rules

ADR does not normally form part of court procedures and may not be compelled by the court, although the Civil Justice Reform encourages ADR, in particular mediation.

9.4 Evidence in ADR

Parties to ADR proceedings must agree on the procedures relating to the giving of evidence. This may be set out in the arbitration rules or procedures designated by the arbitration agreement.

ADR is normally considered confidential. Unless otherwise agreed by the parties, no party can publish, disclose or communicate any information in relation to arbitral proceedings and awards.

In respect of mediations and other forms of ADR, the parties would normally agree that communications shall be protected by without prejudice privilege from disclosure in further legal proceedings.

9.5 ADR reform

Class actions

In November 2009, the Law Reform Commission launched a consultation entitled "Class Actions" proposing a new mechanism for multi-party litigation in Hong Kong.

The Commission recommended a "class action" regime with an "opt-out" approach. The Commission published its report on 28

May 2012, proposing that a mechanism for class actions should be adopted in Hong Kong. The Commission recommended phasing in the implementation of a class action regime by starting with consumer cases to avoid the risk of unduly encouraging litigation and to allow the court system and the community to gain more experience with the new mechanism.

Privity of contract

In October 2005, the Law Reform Commission published a report on Privity of Contract proposing certain statutory exceptions to the doctrine of privity.

On 1 January 2016, the Contracts (Rights of Third Parties) Ordinance (Cap. 623 of the Laws of Hong Kong) came into effect. The Contracts (Rights of Third Parties) Ordinance allows a third party, in specified circumstances, to enforce a term of a contract if the contract expressly provides that the third party can do so, or the term purports to confer a benefit on the third party.

Third party funding for arbitration

In October 2015, the Third-Party Funding for Arbitration Sub-committee of the Law Reform Commission released a consultation paper, proposing that third party funding for arbitration taking place in Hong Kong should be permitted under Hong Kong law. It was recommended that the Arbitration Ordinance should be amended and that clear ethical and financial standards for Third Party Funders should be developed. The consultation period ended on 18 January 2016.

9.6 ADR organizations

The Hong Kong International Arbitration Centre (HKIAC)

As established in 1985, the HKIAC administers and supports the services for arbitrations and other dispute resolution activities, including mediation. The HKIAC is administered by the Centre's Secretary General, the chief executive and registrar.

The International Chamber of Commerce (ICC)

With a representative office in Hong Kong, the ICC provides an array of both binding and non-binding ADR methods including mediation and expert determinations. ICC arbitration is internationally recognized and respected and, for that reason, is acceptable to multinational corporations.

China International Economic and Trade Arbitration Commission (CIETAC)

The CIETAC Hong Kong Arbitration Center is CIETAC's first branch outside mainland China. It bears the role and responsibility as a sub-commission of CIETAC stipulated in CIETAC Arbitration Rules to settle disputes closer to where they took place.

Arbitration Chambers

Arbitration Chambers Hong Kong brings together experienced arbitration counsel and arbitrators to form China's first set of chambers dedicated to international arbitration. Tenants of Arbitration Chambers Hong Kong are able to act as arbitration counsel or as arbitrators in *ad hoc* arbitrations as well as arbitrations held under the rules of institutions such as the ICC, HKIAC, SIAC, CIETAC, LCIA and the SCC.

Hong Kong General Chamber of Commerce

The Hong Kong General Chamber of Commerce has an arbitration committee, which will appoint arbitrators at the request of parties to an arbitral agreement irrespective of whether the parties are members of the chamber.

Mediation Centers

There are also various mediation centers in Hong Kong that offer venues and panel of mediators. One of the most prominent centers is the Hong Kong Professional Mediation Association.

Singapore

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1. OVERVIEW

1.1 Overview

The main dispute resolution methods used in Singapore to settle large commercial disputes

Singapore is a premier international commercial dispute resolution centre. The main dispute resolution methods in Singapore are (a) court litigation, (b) arbitration and (c) mediation. As a dispute resolution centre, Singapore offers a full suite of international dispute resolution services.

For international arbitration, Singapore continues to be a seat of choice. The 2015 International Arbitration Survey by the Queen Mary School of International Arbitration and White & Case ranked Singapore as the 4th most preferred seat of arbitration in the world for reasons which included the neutrality and impartiality of the legal system, the national arbitration law and its track record for enforcing agreements to arbitrate and arbitral awards. The International Chamber of Commerce, a popular choice of international parties for Singapore seated institutional arbitrations reported for 2015 that 6.09% of all ICC arbitrations were seated in Singapore and Singapore was 4th most preferred city in the world and again number one in Asia. This was an improvement over 2014, when 4.10% of all ICC arbitrations were seated in Singapore and Singapore was the 5th most preferred city in the world. Over the last 10 years, Singapore, on an average, has been 5th most preferred seat of ICC arbitration in the world. Over the last 5 years, Singapore has consistently, been the number one seat of ICC arbitration in Asia. The Singapore International Arbitration Centre ("SIAC") also did well. Compared to the ICC which had in 2015, 801 new cases involving the value of US$62 billion in aggregate, SIAC had a record year in 2015, with 271 new cases involving S$6.23 billion in dispute. Aside from the ICC and SIAC Rules, the UNCITRAL Rules continue to be popularly used for Singapore seated arbitrations.

In court litigation, Singapore had in January 2015 established the Singapore International Commercial Court ("SICC") to meet the demand for commercial dispute resolution in the region and internationally, to complement international arbitration where parties prefer not to arbitrate. The SICC has since delivered its first 8 written decisions in the period 12 May 2016 to 17 February 2017.

In the mediation space, the Singapore International Mediation Centre (SIMC) was established to provide mediation services for international disputes.

Recent developments or trends in dispute resolution

First, the developments in respect of court litigation. On 25 March 2015, Singapore signed the Convention on Choice of Court Agreements done at The Hague on 30 June 2005 (The 2005 Hague Convention) and took steps to ratify it by passing as law on 14 April 2016, the Choice of Court Agreements Act (CCAA) to give effect to the convention. Upon the commencement of operation of the CCAA on 1 October 2016, a Singapore court would recognize and enforce the choice of court agreements and judgments from some 28 countries that have signed and ratified the 2005 Hague Convention (namely Mexico and the EU States except for Denmark). Likewise, a Singapore Court judgment would be or is expected to be treated in the same way in these countries. These are additional to certain countries that already recognize the judgments of the Supreme Court of Singapore under 2 reciprocal enforcement of judgments legislation. Ukraine and the United States which have signed but have not ratified the 2005. Compared to an international arbitration award which is recognisable and enforceable in 155 States which are parties to the New York Convention 1958, the number of countries that are signatories to the 2005 Hague Convention is not insignificant. The judgments of the recently established SICC should be recognisable and enforceable under the equivalent legislation to the CCAA promulgated by the other signatory countries of the 2005 Hague Convention.

In international arbitration, the SIAC has made changes to its rules to better meet the needs of users, namely (i) enhancing the expedited procedure by giving the Tribunal the discretion to decide whether the hearing should be a documents only hearing; (ii) enhancing the emergency arbitrator ("EA") procedure by requiring that the EA renders his award within 14 business days from appointment and empowering him to issue interim reliefs or preliminary orders pending hearing; (iii) rules for joinder of and intervention by 3rd parties; (iv) rules for consolidation. The 6th edition of the SIAC Rules came into effect on 1 August 2016, incorporating most of these proposed changes. In addition, the SIAC has also released the SIAC Investment Arbitration Rules (known as the SIAC IA Rules 2017) which came into effect on 1 January 2017, for the administration of investment arbitrations, a new area for the SIAC. The rules are a hybrid of modern commercial arbitration rules and the specialist investment arbitration rules typified by the ICSID Rules.

In mediation, a legislative bill for a Mediation Act has been proposed. Some features of the Mediation Bill are (i) a party's right to apply to stay proceedings commenced in breach of a mediation agreement; and (ii) a mediated settlement being recorded as a Court Order if certain conditions are met.

Recent Singapore case law

There have been some recent interesting decisions of the Singapore Courts. Here is a sampling.

Earlier case authority and writing had suggested that it was trite law that "an appropriate case of risk of dissipation is made out, evidentially, where there is a good arguable case of fraud" in the context of Mareva injunctions. The Singapore Court of Appeal disagreed. In *Bouvier, Yves Charles Edgar v Accent Delight International Ltd* [2015] 5 SLR 558, it decided that there is still a need to establish a real risk of dissipation even where there is a good arguable case that the defendant had acted fraudulently, dishonestly or unconscionably because an allegation of dishonesty cannot obviate the need to establish a real risk of dissipation. This is contrary to earlier case authority and writing that suggested that it was trite law that "an appropriate case of risk of dissipation is made out, evidentially, where there is a good arguable case of fraud". However, the Court did hold that it may legitimately infer a real risk of dissipation where the nature of the dishonesty was of such a nature that it had a real and material bearing on the risk of dissipation. It also cautioned that the finding of dishonesty should not easily be made at an interlocutory stage. The Court also confirmed the principle that a freezing order could extend to assets belonging to a third party on the basis that the assets are in truth the assets of the defendant.

Singapore law allows an additional ground (aside from the fraud exception) to resist payment on a performance bond, that of unconscionability which has been and continues to be a departure from the recognized English law exception of established fraud being the only ground for the bank to resist payment (although there may be in some exceptional clear cases of total failure of consideration, illegality or failure to comply with a condition precedent, where inroads are made into the principle that the only ground to resist payment is fraud, see e.g. *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657). The Singapore Court of Appeal recently weighed in on the scope of the fraud exception and unconscionability in respect of demands on performance bonds in *Arab Banking Corp v Boustead Singapore Ltd* [2016] SGCA 26 / [2016] 3 SLR 557. It was in the usual context of such bonds issued to a beneficiary by an issuing bank backed by a counter indemnity from a guarantor bank (here, the appellant), on in effect, the application of the account party (here, the respondent) but different in that the stage of proceedings was not interlocutory but final, resulting in a permanent injunction against the appellant bank from paying on the counter indemnity and from receiving payment from the respondent. It decided that (a) a beneficiary that presents an invalid demand under a guarantee recklessly, that is to say indifferent to whether it is or is not a valid demand, would be acting fraudulently; (b) it should not matter whether the operative fraud in question is perpetrated by the guarantor bank alone or in concert with the beneficiary and therefore the fraud exception should apply where (i) the beneficiary's demand is shown to be invalid; and (ii) regardless of any fraud on the beneficiary's part, where it can be shown that the guarantor bank is itself acting fraudulently in either paying the beneficiary and/or in asking to be indemnified by the account party because it either knows or has no honest belief that it is obliged to pay the beneficiary under the demand made by the beneficiary or is recklessly indifferent to that question. This is predicated on 2 facts:- the beneficiary's demand being in fact invalid and the guarantor bank either knowing the demand to be invalid or has no honest belief that it is valid or reckless to this fact; (c) however fraud on the part of the beneficiary alone without the bank being aware, will not suffice; (d) although unnecessary to decide the point, the Court stated that on one view the unconscionability exception (that exist under Singapore law and not English law) would only be available at the interlocutory stage pending resolution of the substantive dispute and not after a full trial and determination of liability under the relevant substantive dispute. It is however then a question whether that substantive dispute has to be that under the underlying contract.

Disputes over minority oppression or unfairly prejudicial conduct are arbitrable. The Court of *Appeal in Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 so upheld. The Court also held that it was beyond the powers of the arbitrator to liquidate a company, but the arbitrator's lack of power to grant a particular relief does not mean that the dispute is not arbitrable. The Court also adopted the prima facie approach as opposed to a full merits approach in a stay application where it has to determine if there is a valid arbitration agreement, the scope of the arbitration agreement and whether it is not null and void, inoperative or incapable of being performed.

While the Singapore Courts have a well-earned reputation for minimal judicial intervention in the arbitral process and awards, there have been notable exceptions. A recent example is *AKN v ALC* and other appeals [2015] SGCA 18 where in one of the appeals, we (Philip Jeyaretnam SC) succeeded in setting aside an award against our clients (a fund) on the grounds that the arbitral tribunal had acted in excess of its jurisdiction or in breach of natural justice in holding our clients liable, alongside others for breaches of an agreement when our clients (not an original party to the arbitration agreement) had only agreed to bound by certain findings of fact to be decided between

the other parties to the arbitration and had therefore vested only a limited jurisdiction in the tribunal and not a wider jurisdiction which would have entitled the tribunal to find our clients liable for breach that the tribunal did. Subsequently, the following questions were raised: - the effect of setting aside; whether the court had the power to remit matters to the same tribunal or was that tribunal *functus officio*; whether the court had the power to remit such matters to a new tribunal; whether the parties could be precluded by the application of *res judicata*, or any related doctrine, from seeking to remit or re-arbitrate these matters? In another written decision in *AKN v ALC* [2015] SGCA 63, the Court of Appeal held as follows. The immediate effect of setting aside was that the award ceased to have legal effect, at least in the jurisdiction of the seat court. It did not follow, however, that by reason of this, the arbitration proceedings and the mandate of the tribunal were automatically revived. The mandate of the tribunal generally expired upon the issuance of a final award. Where the award dealt with the entirety of the dispute then the tribunal's mandate was completely exhausted and where it dealt finally with a part of the dispute, then the tribunal's mandate was exhausted as to that part of the matter in dispute. However, as the arbitration agreement would typically survive the setting aside of an award, it might be open for a party which had successfully obtained an award in the arbitration, and then seen that award set aside by the court, to commence a fresh arbitration. However, where the award was set aside on the ground that there was no arbitration agreement between the parties, there would be no agreement that would survive the setting aside, and hence, no basis on which either party could commence a fresh arbitration. There were at least three further factors that could have an influence on attempts to commence fresh arbitration proceedings following the setting aside of an award:- (a) the possibility of a limitations defence having accrued by the time the fresh set of proceedings was commenced; (b) the possibility of objections being taken against an attempt to re-appoint a member of the previous tribunal in the "fresh" arbitration proceedings on the grounds of a reasonable suspicion of bias; and (c) considerations of *res judicata*. As finality was of equal importance to arbitration as to the courts, the "extended" doctrine of *res judicata* operated to preclude the reopening of matters that (i) were covered by an arbitration agreement, (ii) were arbitrable, and (iii) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded. Further, after having set aside an arbitral award, the Court had no power to refer matters to arbitration before a *new* tribunal. As was evident from the wording of Art 34(4) of the Model Law, the power to remit to the same tribunal was a limited one in that the remission was an alternative to setting aside, meaning the relevant provisions empowered a court to suspend setting aside proceedings and give the arbitral tribunal an opportunity to resume the arbitration to eliminate the grounds for setting aside. However once an award had been set aside, there was no power to remit such matters back to the arbitral tribunal either under the IAA or the Model Law.

Dentons Rodyk's contribution to arbitration related jurisprudence continued in the 2016 High Court decision of *BCY v BCZ* in which Herman Jeremiah successfully argued for the application of the Sulamerica principle that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract and not the law of the seat, as advanced for some time by the outlier decision of Firstlink (2014).

Following its launch in January 2015, the SICC delivered its first judgment in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) on 12 May 2016. The panel of judges comprised Justice Quentin Loh (of the Singapore High Court) and international judges Justices Vivian Ramsey (formerly of the English High Court) and Anselmo Reyes (formerly of the Hong Kong High Court). The case concerned a joint venture between parties in Australia and Indonesia with associated companies in Singapore. The joint venture was to exploit a technology developed in Australia for the upgrading of coal from mines in East Kalimantan, Indonesia. Certain agreed issues were put to the Court for its determination. The Court applied Singapore law on contractual interpretation, illegality under foreign law and implied terms. The value of the main dispute was reported elsewhere to be in the region of about US$800 million. The SICC has gone on to delivered 7 other written reported decisions to date.

2. LITIGATION

2.1 Court system

The Supreme Court of Singapore comprises the Court of Appeal and the High Court. The Court of Appeal is the highest court in Singapore. The minimum amount of claim for the High Court is set at S$260,000, with claims of lower values dealt with in the State Courts.

There are no specialist divisions within the High Court. However, there is a modified docket system in the High Court for Companies, Insolvency, Equity & Trust and Arbitration (CITA) suits which judges with relevant experience and expertise are assigned to. In addition, there are judges with relevant expertise in certain other areas e.g. admiralty and intellectual property.

In January 2015, the SICC was created. It is a division of the High Court. It is intended for the resolution of international commercial disputes

The jurisdiction of the Singapore Court is founded on submission to jurisdiction and in respect of defendants outside of Singapore, on the basis of valid service of the Singapore Court issued Writ of Summons or Originating Summons on the defendant. The grounds on which such service may be allowed are set out in Order 11 of the Rules of Court.

2.2 Pre-action conduct

The Supreme Court Practice Directions deal with alternate dispute resolution for civil cases. See Part IIIA. It is the professional duty of local counsel to advise their clients about the different ways their disputes may be resolved using an appropriate form of ADR e.g. mediation, neutral evaluation, expert determination and conciliation.

In exercising its discretion whether to award costs, the Court takes into account the parties' conduct including attempts at resolving the matter e.g. by mediation and conduct before and during the proceedings.

Further, the Professional Conduct Rules require the legal practitioner amongst many other things, to act in the best interest of the client as well as to comply with all practice directions. Accordingly, he would need to consider the use of ADR for every dispute. Failure to do so would amount to professional misconduct.

2.3 Typical proceedings

The main stages of court litigation are:

- commencement of proceedings and pleadings for Writ actions. A claim can be started by issuing one of the following: (i) a writ of summons with an endorsement of claim and eventually a statement of claim or (ii) an originating summons (with a supporting sworn statement called an affidavit) where the matter is not expected to turn on factual issues requiring oral testimony of witnesses. This would be followed by service on the defendant, the defendant filing an appearance to defend if a Writ action, the defense and counterclaim (if any) and then the reply and defense to counterclaim, in a Writ action or affidavits in reply for an OS action, all within the requisite timelines. Further pleadings or affidavits (as the case may be) may be filed with Court consent;
- pre-trial conferences for case management and directions;
- discovery;
- exchange of witness affidavits of evidence in chief, both factual and expert (if any) within prescribed time lines (for OS actions, on the determination of the Court);
- setting down for trial for Writ actions;
- trial or hearing;
- judgment.

In a Writ action, there may be interlocutory applications at the relevant stages above [some of which also applies in an OS action e.g. security for costs, the joinder of parties and discovery:

- a jurisdictional or forum challenge by the defendant after appearance is filed and before the defense or taking any other step that could be construed as accepting the jurisdiction of the court;
- a third party claim to join all necessary issues and parties; if the defendant fails to enter appearance or a defense, the plaintiff may enter judgment in default. However, default judgments can be set aside on terms prescribed by the court;
- the defendant may apply to strike out the claim on the ground that the statement of claim discloses no reasonable cause of action, is vexatious or is otherwise an abuse of process;
- the plaintiff may apply for summary judgment for a Writ action, on the basis that the claim is clear cut, there is no defense and therefore no issues that should go for a trial;
- the parties may apply for further and better particulars of the pleadings for a Writ action;
- the parties may apply further discovery from the other;
- the defendant may apply for security for costs;
- interrogatories;
- interim reliefs

2.4 Limitation periods

For actions based in contract or tort (the law of wrongs which are non-contractual), the limitation period is 6 years from the time the cause of action arises. For contract claims, the 6 years would start from the date of breach or some specified event in the contract. For tortious claims, the 6 years would start to run from the time that the cause of action is completed namely when loss is suffered. In personal injury cases, the limitation period is 3 years from the date when the cause of action accrued or knowledge required to bring an action for damages and of

the right to bring such an action, whichever is later. There are provided in the Limitation Act Cap 163, several exceptions where the general limitation periods are extended.

2.5 Confidentiality

Generally, all trials are conducted in open court with some exceptional cases where the proceedings are conducted in private.

Whatever documents or testimony is read or heard (as the case may be) in open court are accessible to the public. Although Court documents are considered public records, a third party cannot be allowed access to them without the consent of the Court and for good reason only.

Where the Court proceedings relate to international arbitration matters, Sections 22 and 23 of the International Arbitration Act permit a party to apply to have the matter not be heard in open Court and to anonymize case names of parties, respectively.

For proceedings in the SICC, a party can apply for the case to be heard in camera, to restrain disclosure and for sealing of the Court file.

2.6 Class actions

Class actions cannot be brought in the Singapore Courts. The closest mechanism for collective redress is a representative action

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Generally, only Singapore practitioners called to the Singapore Bar with a valid practicing certificate can appear in the Singapore Courts.

Foreign lawyers cannot appear in the Singapore Courts except for (a) ad hoc admissions for Queen's Counsel from England or its equivalent in any other jurisdiction with special qualifications or experience for the purpose of a case. There is case law setting out the requirements to be met for ad hoc admission; and (b) foreign lawyers registered to appear before the SICC either on a full registration basis or a restricted registration basis, the latter being only for submissions on foreign law. The minimum requirements for a full registration for the SICC include having at least 5 years' experience in advocacy and having sufficient proficiency in the English language to be able to conduct proceedings. For a restricted registration, there is no minimum requirement for advocacy experience. As at 9 June 2016, the list of 65 fully registered foreign lawyers comprise lawyers largely from England (many QCs) and other commonwealth countries with a few from Japan, Switzerland, Hong Kong SAR, South Korea, the Philippines and USA. 2 Indonesian lawyers were registered on the restricted list with one possibly now on the full list.

3.2 Rules of service for foreign parties

In respect of service of foreign processes, Order 65 of the Rules of Court permits various alternative methods: (a) pursuant to a letter of request from the foreign tribunal to the Minister for service on a person in Singapore and the Minister forwards that request to the Singapore Court; or (b) a method of service that is permissible had the analogous process been issued by the Singapore Court. This is largely a question of what the foreign court would recognize as valid service for its own processes.

3.3 Forum selection in a contract

Before the passing of the Choice of Court Agreements Act, it was already well established that the Singapore Court would give effect to a choice of jurisdiction clause in a contract. In respect of exclusive jurisdiction clauses in favor of a foreign court, the Singapore Court would only assume jurisdiction if a strong cause is shown that the Court should not give effect to the exclusive foreign jurisdiction clause. In respect of non-exclusive jurisdiction clauses, the Singapore Court would consider the question of the more appropriate or convenient forum.

3.4 Choice of law in a contract

The Singapore Courts would give effect to the choice of governing law in a contract unless it is proven that the choice is not one made in good faith but to evade the consequences of a foreign law.

3.5 Gathering evidence in a foreign jurisdiction

Singapore is not a signatory to The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).

It is permissible to obtain evidence for foreign courts or tribunal. Order 66 of the Rules of Court is applicable and permits orders for examination of witnesses and for production of documents to be applied for. A letter of request or certificate or document

showing a desire of the foreign court or tribunal to obtain the evidence of that witness or document is required as part of the supporting materials for the application. Singapore is a signatory to the Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague Evidence Convention).

3.6 Enforcing a foreign judgement in local courts

Choice of Court Agreements Act 2016 (the CCAA)

Singapore is a signatory to the Convention on Choice of Court Agreements done at The Hague on 30 June 2005 (The Hague Choice of Court Convention), which has been described as establishing an international legal regime for upholding exclusive choice of court agreements in international civil or commercial cases, and which governs the recognition and enforcement of judgments amongst parties to The Hague Choice of Court Convention.

The CCAA gives effect to The Hague Choice of Court Convention and came into force on 1 October 2016. With ratification of the Convention, the judgments of the current 28 signatory States (Mexico and all EU States except Denmark. Both US and Ukraine have signed but have not ratified).

The CCAA does not apply to certain types of matters including matrimonial, succession, insolvency, competition law matters. The enforcement of foreign judgment provisions in the CCAA applies even in non-monetary judgments unlike the RECJA and the REFJA below.

Reciprocal Enforcement of Commonwealth Judgments Act (RECJA)

The RECJA applies to judgments for a monetary amount (other than taxes or the like) made by the superior courts of the following signatory countries: -- UK, NZ, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei, PNG, India (except Jammu and Kashmir and identified states/ territories of Australia.

Reciprocal Enforcement of Foreign Judgments Act (REFJA)

The REFJA applies to judgments for a monetary amount (other than taxes or the like) made by the superior courts of Hong Kong which was previously under the RECJA regime. When Hong Kong reverted to PRC and became a special administrative region, Hong Kong was gazetted as the 1st region under the REFJA.

Common law actions

Aside from legislation, Singapore law permits common law actions commenced in the Singapore Courts for the purpose of enforcing the foreign judgment as a debt. As the merits would have been determined in the foreign court, res judicata and/or issue estoppel could prevent a rehash of the case on its merits. The usual course would therefore be for the foreign judgment creditor as plaintiff to attempt to shorten the Singapore action by applying for summary judgment under Singapore Court Rules, on the basis that it is a clear-cut claim with no defense with no triable issue. If the court finds in the judgment creditor's favor, the resulting judgment can be enforced as any other judgment of the Singapore Court.

Time limits

An application to register a foreign judgment under the RECJA needs to be made within 12 months after the date of the judgment. For the REFJA, the time limit is within 6 years of the date of judgment. As a common law action on a foreign judgment is an action on an implied debt, the limitation period of 6 years would apply.

Procedure / grounds for refusal

The procedures for the enforcement of a foreign judgment under the RECJA and REFJA are set out in Order 67 of the Rules of Court. Enforcement is by registration under the relevant Act, as opposed to commencement of a new action on the judgment debt (i.e. the common law action). The application is made by an originating summons supported by an affidavit exhibiting the judgment, stating the judgment creditor's entitlement to enforcement of the judgment which has not been satisfied, and setting out other requirements. At the 1st instance, the order is made ex parte and thereafter upon notice of the order served, the judgment debtor has a period of time within which to set aside the order for registration. The application to set aside is made by summons supported by affidavit.

Registration under the RECJA would be refused if (a) the original court acted without jurisdiction: (b) the judgment debtor was not duly served with the process of the original court; (c) the judgment was obtained by fraud; (d) there is a pending appeal in the original jurisdiction; or (e) public policy of the Singapore Court does not permit it.

Registration under the REFJA would be refused if (a) the original court acted without jurisdiction; (b) no notice of the claim in sufficient time to defend the proceedings; (c) the foreign judgment was obtained by fraud; (d) enforcement would be contrary to Singapore's public policy

Similar restrictions apply in respect of a common law action to enforce a foreign judgment. It can be refused where (a) the foreign judgment has been obtained by fraud, (b) there has been a breach of natural justice, meaning (right of hearing and

free of bias), and (c) recognition or enforcement would amount to a breach of Singapore's public policy.

Once registered under the RECJA and REFJA, the judgment will be of the same force and effect as a judgment of the High Court of Singapore.

The grounds upon which the CCAA requires that the High Court must refuse recognition or enforcement are: (a) if the foreign judgment has no effect or is unenforceable in the State of origin; (b) no notice of the claim in sufficient time to defend the proceedings; (c) the foreign judgment was obtained by fraud in procedure and (d) where it is manifestly incompatible with the public policy in Singapore including where the proceedings leading to the judgment would be incompatible with fundamental principles of procedural fairness in Singapore. However, the High Court may refuse on other grounds including where the exclusive choice of court agreement is null and void or where the foreign judgment is inconsistent with a Singapore judgment in a dispute between the same parties etc. In addition, the High Court may also refuse where the foreign judgment awards damages (including exemplary or punitive damages) in excess of the compensation for the actual loss or harm suffered. The High Court must however recognize and/or enforce a severable part of the foreign judgment.

On the commencement of the CCAA, the RECJA and REFJA shall not apply to any foreign judgment to which the CCAA applies. For example, a judgment of the English High Court would be under the CCAA and not the RECJA.

4. EVIDENCE

4.1 Fact witnesses

Factual witnesses generally provide their evidence in chief for trial by way of affidavits of evidence in chief which are confirmed under oath at trial, and are then cross-examined and re-examined.

Where the named witnesses do not appear at trial to be cross-examined, their affidavits of evidence in chief would be rejected and not be admitted into evidence. There are some exceptions to the hearsay rule.

4.2 Expert witnesses

The expert witness owes a duty to the Court, notwithstanding that he may be party appointed. The expert's role is to assist the court in reaching its decision. An expert must be independent, must not lose objectivity or become partisan or the court is likely to disregard his opinion.

He can be party appointed, jointly appointed or Court appointed.

On the process, parties are free to agree on the process including (a) issuance by each side's expert report, conference between the experts leading to a joint report noting the common ground and where they differ and each expert to then produce a report on where they disagree; (b) "hot-tubbing" where opposing experts testify together on one panel and are then cross-examined. It is believed that this procedure helps narrow the issues and permits the adjudicator to better understand where the experts differ.

The retaining party pays the expert's fees. These would usually be recoverable by a successful party as part of a costs award.

4.3 Documentary disclosure

The Evidence Act applies. The Evidence Act is a codification of the law of evidence but is supplemented by rules of evidence at common law to the extent not inconsistent with the provisions of the Act. It deals with relevance, admissibility, the hearsay rule, the parol evidence rule, proof, the burden of proof, professional legal privilege, compellability of witnesses amongst other aspects of the law of evidence.

Generally, any document in a party's possession, control or power that is relevant to any matter in issue in the case must be disclosed during the discovery process. Order 24 of the Rules of Court require disclosure of documents that (a) a party relies on; (b) affects his own case; (c) adversely affect another party's case or (d) support another party's case.

In addition, for specific discovery of particular documents, an additional class of documents is permitted – that may lead the party seeking discovery of it to a train of inquiry resulting in obtaining information which may adversely affect his own case, adversely affect another party's case or support another party's case.

Any discovery order shall not be made unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

There is an implied undertaking not to use documents disclosed under compulsion of law, for any other purpose except for the case at hand (the Riddick principle), if breached would amount to a contempt of court. The Riddick principle is well applied by the Singapore Courts.

4.4 Privileged documents

Privilege is governed by substantive law. Privilege arises from statute (e.g. the relevant provisions in the Evidence Act) as well as common law.

Communications that are privileged and exempt from disclosure fall within the following categories (non-exhaustive):

- communications between an advocate and solicitor and the client for the purpose of obtaining legal advice and this includes communications between an in-house lawyer in an entity and his colleagues within that organization (legal advice privilege);
- communications and documents made in contemplation of and for the dominant purpose of litigation (litigation privilege);
- without prejudice communications;
- marital communications;
- self-incriminating statements.

Privilege does not apply if the communication was made in furtherance of any illegal purpose. The client can elect to waive privilege in relation to a particular document, but this may allow the opposite party to inspect any other document that is related to the document over which privilege has been waived.

5. REMEDIES

5.1 Dismissal of a case before trial

An application may be made for:

- dismissal of the action for no jurisdiction;
- stay of the action on limited grounds e.g. forum non-conveniens or the existence of parallel proceedings elsewhere;
- striking out under Order 18 Rule 19 (for Writ actions) where the pleadings or endorsement show no reasonable cause of action or defense as the case may be, or are frivolous or vexatious or are otherwise an abuse of process.

The applicable procedure would be to apply by summons within the action commenced, supported by an affidavit, except in an application for a striking out of the pleading (or endorsement) or defense only on the ground that there is no reasonable cause of action or defense, where no affidavit evidence is to be referred to.

5.2 Interim or interlocutory injunction before trial

An application may be made for:

- dismissal of the action for no jurisdiction;
- stay of the action on limited grounds e.g. forum non conveniens or the existence of parallel proceedings elsewhere;
- striking out under Order 18 Rule 19 (for Writ actions) where the pleadings or endorsement show no reasonable cause of action or defense as the case may be, or are frivolous or vexatious or are otherwise an abuse of process.

The applicable procedure would be to apply by summons within the action commenced, supported by an affidavit, except in an application for a striking out of the pleading (or endorsement) or defense only on the ground that there is no reasonable cause of action or defense, where no affidavit evidence is to be referred to.

Interim reliefs/remedies

The following interim reliefs are available:

- interim injunctions;
- interim mandatory injunctions (in very exceptional cases and only justifiable by special circumstances);
- a freezing order (Mareva) - this is the well-known interim freezing injunction that restrains the defendant from disposing of or dealing with specific assets pending the determination of a legal action;
- search order (Anton Piller) - this permits a claimant to enter the defendant's premises to preserve relevant materials or to obtain evidence that might otherwise be destroyed;
- pre-action discovery order (Norwich Pharmacal) which enables the identification of the wrongdoers or the relevant causes of action, without which an action cannot be commenced.

Rules concerning interim or interlocutory injunctions (non-mandatory) granted before a full trial

The principles set out in the American Cyanamid v Ethicon [1975] AC 396 have been accepted and applied in Singapore. See for example the CA decision in Maldives Airports Company Ltd v GMR Male International Airport Pte Ltd [2013] 2 SLR 449. The requirements are whether:

- there is a serious question to be tried;
- if the injunction is refused, the applicant will suffer greater hardship than the defendant as part of the balance of

convenience test or more appropriately, "the balance of the risk of doing an injustice" test.

That test is in 2 stages.

At the 1st stage, the question is whether if the plaintiff succeeded at the trial at establishing his right for a permanent injunction, he would have been adequately compensated by damages and if so and the defendant was in a financial position to pay the damages, no interim injunction would normally be granted. If damages were not an adequate remedy, then whether if the defendant succeeded at trial, he would be adequately compensated by damages if an interim injunction were granted and the plaintiff was able to pay damages on his undertaking as to damages, and if so, the interim injunction would be granted.

The 2nd stage involves the Court taking into account factors to determine where the balance should lie, if damages would not be an adequate remedy for either party or there is doubt on the adequacy of the remedies. These factors would include (a) the stage where the defendant is on his impugned conduct, (b) the relative strength of the parties on undisputed affidavit evidence especially where to grant the interim injunction would effectively dispose of the case e.g. in restrictive covenants for six months in employment cases.

If the factors appear evenly balanced, then the status quo immediately before the issue of the Writ, would be preserved.

In general, the party seeking the injunction must give an undertaking to pay any damages suffered by the other party if that party ultimately succeeds in having the injunction set aside. In the appropriate case, a fortification of that undertaking would be ordered. The applicant should therefore as part of its application provide financial information to prove that it would be able to make good that undertaking to pay damages. Otherwise, a fortification may be ordered.

Consistent with settled law that on an ex parte application, the applicant must disclose to the court all matters within his knowledge which might be material even if they are prejudicial to the applicant's claim, where an interim injunction is applied for without prior notice to the other party, there has to be full and frank disclosure of the material facts. The failure to do so would usually result in a setting aside of the interim injunction.

When urgent, the application can be granted in a very short time (technically even in a few hours).

Damages as a result

The claimant is liable to pay damages if it is later proved that the interim order should not have been granted. An undertaking to that effect is a requirement to obtain the interim order.

The claimant may also be liable for substantial costs if the interim order is set aside.

Fortification of undertaking

In certain cases, for example relating to a foreign claimant, the undertaking may be required to be supported by security.

5.3 Interim attachment orders

In addition to the requirements to be satisfied for all interim injunction applications, set out above, the requirements for the freezing and search orders are set out below.

For the Freezing Order (previously called Mareva Injunction) a claimant must show:

- a valid cause of action over which the court has jurisdiction;
- a good arguable case on the merits of the plaintiff's case. This means a case which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 percent chance of success – the Singapore Court of Appeal in Bouvier, *Yves Charles Edgar v Accent Delight International Ltd* [2015] 5 SLR 558 endorsing The Niedersachsen [1983] 2 Lloyd's Rep 600;
- some grounds of belief that the defendant has assets within the jurisdiction; and
- there is a real risk that the assets may be disposed of or dissipated so that the judgment cannot be enforced. There must be solid evidence to demonstrate the risk and not just bare assertions to that effect - the Court of Appeal in *Bouvier, Yves Charles Edgar* (as above). A mere possibility or unsupported fear of dissipation is insufficient.

Unless fraud is involved, all interim injunction applications have to be notified (on short notice) to the other side to allow them an opportunity to appear. The exceptions may be for freezing and search orders applications which if properly conceived, are frequently sought without notice, for fear that relevant evidence could be destroyed or assets put beyond the courts' reach.

A freezing order does not create a preferential right or security.

Search Order (previously called an Anton Piller Order). The applicant must satisfy that:

- the order is necessary;
- it has an extremely strong prima facie case;
- the damage potential or actual must be very serious for the applicant;

- there must be clear evidence that the defendants have in their possession incriminating documents or things (which was the subject matter sought to be preserved) and that there is a real possibility that the defendants may destroy such material before any application inter partes can be made. Direct evidence is not necessary where it is shown that the defendant has a propensity to destroy evidence;
- the harm likely to be caused by the execution of the search order to the defendant and his business affairs must not be excessive or out of proportion to the legitimate object of the order.

Aside from the stringent requirements to be fulfilled above, the other applicable principles to control the otherwise draconian effect of the search order includes where essential to do so in the interest of justice, solid evidence of the risk of destruction, the right of the defendant to reasonable time to obtain legal advice before execution of the search order and independent supervision of the execution of the search order.

5.4 Other interim remedies

Anti-suit injunction – restraint of foreign proceedings

The Singapore Court will grant an injunction to restrain a party from pursuing foreign proceedings in appropriate circumstances. See the Court of Appeal decision in *Bank of America National Trust and Savings Association v Djoni Widjaya* [1994] 2SLR(R) 898 in which the plaintiff was restrained by injunction from continuing with his action in Indonesia. The applicable principles are:

- the jurisdiction is to be exercised when the ends of justice requires it e.g. where the foreign proceedings were vexatious or instituted for an improper purpose or with an ulterior motive (e.g. pressure and harassment of the other party);
- the order is not directed to the foreign court but to the parties so proceeding or threatening to proceed in the foreign court;
- the injunction is against a party amenable to the jurisdiction of the Singapore Court;
- the injunction will be an effective remedy;
- the jurisdiction needs to be exercised with caution because it indirectly affects the foreign court;
- the Singapore Court had to determine if it is the natural forum for the determination of the dispute, the consequence to both sides of allowing the foreign proceedings to continue or not (injustice, oppression or vexatiousness) including whether the plaintiff was being deprived of advantages in the foreign forum.

In *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3SLR409, where Morgan Stanley unsuccessfully tried to restrain a Singapore financial institution from proceeding with its New York action, the High Court reiterated the factors to be considered as follows:

- whether the defendant is amenable to the jurisdiction of the Singapore Court;
- whether Singapore is the natural forum for the resolution of the dispute between the parties;
- whether the foreign proceedings were vexatious or oppressive to the plaintiff if allowed to continue;
- whether an injunction would cause any injustice to the defendant by depriving it of legitimate juridical advantages sought in the foreign proceedings; and
- whether the commencement of the foreign proceedings is in breach of any agreement between the parties.

Pre-action discovery order (wider than the Norwich Pharmacal)

This is an order for pre-action discovery of a third party to further a potential claim (for example fraud or for medical negligence or internet libel), where the claimant is unable to determine who may be liable unless the third party (such as a financial institution or hospital or internet service provider) discloses the necessary information.

Order 24 Rule 6 of the Rules of Court deals with discovery against other persons whether intended to be defendants or not, likely to have documents in their possession, custody or power on an issue relevant to the claim or the identity of persons likely to be parties to the action

The overriding need to satisfy the necessity requirement (either for the fair disposal of the matter or for saving costs) applies in all discovery applications. For example, if the potential plaintiff already had sufficient evidence to mount a claim, it would not be necessary to order discovery under Rule 6 because he is not entitled to discovery before proceedings in order to complete his entire picture of the case. It would be different if the plaintiff needed pre-action discovery to determine whether he had any case at all.

Pre-action discovery does not extend to disputes to be resolved by arbitration.

Part of Order 24 Rule 6(5) "... with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it is just to make such an order, and on such terms as it thinks just" gives statutory effect to the Norwich Pharmacal order.

Interim relief in Aid of foreign proceedings

If the main proceedings are in a foreign jurisdiction, the claimant can apply to a Singapore Court for an injunction over the defendant's Singapore assets, to support those foreign proceedings, only if the claim could have been advanced before the Singapore Court. In order to obtain that interim relief by the Singapore Court, there must be a substantive cause of action against the defendant and the practical measure is to apply for the Singapore action to be stayed pending resolution of the main foreign proceeding, after the interim relief (assistance) is obtained from the Singapore Court.

The position has been specifically addressed for international arbitration where the seat of the arbitration is outside of Singapore, by an amendment to the Singapore International Arbitration Act, which expressly provided for the Singapore Court to assist an entirely foreign arbitral proceeding by issuing interim reliefs where required to assist the foreign arbitral proceedings.

The power of the Singapore Court to assist where the main court proceedings are elsewhere is less clear. There appears to be observations made by the Singapore Court of Appeal (in *Swift- Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629) that suggest that the position remains open. There are also 2 conflicting High Court decisions, the difference being whether the substantive claim in Singapore needs to terminate in a Singapore judgment. See *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1SLR(R)1000 and *Petroval SA v Stainby Overseas* Ltd [2008] 3SLR(R)856.

5.5 Remedies at trial

The Supreme Court has the power to grant all reliefs and remedies at law and in equity including damages in addition to, or in substitution for, an injunction or specific performance. The reliefs and remedies include:

- damages which are compensatory for breach of contract claims. Exemplary or punitive damages for not available for breach of contract claims. For tortious actions, damages are restitutionary. Exemplary damages can be awarded in defamation actions;
- specific performance;
- a declaration (a formal statement by the court on the rights of interested parties or the construction of a document);
- rectification (an equitable remedy which corrects a contract in accordance with the parties' prior agreement);
- permanent injunction;
- foreclosure (an order preventing a mortgagor from redeeming the equity of redemption);
- imposition of a constructive trust (to the effect that the defendant holds an asset in trust for the claimant).

5.6 Security for costs

A defendant can apply for an order for the claimant to provide security for its costs on the grounds of the claimant being ordinarily resident out of Singapore or where the plaintiff is nominal for the benefit of another or where its address is incorrectly stated or it has changed its address to evade the consequences of the litigation. However, the Court has the overriding discretion whether to grant and will take into account all circumstances of the case and only if the Court thinks it is just to do so. Section 388 of the Companies Act provides that the plaintiff corporation (defined to include a corporate in or out of Singapore), may be ordered to provide security for costs where it appears by credible testimony that there is reason to believe that the plaintiff corporation will be unable to pay costs if the defendant succeeds.

6. FEES AND COSTS

6.1 Legal fees

Hourly billing is currently a common legal fee structure although there has been paradigm shifts in how institutional clients wish to be charged for legal services. Fees are not fixed by law. In Singapore, the top commercial litigators charge in excess of S$1200 per hour. However, the market is highly competitive and alternative fee arrangements are becoming increasingly common. These include: capped fees and discounted rates. Contingency fees (that is, an agreement where the lawyer only gets paid if the client wins and recovers or where the quantum of fees is dependent on the amount awarded or recovered) are not allowed in Singapore.

The general rule is costs follow the event i.e. the losing party is ordered to pay the costs of the winning party. However, costs are at the discretion of the court. Generally, the winning party will only recover a fraction of its legal costs from the losing side, possibly a third to half. Costs are awarded on several bases (a) between party and party on a standard basis; (b) between party and party on an indemnity basis; and (c) between solicitor and own client. There is an overriding principle of proportionality applied by the Court in the exercise of its discretion on costs.

6.2 Funding and insurance for costs

Previously, with a few exceptions, 3rd party funding was not permitted in Singapore. Whilst the position remains unchanged for purely Court litigation, the law has been changed very recently to allow for 3rd party funding of international arbitration matters and arbitration related Court applications. Otherwise, commercial litigation is funded by the parties themselves.

The other exceptions for Court litigation are (a) for companies in liquidation, funding by creditors or shareholders is permissible with costs recoverable as liquidators' expenses; (b) insurers for example in professional negligence cases and under director and officer liability policies, depending on the terms of coverage.

6.3 Cost award

Costs are awarded at the discretion of the Court. However, costs usually follow the event meaning a successful litigant is usually entitled to receive its costs of the proceeding (including appeals) from the unsuccessful party unless the Court thinks that the circumstances justify a departure from that rule. Costs awards are fault based meaning whoever is at fault pays costs or is deprived of its costs, as the case may be. In exercising its discretion, the Court takes into account the parties' conduct including attempts at resolving the matter e.g. by mediation and conduct before and during the proceedings, whether proceedings have been unnecessarily or unreasonably protracted.

Where the quantum of costs is not agreed, it can be assessed by the Court (registrars) on one of the several basis (a) between party and party either on a standard or indemnity basis and (b) on a solicitor and client basis. The difference between a standard and indemnity basis is in the former, the burden of proving reasonableness on a balance, is on the party whose bill it is and for the latter, the burden of proving unreasonableness on a balance, is on the paying party.

In deciding the quantum of costs to award, the overriding principle is one of proportionality. The factors that will be taken into account include (a) complexity of the matter, (b) skill, specialized knowledge and responsibility required of and time expended by the lawyer; (c) the number and importance of documents; (d) the urgency and importance of the matter to the client and (e) the value of the property or the amount of money involved.

The Supreme Court as part of its Practice Directions (Appendix G) has issued guidelines for party and party costs awards intended to provide a general indication of the quantum of costs awards for specified types of proceedings e.g. for interlocutory applications. There are also provisions in Appendix G on tariffs per day of trial/ hearing with declining percentages of the daily tariff the longer the trial or hearing takes.

6.4 Cost interest

Generally, post-judgment interest on costs orders is awarded at a rate prescribed by regulation, calculated from the costs order's date.

7. APPEAL

7.1 Appeal

Time and other requirements for appeal

An appeal against a registrar's decision is heard by a High Court Judge and needs to be filed within 14 days of the decision or order and the notice of the appeal needs to be served on the respondent seven days after issue.

Where it is intended to appeal against an order which is interlocutory in nature, further arguments before the High Court Judge need to be sought before a further appeal to the Court of Appeal.

Certain matters are not appealable to the Court of Appeal (e.g. where unconditional leave to defend an action is granted, refusal to strike out an action or pleading, decisions on further and better particulars, leave granted for amendment of pleadings, refusal to order security for costs etc.) or require leave to appeal (e.g. where the amount in dispute does not exceed S$250,000, where the only issue on appeal has to do with costs, refusal of leave to amend pleading except where the limitation period has expired, where security for costs is ordered, refusal of discovery, refusal to stay proceedings, etc.).

An appeal against a High Court Judge's decision needs to be filed within one month from the order, refusal or judgment appealed from.

Security for the respondent's costs will need to be provided for all appeals to the Court of Appeal, S$15,000 for interlocutory matters and S$20,000 for all other appeals.

Grounds for appeal to the Court of Appeal

The grounds on which the Court of Appeal would overrule the trial court are where the latter was:

- wrong on the law or improperly applied the law; and
- plainly wrong on its finding of facts.

Where the lower court's decision is made in exercise of its discretion, the Court of Appeal will not interfere unless it was clearly wrong because of (i) a mistake in law or disregard or misapplication of a significant principle; or (ii) failure to appreciate the true facts or (iii) taking into account of irrelevant considerations or failure to take into account relevant considerations or (iv) exceeding the discretion vested in it or (v) failure to exercise any discretion at all.

Powers of the High Court in its appellate jurisdiction and of the Court of Appeal

For appeals against the decisions of the registrar, the High Court Judge in his appellate role, rehears arguments on the merits and decides the matter afresh.

Although an appeal to the Court of Appeal is by way of rehearing, it does not rehear the witnesses that appeared below and accordingly, the usual rule is that it does not overrule the trial judge's findings of fact particularly where they involve demeanor and intangible characteristics which only the trial judge was in the position to perceive and on issues of credibility. However, the Court of Appeal has the power to draw inferences of fact from the same evidence and depart from the inferences drawn by the trial judge and will do so even on credibility issues where inferences can be drawn from the evidence and the appellate court is in as good a position as the trial judge. Although the Court of Appeal has wide powers to hear additional evidence, it usually does not and no further evidence is admitted after a trial or hearing on the merits except on special grounds

8. ENFORCEMENT OF JUDGMENT

8.1 Enforcement of judgment

A judgment can be enforced in a number of ways including:

- a writ of seizure and sale over goods or immovable property, a process which could eventually result in a sale by auction by the Court Sheriff;
- garnishee proceedings over a debt owed to the judgment debtor by a 3rd party e.g. a bank or an employer. This ensures payment is made directly to the judgment creditor, subject to various exemptions;
- appointment of a receiver e.g. over rental income due to the judgment debtor; and
- committal proceedings in respect of non-compliance with e.g. an injunction or an order for specific performance.

The secured creditor(s) over the relevant asset would take in priority. The judgment creditor is only able to attach the interest that the judgment debtor has over the asset. The execution of the judgment by any of these modes will have to be completed before insolvency sets in.

A judgment debtor summons can also be applied for in aid of execution. By this process, the judgment debtor or its officer can be examined on information about assets against which a judgment can be enforced.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR Procedures

The main alternative dispute resolution methods for large commercial disputes are arbitration and mediation.

Singapore International Commercial Court (SICC)

The SICC was established in January 2015 as a division of the Singapore High Court, to meet the demand for commercial dispute resolution in the region and internationally.

In addition to the grounds which would invoke the jurisdiction of the Singapore High Court, there are additional requirements for cases to go before the SICC: - actions have to be international and commercial in nature.

An action is international if e.g. the parties to the claim have their places of business in different States or none of them have their places of business in Singapore. See Order 110 Rule 1(2)(a) of the Rules of Court for a comprehensive definition of when a claim is international in nature.

An action has to be of a commercial nature which has been defined in Order 110 Rule 1(2)(b) of the Rules of Court to include trade transactions, construction works, consulting, engineering or licensing, investment, financing, banking or insurance, joint ventures, carriage and where parties have expressly agreed that the subject matter of the claim is commercial in nature.

The following matters are not considered to fall within the SICC jurisdiction namely, family law matters; bankruptcy, insolvency, carriage of passengers and goods, status and legal capacity of natural persons, wills and succession, competition law, claims for personal injuries, employment contracts, and individual consumer.

The advantages the SICC offers over international arbitration are (a) the ability to join other parties in multi-party disputes

involving related bilateral contracts, which has been an issue in international arbitration with various arbitral institutions grappling with this by offering incomplete solutions because whether a party can be joined depends on consent; (b) right of appeal as opposed to the position under the Model Law; (c) an international panel of judges (and therefore with the compulsive force of law) drawn from both common law and civil law jurisdictions; (d) possibly less expensive and (e) possibly faster.

The international panel of judges comprise judges and ex-judges from civil law (Austria, France and Japan) and common law (Australia, Canada, Hong Kong, UK and the US) jurisdictions.

Like international arbitration, the parties are free to choose (a) the rules of evidence including the taking of evidence and the law to govern privilege; (b) questions of foreign law may be by way of submissions as opposed to proof; (c) representation by registered foreign lawyers although limited to some situations including in offshore cases (meaning where there is no substantial connection to Singapore e.g. applicable law is not Singapore law and the subject matter of the dispute is not regulated by Singapore law or where the only connection is that the parties have chosen Singapore law to be the governing law and parties have submitted to the jurisdiction of the SICC); and (d) confidentiality for the proceedings.

As stated previously, there is currently a list of registered foreign lawyers permitted to appear before the SICC.

The SICC judgment being that of the Singapore High Court would be enforceable pursuant to legislation in the countries which are signatories to the Convention on Choice of Court Agreements done at The Hague on 30 June 2005.

A Singapore Court judgment (not limited to the SICC) may be enforceable in approx. 40 countries as a result of the said convention and the reciprocal arrangements with certain Commonwealth countries (listed below) and with the Special Administrative Region of Hong Kong.

International Commercial Arbitration

Singapore is a signatory to the New York Convention for the enforcement of arbitral awards.

Its International Arbitration Act is Model Law based. The IAA applies as the law of the seat.

Singapore is a popular choice for the seat of international arbitrations because of several reasons which include:- a strong tradition of the rule of law supported by a highly skilled and respected judiciary supportive of arbitration with minimal intervention, an independent neutral 3rd country venue, competent legal expertise, language fluency, an international air hub, an arbitration law that has UNCITRAL Model law as its cornerstone, a very responsive government that quickly updates legislation when required, freedom of choice of counsel, foreign law firms are free to do arbitration work in Singapore, no work permit requirements for non-resident lawyers and arbitrators providing arbitration services in Singapore, excellent hearing facilities and support at Maxwell Chambers, Asia's largest integrated dispute resolution complex with state of the art hearing facilities (soon to be further expanded) and lower costs than almost any other major center of arbitration.

The 2015 International Arbitration Survey by the Queen Mary School of International Arbitration and White & Case ranked Singapore as:

- the 4th most preferred seat of arbitration in the world, after London, Paris and Hong Kong and ahead of Geneva. The factors taken into account for that ranking would have included the neutrality and impartiality of the legal system, the national arbitration law and its track record for enforcing agreements to arbitrate and arbitral awards;
- the most improved arbitral seat during the past five years; and
- having the 2nd most improved arbitral institution in the SIAC ranked behind the HKIAC and followed by the ICC and the LCIA, although of the 5 most preferred arbitral institutions, the order is ICC, LCIA, HKIAC, SIAC and SCC.

The Court of Arbitration of the International Chamber of Commerce (ICC), a popular choice of international parties for Singapore seated institutional arbitrations reported for 2015 that 6.09% of all ICC arbitrations were seated in Singapore and Singapore was 4th most preferred city in the world and again number one in Asia. This was an improvement over 2014, when 4.10% of all ICC arbitrations were seated in Singapore and Singapore was the 5th most preferred city in the world. During the last 10 years, Singapore, on an average, has been 5th most preferred seat of ICC arbitrations in the world. During the last five years, Singapore has consistently, been the number one seat of ICC arbitrations in Asia.

As stated previously, foreign lawyers are permitted to appear as counsel in arbitration cases without the assistance of Singapore qualified lawyers even in cases involving Singapore law governed contracts.

The commonly used arbitration rules in Singapore are that of the Singapore International Arbitration Centre (SIAC) and ICC. UNCITRAL Rules are also popularly used, especially in ad hoc arbitrations.

Mediation

Mediation is a voluntary process. However, a Mediation Bill has been tabled for public consultation and had its first reading in Parliament recently. The objective of that proposed legislation is to strengthen the framework for mediation in Singapore. It is part of Singapore's approach in offering a full suite of dispute resolution services for commercial cross border disputes.

Previously, the Singapore Mediation Centre (SMC) was set up mainly for domestic disputes. More recently on 5 November 2014, the Singapore International Mediation Centre (SIMC) was established, its intention being to provide world class mediation services.

The key provisions in the proposed Mediation Bill are (a) parties by agreement can apply to Court to record a written and signed mediated settlement agreement as an order of court provided the mediation has been administered by a designated mediation service provider and conducted by a certified mediator; (b) confidentiality and the exceptions; (c) stay of court proceedings pending mediation; and (d) the work of foreign mediators and foreign qualified counsel would not amount to unauthorized practice of Singapore law and therefore exceptions to the Legal Profession Act.

9.2 Costs in ADR

Costs are dealt with by the relevant institutional arbitral rules selected to be applicable.

9.3 ADR and the court rules

See 9.1 ADR procedures.

9.4 Evidence in ADR

The parties generally agree in advance how evidence will be given. In the absence of agreement, the arbitral tribunal determines the procedures to be followed, including the rules of evidence (which may be similar to those of the courts). The IBA Guidelines for the Taking of Evidence in International Commercial Arbitrations are a popular choice for international arbitrations.

Confidentiality and costs are dealt with by the relevant institutional arbitral rules selected to be applicable.

9.5 ADR reform

If there is a need to clarify the position, it should perhaps be made clear whether the Singapore Court has the power to provide assistance by way of interim relief to the foreign court even where the proceedings are entirely in the foreign jurisdiction and would only result in a judgment of that foreign court.

While to affirm that the Singapore Court has the power to assist may not promote the use of the Singapore Courts as the primary dispute resolution forum, such a step would be perceived as securing its place as a jurisdiction which promotes international judicial comity and assistance.

Leaving it vague has its advantages too. There may be circumstances where the Singapore Court may well not want to assist, in order to achieve a just result for the aggrieved party.

In order to further strengthen Singapore as the international dispute resolution center for the region, the following developments would be helpful:

- multi-lateral or bilateral treaties with the rest of ASEAN for the recognition and enforcement of court judgments;
- alternatively, more countries whether in ASEAN or Asia or the rest of the world becoming parties to Hague Choice of Court Convention 2005; and
- third party funding for Court litigation (in addition to that for international commercial arbitration allowed recently), which if properly controlled, could allow parties better access to justice which has increasingly become more expensive.

9.6 ADR organizations

Aside from (a) the ICC and (b) the SIAC, the following arbitral institutions have a presence in Singapore's Maxwell Chambers; (c) International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association ("AAA"); (d) Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO); (e) Singapore Chamber of Maritime Arbitration (SCMA); (f) International Centre for the Settlement of Investment Disputes (ICSID); (g) Permanent Court of Arbitration (PCA) which has a cooperation agreement with the SIAC.

MIDDLE EAST


RIYAL

Jordan

Safwan Moubaydeen

1. OVERVIEW

1.1 Overview

The principle methods of dispute resolution in respect of large commercial disputes in Jordan are litigation, mediation, and arbitration.

Mediation

Pursuant to the Mediation Law for Settlement of Civil Disputes No. 12 of 2006 (the Mediation Law) a dispute is transferred by the claim administration judge at the Court of First Instance or the Magistrate Court judge to a mediator to settle the disputes amicably. Such mediation shall take place within three months from the date of transfer of such dispute. The mediation procedures are considered confidential and may not be objected to, nor can the concessions made by the parties to the dispute be objected to before any court or other entity.

Arbitration

Arbitration is permissible in Jordan by way of the Arbitration Law No. 31 of 2001 (the Arbitration Law), whereby the law permits the settlement of a civil or commercial dispute between public or private persons, whatever the nature of the dispute, and whether contractual or non-contractual.

Under the laws of Jordan, an arbitration agreement must be in writing, otherwise it is void.

An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, faxes or telexes or other means of telecommunication, which provide a record of the agreement. The reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference to such clause is clear in considering the clause as a part of the contract. It is also permitted to agree to arbitration whilst the dispute is being reviewed by the court. If the parties agree to arbitration while a court is reviewing the dispute, the court shall refer the dispute to arbitration and its decision shall be deemed as an arbitration agreement in writing. The choice of law and the seat should be spelled out clearly in the contract, along with the rules or arbitration institution.

The national courts would generally uphold a valid arbitration agreement and would decline to assert jurisdiction over the matter where the defendant raises this prior to entering into the subject of the claim. The arbitration agreements are enforced according to their terms.

Decisions issued by way of arbitration may not be objected to using any of the methods stipulated in the Civil Procedures Law and its amendments No. 24 of 1988, however, a claim to void an arbitration decision may be raised in any of the following cases:

- In the absence of a valid and written arbitration agreement or if such agreement is invalid or no longer applicable due to the end of its term.
- If either of the parties to the arbitration agreement was missing or lacks legal capacity in accordance with the law governing such capacity.
- If either of the parties was unable to submit his defences due to not being notified or incorrect notification in respect of the appointment of an arbitrator and the arbitration procedures or for any other reason outside of his control.
- If the arbitration decision did not apply the governing law agreed upon by the parties to the dispute at hand.
- If the arbitration committee is formed or arbitrators are appointed in a manner which violates the provisions of governing law or the agreement of the parties.
- If the arbitration decision provides for matters which do not fall within the arbitration agreement or go beyond the scope of such agreement. Nonetheless, if it is possible to separate the parts of the decisions dealing with those matters which are subject to arbitration from those which are not, then such voidance shall only apply to the latter.
- If the arbitration committee did not consider the conditions which must be met in the decision in a manner which affected its content or if the decision relied on invalid arbitration procedures which affected the decision.

2. LITIGATION

2.1 Court system

There are two types of courts which hear commercial and financial disputes generally.

The first are the magistrate courts which hear disputes where the claimed amount does not exceed seven thousand Jordanian Dinars, and the second are the courts of first instance which hear claims for amounts exceeding seven thousand Jordanian Dinars.

It is worth noting that there are certain cases which are exclusively heard by the magistrate courts, whereby Article (3) of the Magistrate Courts Law No. 15 of 1952 and its

amendments (the Magistrate Courts Law) provides that the magistrate courts shall hear the following claims:

- Civil and commercial disputes relating to a debt or to moveable or immoveable property to the extent that such claimed amounts do not exceed seven thousand Jordanian Dinars.
- Counter claims regardless of value.
- Claims relating to damages provided the claimed amount does not exceed seven thousand Jordanian Dinars.
- Counter claims relating to damages which originate from the original claim falling within the jurisdiction of magistrate courts regardless of the amounts being claimed in such counter claims.
- Claims relating to right of flow of and access to water.
- Claims relating to the repossession of property regardless of the value of the property, on the condition that the decision relating to the property itself is not considered.
- Claims relating to termination of lease agreements or eviction if the annual rent does not exceed seven thousand Jordanian Dinars. In such case, the magistrate court judge shall have jurisdiction in hearing the dispute relating to the claimed amounts resulting therefrom regardless of the value of such claimed amounts.
- Claims relating to the division of shared immovable properties regardless of value, though a decision may not be issued which relates to an immovable property within the organized city area unless the applicant evidences by way of a map duly certified by the city organizational committee (if there is such committee in the area) that such division is in line with any city development project issued in accordance with the Temporary Law on Organizing Cities, Villages and Buildings No. 79 of 1966 and its amendments (the Law on Organizing Cities) and provided that the execution department carries out the sale of the immovable property where a decision is issued to sell due to inability of dividing the property in accordance with the previously mentioned law.
- Claims relating to division of the immovable property regardless of value if it is divisible and deciding the sale thereof with the knowledge of the execution department if it is not divisible; the execution department shall when undertaking the sale consider the provisions relating to the sale of a shared immovable property set out in the Law on the Division of Shared Immovable Property No. 7 of 1968 and its amendments (the Law on Division of Shared Immovable Property).

There are other laws which grant the magistrate courts the jurisdiction to hear certain disputes, but these mainly do not relate to financial claims.

Commercial disputes not falling under the jurisdiction of magistrate courts would fall to the courts of first instance.

2.2 Pre-action conduct

Generally, there are no penalties taken in respect of the parties, except that Article (7) of the Mediation Law permits the claim administration judge or the magistrate judge to impose a penalty on the party or such party's lawyer causing the failure of settlement as a result of failure to attend settlement sessions. Such penalty shall not be less than one hundred Jordanian Dinars and shall not exceed five hundred Jordanian Dinars in respect of magistrate cases and shall not be less than two hundred Jordanian Dinars and not exceeding one thousand Jordanian Dinars in cases brought before the courts of first instance.

2.3 Typical proceedings

The stages of court proceedings vary depending on the nature and level of the court which has jurisdiction.

Court of First Instance: the claimant shall submit a statement of claim to the court's clerk, (both an original and copies for the defendants) as well as a documentation file enclosing the following: list of supporting evidences, evidence in the possession of third parties and a list of witnesses (and their respective addresses) and the facts that each will attest to. The claimant or his attorney must sign each page of the papers in the documentation file; this signature must be supported with the attorney's acknowledgment that the papers are true copies of the original (if any). Following the payment of fees for filing the lawsuit, the clerk will register the case on the same day into the case log under a serial number according to the earlier sequence of submission. The case and its documents will be provided with the seal (stamp) of the Court and the date of submission will be indicated (day, month and year) both on the original documentation and the copies.

Following the notification of the defendant and his/her receipt of the copy of the statement of claim and supporting evidence of the claimant, the defendant shall then provide the court clerk within a period of thirty days from the date following the date of notification, a response to the statement of claim (original and copy). The defendant shall also submit a documentation file enclosing a list of supporting evidences, evidence in the possession of third parties and a list of witnesses (and their respective addresses) and the facts that

each will attest to. If the defendant does not submit his/her response within the aforementioned time period, the court will schedule a hearing date to look into the claim and will duly notify both parties to attend. In this instance, the defendant will have lost the right to submit a response to the statement of claim, and lost the right to submit any supporting evidence, but will retain the right to administer a conclusive oath and to provide a memorandum of defences and his/her objections to the supporting documents submitted by the claimant, and submitting a final statement.

Following the submission of a response to the statement of claim by the defendant within the legal period as identified above, the claimant is entitled to submit a response as well as a memorandum of the defences and objections on the evidence of the defendants within a period of ten days starting from the day following the date of notification of the response to the statement of claim. The claimant is also entitled to submit evidence refuting the evidence of his opponent.

Before transferring the case to the competent judge, the case must first pass through a judicial department known as the Civil Case Administration Department, chaired by a judge who shall be responsible for overseeing the case file. The judge will set a date to meet with the parties or their legally assigned attorneys in a preliminary session held to deliberate with them the disputed matter without giving any opinion in this respect. The judge will have the authority to verify completion of all documents related to dispute, and request documentation under the possession of third parties as is listed on the parties' evidence list. If the required document cannot be brought within the set period, the case file will in turn be transferred to the trial judge.

In expedited matters, the judge presiding the case will determine a date for the first hearing once the case has been registered within a period of ten days from the date of registration of the case, and with no need to exchange the documentation as outlined above. Claims shall be deemed expedited matters following a determination of the same from the chief of the court or his delegates, if the nature of the claim or its subject matter demands it, or if the claim is limited to collecting a debt or an agreed amount of money that the defendant has to pay and which has been incurred by virtue of an explicit or implicit contract (such as promissory notes or cheques) or a bond or a written contract or a guarantee.

Magistrate Courts: claims will be registered once the case is brought before the magistrate court judge. A copy thereof as well as a notification of the need of attendance before the court on a determined date will be delivered to the parties in accordance with the rules stipulated under the Civil Procedures law.

Date of appearing before the court in summary action cases/expedited matters shall be at least twenty-four hours from the date of notification of the parties/witnesses. This period may be reduced to one hour if need be, on condition that the service of papers will be made to the parties themselves. If the date of appearing is not followed, yet both parties attend the court session, the court will commence with litigation procedures.

The date of the court hearing, the judge will recite the statement of claim to the defendant and will oblige him to prepare a response within a period of fifteen days from the date following the date of recitation. The court may extend this period for one additional similar period.

If it becomes evident for the judge that the dispute can be resolved through mediation, the judge may, following the consent of the litigants, refer the case to mediation or to exercise his/her best efforts towards reconciliation of the parties. In the event of oral reconciliation, this must be reflected on the case file, and signed by both parties or their attorneys. If a deed of reconciliation was drafted and signed between the parties, then the judge must certify the same and attach a copy thereof to the case file. Such deed will be deemed as effective as a judgment issued by the courts and shall not be appealable in any manner.

The claimant shall submit his written supporting evidences, and a list of the evidence in the possession of third parties and a list of witnesses (and their respective addresses) and the facts that each will attest to within a period of fifteen days following the expiry of the period given to the defendant to submit his response to the statement of claim. The defendant shall in turn submit written supporting evidences, and a list of the evidence in the possession of third parties and a list of witnesses (and their respective addresses) and the facts that each will attest to within a period of fifteen days following the date the claimant submits all his/her respective documentation. The magistrate court judge may extend this period for one similar additional period. If the defendant fails to submit the evidence as indicated above during the stipulated legal period, he waives the right to submit his defence statement.

Finally, the claimant has the right to submit evidence refuting the information in his opponent's evidence within a period of ten days following the date on which the defendant completes submission of his evidence.

2.4 Limitation periods

Limitation periods vary depending on the right being claimed, and in each case the relevant legislation would set out such time limitations.

It is worth noting that there are certain rights which do not carry a limitation period, such as those relating to public moneys (state rights).

2.5 Confidentiality

Article (71) of the Civil Procedures Law No. 24 of 1988 and its amendments (the Civil Procedures Law) provides that court proceedings shall be public unless the court decides of its own accord or based on the request of one of the parties to carry out proceedings in private so as to maintain public morals and order or to protect a family's privacy.

Article (171) of the Criminal Procedures Law No. 9 of 1961 and its amendments the Criminal Procedures Law) also provides that court proceedings shall be public unless the court should decide to carry such proceedings privately so as to maintain public morals and order. In any case minors or any specific category of persons may be excluded from attending the proceedings.

2.6 Class actions

The Civil Procedures Law does recognize class action litigation. Article (70) provides that one or more persons may unite in one claim as claimants if the right which they are claiming relates to one action or one group of actions or one transaction or one group of transactions. They may also unite if they had previously individually filed claims then it became evident that that such cases had a legal matter in common.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Article (7) of the Jordan Bar Association Law No. (11) of (1972) and its amendments (the Jordan Bar Association Law) provides that anyone practicing the profession of Law in Jordan must be registered as a licensed lawyer in the Jordan Bar register.

Article (8) of the Jordan Bar Association Law provides the following conditions for an applicant to register with the Jordan Bar Association:

- That such person has been a holder of the Jordanian nationality for at least ten years, unless the applicant was a holder of an Arab nationality prior to obtaining the Jordanian nationality, in which case the total amount of holding both nationalities should not be less than ten years.
- The applicant has reached 23 years of age.
- The applicant must enjoy complete civil capacity.
- Must actually reside in the Hashemite Kingdom of Jordan on a permanent basis.
- The applicant must be of sound reputation and must not have been convicted or had a decision issued against him relating to an ethical crime nor been subject to any disciplinary action for reasons relating to honour and dignity. The end of the applicant's service in any previous position or work in any previous career must not have ended for any reasons relating to honor, integrity or morality. In verifying the aforementioned, the Jordan Bar Association council may carry out any procedures or investigations necessary to determine that the applicant meets this condition.
- The applicant must hold a degree in law from an accredited university or college, provided that such degree is accepted to practice the profession of law in the country granting it.

For the purposes of implementing this provision, the Jordan Bar Association council, with the agreement of the Ministry of Justice and the Ministry of Foreign Affairs, shall prepare a list of the accredited universities and colleges, and the Jordan Bar Association council may, from time to time and with the consent of the two ministries, add or remove the names of any universities or colleges. The list and any amendments thereto shall be published in the Official Gazette.

- The applicant must have completed the training stipulated in the seventh chapter of this Law.
- The applicant must not be a state or municipality employee.

Those lawyers who were granted the license to practice the profession of law and were registered in the register of licensed lawyers at the Jordan Bar Association prior to the issuance of this law shall be exempted from the conditions stipulated in paragraphs (f) and (g) above.

Article (9) of the Jordan Bar Association Law permits lawyers who are holders of Arab nationalities to apply to register in register of licensed lawyers at the Jordan Bar Association provided the applicant has been a holder of the nationality for at least ten years prior to the date of submitting the application, provided that a similar reciprocal term exists in the country of which the applicant is a national, and provided the applicant meets the conditions set out in paragraphs (b-f) of Article (8).

This article also permits a trainee lawyer who is a holder of an Arab nationality to apply to register in register of trainee lawyers at the Jordan Bar Association provided the applicant has been

a holder of the nationality for at least ten years prior to the date of submitting the application, that the applicant meets the conditions set forth above and provided that a similar reciprocal term exists in the country of which the applicant is a national.

Additionally, Article (10) allows an Arab lawyer who is a member of a bar association of an Arab nation the right to attend before the courts in cooperation with a Jordanian lawyer registered with the registry of practicing lawyers at the Jordan Bar Association, and that is on a specific case and with a permission granted by the Jordan Bar Association Council or by the President of the Jordan Bar Association in the event the Jordan Bar Association Council is unable to meet for any reason, and after confirming the status of the attorney requesting to attend before the courts, provided that Jordanian lawyers are treated on a reciprocal basis.

3.2 Rules of service for foreign parties

The Law on Enforcement of Foreign Judgements No. 8 of 1952 (the "Enforcement of Foreign Judgements Law") allows the enforcement of a foreign judgement in the Hashemite Kingdom of Jordan by way of raising a lawsuit relating to execution before the court of first instance having jurisdiction in accordance with the place of residency of the party which has had a decision issued against it or having jurisdiction in accordance with the place of the property of the losing party which the decision shall enforce against if the losing party does not reside in the Hashemite Kingdom of Jordan.

The Enforcement of Foreign Judgements Law defines foreign awards as all judgements issued by a court outside the Hashemite Kingdom of Jordan including religion courts, in addition to foreign arbitral awards, and Jordanian courts generally enforce foreign awards without re-examination of the merits, subject to exceptions provided for under Article (7) of the Enforcement of Foreign Judgements Law, which provides that:

- The court may dismiss an application for enforcing a foreign judgement in the following circumstances:
  - if the court which issued the judgment did not have jurisdiction;
  - if the defendant had not carried on any business within the jurisdiction of the court, or if he was not a resident within the jurisdiction and did not willingly appear before the court or did not accept its jurisdiction;
  - if the defendant was not notified to appear before the court that issued the judgment or was not duly or properly served with notice of the proceedings;
  - if the judgment has been obtained by fraud;
  - if the defendant convinces the court that the court judgment is not final; or
  - if the judgment relates to claims which are not heard before the courts in the Hashemite Kingdom of Jordan as it contravenes with Jordanian public policy or public morals.
- The Court can dismiss a statement submitted to it requesting the execution of a court order issued by a court of any foreign country whose laws do not enforce court judgments of the Hashemite Kingdom of Jordan.

It is worth noting that Jordan is a Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

3.3 Forum selection in a contract

Generally Jordanian law allows both parties to agree on settling a dispute in foreign courts in consideration of the following:

- There are some legislations that do not allow the parties to agree on allowing a foreign court to review the dispute, such as the Agents and Mediators Law No. 28 of 2001 (the Agents and Mediators Law) which only allows Jordanian courts to review disputes or controversies arising from the commercial agency contract or from the applications of the provisions of this law.
- That the agreement does not prevent the Jordanian courts from settling the disputes falling within its jurisdiction according to general rules, and if either party resorts to the Jordanian courts in such matters, the Jordanian courts shall review the dispute despite the existence of an opposing agreement.

3.4 Choice of law in a contract

Local courts will respect the choice of governing law in a contract, as long as the provisions of the law do not violate mandatory provisions or public policy.

3.5 Gathering evidence in a foreign jurisdiction

The Civil Procedures Law and the Evidences Law do not regulate this procedure. Jordan is party to the Riyadh Convention for Judicial Cooperation of 1983 (the Riyadh Convention), of which Article (16) provides that the request for rogatory commission shall be written in accordance with

the laws of the requesting contracting party, and shall carry the relevant date, the signature and seal of the requesting body along with all accompanying papers, but neither request nor enclosures need be officially certified.

The request shall include the type of legal action sought, the name of the requesting body, the name of the body requested to execute the action, and all the detailed representations related to the facts of the action, the undertaking to be carried out, particularly the names of witnesses, their domiciles, and the questions to be put to them.

Article (17) provides that the party requested to conduct such rogatory commission is obliged to do so in accordance with the provisions of the present agreement, and shall not refuse to carry out such requests except in the following cases:

- If such implementation is not within the competence of the judicial authority requested to do so.
- If such implementation would infringe upon the sovereignty of the contracting party requested, or public order in its territory.
- If the request concerns a crime considered by the contracting party requested to be a crime of a political nature.

In the case of refusal to carry out the request or the impracticability thereof, the requested party shall promptly notify the requesting party to this effect, return the relevant papers, and set forth the reasons behind the refusal or impracticability of carrying out the request.

3.6 Enforcing a foreign judgment in local courts

Please refer to section 3.2 Rules of service for foreign parties.

4. EVIDENCE

4.1 Fact witnesses

Article (81) of the Civil Procedures Law provides that before providing his deposition, the witness will make the following oath:

(By the Almighty God, I swear to say the truth and nothing but the truth). The Court will hear him in absence of the witnesses whose depositions have not been heard yet.

The Party that calls a witness shall have the right to examine him and then the other parties may cross-examine. Afterwards, the party which initially called him can re-examine him in relation with the points arising from examination by the counterparty. Such questioning must not go beyond the subject of the case. If a question addressed to a witness has been objected to, the objector must explain the reason for objection. Then, the party asking the question will respond to the objection. The Court shall, then, decide if it is possible to address the question or not. The Court must write the question and the discussion taking place in the minutes along with the decision made in this respect if any of the parties ask it to do so.

At any stage during the trial, the Court shall have the right to ask the witness all questions in line with the case; the head of the session must ask the judges if they want to address any questions to the witness once he has finished his deposition. At any time, the Court shall have the right to call any witness who was heard before to be questioned again.

The deposition must be performed orally; and it shall not be permissible to use written notes except for those matters which are difficult to be recalled and in respect of mute persons, then such depositions may be given in writing or by way of sign language.

If the witness has been duly served and he fails to attend without a legitimate excuse, the Court shall have the right to issue a subpoena including an authorization for the police to release him against a guarantee. If the witness appears and the Court is not satisfied with his excuse, it can sentence him to prison for one week maximum or a fine of ten Jordanian Dinars maximum and its decision will be irrevocable in this respect.

Article (82) provides that the party requesting the issuance of a subpoena to a witness must pay to the Court before such an issuance the amount that the Court considers enough to cover expenses of traveling and other expenses that the witness shall pay on his way to the court and back. If it is necessary to hear a witness who cannot appear before the court for a reason that the Court is satisfied with, his deposition will be taken in presence of both parties at his place of residence, at the judges' room, or in another place that it finds suitable. Otherwise, the court can delegate one of its judges for this purpose. A deposition heard this way will be recited while considering the case.

4.2 Expert witnesses

Articles (83 – 86) of the Civil Procedures Law set out the conditions, situations and procedures to be followed in relation to the appointment of experts, whereby at any stage of the trial, the Court shall have the right to decide on inspection and expertise by one or more experts in relation to any movable or immovable property or for any matter that it deems as necessary to apply expertise to.

If the parties agree on selecting the expert(s), the Court approves of appointing them; otherwise, it will select them by itself and it must explain in its decision the reasons calling for an inspection and expertise and the purpose for that as well as setting the task. It shall order the expenses to be deposited and specify the party that shall be responsible for the payment thereof. The Court can accompany the experts on the inspection together with all its members or by delegating one of its members to do so.

Upon depositing the expenditures of the inspection and expertise, the Chief Judge or the Judge delegated by the Court from among its members will call the expert(s) and the parties for a meeting at the venue and on the date set. He shall explain to the expert(s) the task assigned thereto and hand them the required papers or photocopies and shall request the expert(s) to take the oath to undertake their work honestly and sincerely. Then, he will fix a date for the expert(s) to submit the report. If not able to give an expert opinion during inspection, a report shall be produced on the procedures undertaken, which shall be signed by those present.

Upon submission of the expert report, each of the parties will be served a copy thereof and the report shall be publicly recited at the session. The court may, of its own accord or upon a request by one of the litigants invite the expert for discussion and can decide to return the report to the expert to complete any gaps it discerns in the report. The Court can also commission others who are duly selected to give the expert opinion.

If the inspection and expertise relates to any property or matter beyond the jurisdiction of the court that has issued the decision, it can delegate the Chief Judge or the Judge at the court within which the jurisdiction of the matter or expertise falls to carry out the inspection and expertise in accordance with the decision of the Court issuing the decision of delegation. However, the Court delegated will select experts according to the aforementioned provisions.

If the litigant responsible for depositing the required amount fails to do so within the time period specified for this purpose, the other party may do so without prejudice to his right to claim such amount from the counterparty responsible for such amount. The Court may also consider this failure as relinquishment of the right to prove the event that he requested the expertise in respect of.

If the expert does not submit his report within the time period set in the decision issued to the effect of his appointment, he must submit a memo to the court clerk explaining the actions he has already undertaken and the reasons causing the delay in submitting the report. If the Court finds in the memo a good reason for this delay, it will grant an additional period of time to complete the assessment and submit the report. If there is no valid reason for such delay, the Court will sentence him to pay a fine not exceeding twenty Jordanian Dinars and will grant him another period of time to finish the job and submit his report; otherwise, it will replace him and require him to refund the money he has received to the court clerk. The decision issued to the effect of replacing the expert and requiring him to refund the money will be irrevocable.

Upon submitting the report to the Court, each of the two parties will be served a copy and it will be publicly recited at the session. Of its own accord or upon a request by one of the litigants, the Court shall have the right to call the expert(s) for discussion. It shall also have the right to decide to return the report to the expert(s) to complete any gaps or to assign the task to one or more experts selected according to the duly followed practices.

The expert report shall not bind the court in any case. It is also worth noting that the law specifies the procedures specific to appointment of experts relating to investigating handwriting or signature being denied by the other party.

4.3 Documentary disclosure

The Evidences Law No. 30 of 1952 and its amendments (the Evidences Law) provides in Articles (20-25) the conditions and procedures which are followed in order to oblige the counterparty or others to submit documents which are in their possession. A counterparty may request the submission of documents:

- Where the law permits requesting such documents be presented.
- If the counterparty relies on any such documents during any stage of the case.

The person requesting the submission of certain evidences must describe the document and specify its content to the extent possible, as well as indicate the fact that the document is intended to evidence, and provide the circumstances which indicate that such document is in the possession of the counterparty and the reasons for obliging the counterparty to provide it.

If the applicant proves his request or the counterparty declares that the document is in their possession or remains quiet in relation thereto, then the court shall require the submission of the document immediately or as soon as possible. If

the counterparty denies having possession of such document and the applicant did not provide enough information to render the request correct, the counterparty denying having possession of the document must swear that such document is not in their possession and that they do not have knowledge as to its existence or as to its location and that they are not hiding such document and that they have not been negligent in looking for such document to prohibit the other party from relying on such document.

If the counterparty does not present the document at the date which has been specified by the court or refuses to swear as mentioned above, then the document shall be considered correct in the from presented by the applicant, and if the applicant did not provide a description copy of the document it is permissible to take into consideration comments as to the form and subject matter of such document.

The court may throughout the proceedings request others to submit a document in their possession and that is in light of the situations provided above; the court may also of its own accord or based on the request of the counterparty request that documents be provided by official departments where the counterparty fails to do so.

Article (100) of the Civil Procedures Law provides that the court is entitles to request documents in the possession of any party as it deems necessary to issue a decision in relation to a case.

The Civil Procedures Law also regulates the procedures for where a party requests documents in the possession of its counterparty in Articles (101-108) of the law.

Each party of the case shall have the right to request the Court to serve a notice to any other party to present any document listed on their list of evidences where no copy was submitted for review and to permit such a party to make a photocopy. A party which does not comply with this notice cannot present that document later on as an evidence during the case unless they convince the Court that there is a satisfactory reason or excuse for their non-compliance. The party which has received notification must respond to the notifying party within seven days from the date of such notification a response by way of notification within which such party sets a date for attending to the lawyer's office or any other place to allow perusal of such documents to which they do not object. If such documents are bank or accounting books or any records which are used in a particular profession or business then such notification must include a remark as to permitting review in the place where the documents are usually kept. They must identify the documents to which they object to the presentation thereof while explaining the reasons for that.

If the party which has been served a notice in accordance with Article (101) has not complied with the notice requirement, the Court can issue a decision to review the documents at the venue and in the manner that it deems necessary. This decision will be upon a request by the party wishing to review the documents. The Court, however, shall have the right to abstain from issuing such a decision if it deems that its issuance is not necessary to adjudicate the case or for the purpose of decreasing expenditures.

If one of the parties requests to review the documents in possession of the other party or entrusted thereto and such documents are not listed in the statement of claim (or response thereto), they must identify the documents they can review. The Court shall have the right to abstain from issuing a decision to the effect of reviewing these documents if it determines that its issuance is not necessary to adjudicate the case or in order to reduce expenditures.

If one of the litigants submits an application to review bank or trade books; or retrieved computer records, the Court shall have the right to order the submission of a copy of any of the records therein ratified by the bank manager or the person in charge. The Court shall also be entitled to review the original records.

If an application is submitted to issue a decision to the effect of reviewing a document and the counterparty has claimed immunity in respect of such document, the Court shall have the right to inspect said document in order to verify the claim as to its immunity. However, this article shall be without prejudice to any right of the Court to reject the presentation of any document requested to be presented.

4.4 Privileged Documents

Please refer to sections: 2.3 Typical proceedings and 4.3 Documentary disclosure.

5. REMEDIES

5.1 Dismissal of a case before trial

The Law of Civil Procedure provides for five instances where a defendant is entitled to submit a separate motion to dismiss the lawsuit before considering the merits of the case. These are as follows:

- Lack of jurisdiction.
- Provision for arbitration.

- Res judicata.
- Limitation period.
- Wrongful service of lawsuit.

The foregoing motions shall be submitted simultaneously alongside the Statement of Reply. Otherwise, the defendant will forfeit their right to invoke said motions.

Furthermore, the foregoing motions will stay the trial proceedings and the court will move to consider those motions separately. Any resulting judgment would be subject to appeal to the Court of Appeal and thereafter to the Court of Cassation.

There are also certain instances where the case is dismissed where the case has commenced but a full trial has not been completed, though we cannot provide an exhaustive list, such as dismissal by the court as a result of the claimant failing to adhere to the requests of the court. Article (107) of the Civil Procedures Law, granted the court the competence to dismiss the case due to the failure to submit a requested document/evidence; this would be on the basis of lack of proper evidence in the event the claimant was the party who failed to comply with the court's instructions and on the basis of insufficient defence in the event the defendant was the party who failed to comply with the court's instructions. The court will issue its decision to dismiss the case following a request from the party who asked or requested access to the document/evidence.

Furthermore, Article (124) of the said law, has granted the court the authority to decide to dismiss a case in the following events: the statement of claim does not encompass a valid reason or cause of action, the alleged claims were valued at an amount lower than its true value and the party failed to amend the same and pay the court fees within a certain period following explicit instructions from the court to do so, and in the event the fees paid are incomplete and the party failed to pay the difference within a certain period following explicit instructions from the court to do so.

Article (67) of the said law grants the court the right to drop the case in the absence of the claimant or the failure to notify him for any reason, provided the claimant does not follow up with the court for a period of three months from the date of filing the lawsuit.

5.2 Interim or interlocutory injunction before trial

Interim injunctions are measures taken on time sensitive matters, such as requests to appoint an agent or custodian on money, precautionary seizure, travel bans, urgent requests to prove a specific matter, request to hear a witness with a fleeting opportunity to hear his/her statement, on a matter not yet presented to the judiciary but may potentially be introduced.

5.3 Interim attachment orders

The court or summary action judge will review urgent matters without the need to request the interested parties to appear before the court, unless the court or judge determines otherwise. The claimant shall submit all relevant documentation on which he based his request. The court or summary action judge may oblige the claimant to submit a cash deposit or bank or notarial guarantee, the type and amount to be determined by the court or summary action judge; this guarantee shall be submitted by a solvent guarantor to cover the damage and harm that might occur to the defendant if it later becomes evident that the plaintiff does not have the right to what he's claiming. Governmental entities, official and public institutions, municipalities and banks operating in the kingdom are exempt from submitting such guarantee. The court or summary action judge has the authority to verify the solvency of the guarantor.

5.4 Other interim remedies

There are no other interim remedies available, bearing in mind that the order to take such action may occur before the claim is filed, in which case the claimant must raise a claim within eight days, starting from the day after the decision for precautionary sequestration or travel ban or any other precautionary procedure is taken. If a claim is not raised within the specified period, the decision issued in this regard is considered cancelled, and the chief of the court or whom he delegates or the Summary Action judge shall take the actions necessary to nullify said decision.

5.5 Remedies at trial

The concept of punitive damages is not recognized under Jordanian law.

The claimant is entitled to request the court to oblige the counterparty to perform its obligations under a contract. In the event such party fails to do so, the claimant is entitled to request the court to oblige the counterparty to pay compensation which is equal to the current actual damages. It is worth noting that the Civil Code No. 43 of 1976 (the Civil Code) grants the parties the right to determine the amount of compensation in their contract. However, such compensation is subject to the court's discretion.

Whilst damages arising from contractual liability are confined to actual damages, damages arising from tort or wrongful acts will include loss of profit in addition to actual damages. The amount of damages will be assessed by court-appointed experts. The law does not prescribe limits to the extent of damages that may be awarded.

5.6 Security for costs

The law does not entitle the defendant to request the claimant to provide a guarantee against the alleged claims, noting that Articles (33) and (141) of the Civil Procedures Law requires the submission of guarantees in regards to precautionary requests (such as seizure and travel bans) in the form of a cash deposit, or a bank or judicial guarantee/bond. The Court or the summary action judge shall define the type and amount of such a guarantee. A solvent guarantor shall submit this guarantee to cover the damage and harm that might occur to the defendant if it later becomes evident that the plaintiff does not have the right to what he's claiming.

6. FEES AND COSTS

6.1 Legal fees

Article (46) of the Jordan Bar Association Law provides that lawyers are entitled to fees in accordance with the contract concluded between him/her and the client, provided that fees do not exceed 25% of the actual value of the disputed amount except for in exceptional circumstances assessed by the Jordan Bar Association council.

If the fees have not been determined by way of an explicit written agreement, the competent committees at the Jordan Bar Association shall determine these fees after inviting both parties; the efforts of the lawyer and the importance of the case and any other relevant factors shall be taken into consideration.

If other claims branch from the original claim, it is the right of the lawyer to request fees in relation thereto.

The court shall, based on the request of a party decide that the opposing party shall pay lawyer fees, which the court shall assess, provided that at the first stage this shall not be less than 5% of the decided amount and shall not exceed 1000 Jordanian Dinars in any claim regardless of the amount decided. The lawyer fees at the appeal level shall not exceed half of what was decided at the first stage level.

Further to Article (47) of the Jordan Bar Association Law, if a lawyer completes a case by way of amicable settlement or arbitration in accordance to the authorization granted by his client or in the event that the client no longer wishes to pursue a case after signing a power of attorney for any reason, the lawyer is entitled to the agreed fees provided there is no agreement to the contrary.

6.2 Funding and insurance for costs

Fees are paid by the parties. Jordanian law does not regulate payment of such fees by a third party. It is worth noting that in the law permits the Chief of Court to delay the payment of fees in the event that the party which is liable to pay such fees is unable to do so.

We are not aware of any insurance available for litigation costs.

6.3 Cost award

Article (161) of the Civil Procedure Law states that the court, when it issues its final judgement, shall oblige the losing party to pay all of the fees and expenses incurred during the litigation procedures. The court may also, during court proceedings, oblige either of the parties to pay any fees relating to any particular request or session at the time it is requested; this shall not affect the decision issued later on in regards to expenses. The fees and expenses of the counterclaim shall be judged in the same manner as the original case.

Article (162) also states that:

The expenses of verifying handwriting, stamps, signatures, and fingerprints will be paid by the party that alleges that they are illegitimate or forged, provided that the investigation into the allegation determines it to be false.

Article (163) states that:

If it is found that the claimant is incorrect in any part of his claim, he shall be obliged to pay all of the expenses as well as partial court fees pursuant to the amount determined by it court if the claimed amount is defined, or half of the court fees if the claimed amount is not defined.

Article (166) further provides:

In addition to all of the various fees and expenses, the court shall also oblige the losing party to pay the lawyer fees incurred during the lawsuit.

6.4 Cost interest

Article (167) of the Civil Procedure Law states that:

- If the debtor pledges to pay an amount of money at a certain time and fails to do so when such amount is due, he is obliged to pay interest without the other party having to prove that damages were incurred as a result of this failure of payment.
- If the contract includes a clause relating to interest, the judgement shall be made in accordance with it. If no such clause exists, it shall be calculated from the date of notarial notification. Otherwise, it shall be calculated from the date of the statement of claim or the claim that arises after said statement is delivered.
- Interest will be accrued on compensation and remedies that the court determines for one of the litigants and is calculated from the date the claim is raised.

While taking into consideration the content of special laws, legal interest will be calculated at (9%) annually, and exceeding this rate cannot be agreed upon.

7. APPEAL

7.1 Appeal

The losing party has the right to appeal decisions issued at the first instance level (with amounts exceeding seven thousand Jordanian Dinars) within thirty days from the date following the issuance of the decision against it if the decision was delivered in person or from the date of notification if the decision was issued in complete absence or where the losing party has attended some sessions but was absent at the time of issuing the decision, and shall pay the fees accordingly. This time duration shall be ten days in any of the following circumstances:

- Summary proceedings
- Suspension of the case
- Argument of lack of jurisdiction
- Argument of arbitration clause
- Argument of the case being previously settled
- Argument of elapse of limitation period
- Requests of intervention and admittance.
- Refusal of counterclaim.
- Argument of voidance of case notification documents.

The law permits the counterparty to submit a statement of response to the appeal within a period of ten days commencing from the day following the date of notification. The counterparty may also submit a counter-appeal within such period in the event that such party loses part of its claim.

The appeal statement of claim shall be presented in the same number as there are respondents to the court clerk at the court which has issued the decision to be raised with the case documents after carrying out notifications. One or more parties may raise an appeal claim together.

The appeal statement of claim must contain the following details:

- The name of the appellant and his attorney and address for notification.
- The name of the respondent and his attorney and address for notification.
- The name of the court which has issued the appealed decision, the date of such decision and the number and of the court case.
- The reasons for appeal should be listed in summary form in separate numbered provisions.
- The claims.

The appeal court shall consider the appeals by way of review in those decisions issued by the magistrate courts and with attendance of the parties in respect of those decisions issued by the courts of first instance if the claims do not exceed thirty thousand Jordanian Dinars, unless it shall decide of its own accord or based on the request of one of the litigants to hear the pleas.

The appellant court shall hear the pleas in respect of the appeals put forward to it in respect of the decisions issued by the courts of first instance in absence, regardless of whether the parties attended any sessions or the session at which the decision was issued (in cases where the appellant did not complete the submission of his evidences or defences for reasons beyond his control which the court accepts as valid reasons).

The appeal courts shall also hear pleas with the attendance of both parties in cases which have been rejected by the Court of Cassation.

The appeal court of this type shall be composed of three judges.

8. ENFORCEMENT OF JUDGMENT

8.1 Enforcement of judgment

The Execution Law No. 24of 2007 (the Execution Law) provides under Article (6) that execution is by deed of execution, and said deed could be a judicial decision from human rights courts, *Shari'ah* courts, religious courts, the provisions of criminal courts that relate to personal rights, and the decisions of any court or council or other authority whose special laws state that the execution department shall carry out the aforementioned decisions and any foreign provisions that must be executed according to any agreement, and this definition includes formal and regular deeds as well as commercial instruments.

The law allows all litigants to submit a request to the department that includes the name of the creditor, his title, and his place of residency, and the name of the debtor, his title, and his place of residency along with the deed of execution, and the creditor must be notified prior to the execution, and this notification must include a summary of the demands included in the execution and the address of the party demanding the execution, to which the creditor has 7 days from the date of notification to comply. In the case of instant execution, the debtor shall be informed by way of notification of the procedures that were taken in this regard.

The law allows for the creditor to call for the imprisonment of the debtor (if he is a natural person) in the case where the aforementioned notification is issued and he does not repay the debt or suggest a settlement that suits his financial ability, within a period of 7 days starting from the day after the debtor is notified, provided that the first payment made as part of the settlement is no less than 25% of the judged amount. If the winning party does not agree to this settlement, the chief of the court shall order both parties to be heard and will then investigate the ability of the debtor to pay the amount, and shall examine the creditor's claims and evidence provided regarding the financial ability of the debtor, and make the appropriate judgement.

The law also specifies the procedures regarding the selling of the debtors movable and immovable property.

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

Arbitration is the main ADR method used in Jordan, and in particular, in construction and supply contracts.

9.2 Costs in ADR

If the dispute is resolved in full by way of judicial mediation the claimant may recover half of the official court fees that he paid.

If the dispute is resolved in full by way of a specialised mediator the claimant may recover half of the official court fees that he paid and the remaining half is spent as fees for said specialised mediator, which must be no less than three hundred Jordanian Dinars. If the moderator's fees turn out to be less than this, both parties must split the difference between them and pay it so that the moderator's fees reach the specified amount. If the specialised moderator does not reach the dispute resolution, the case administration judge shall determine the moderator's fees which shall not exceed two hundred Jordanian Dinars, which the claimant must pay to him, and these fees shall be considered part of the case expenses.

9.3 ADR and the court rules

Mediation is not mandatory, and each party involved in the dispute must, within 15 days from the date of referral of the dispute to mediation provide a brief note containing a summary of their claims or defences, as well as the documents on which they are based, and these notes and documents are not exchanged by the two parties involved in the dispute.

The mediation procedures are considered confidential and neither they nor any concessions resulting from them may be protested against by either of the parties involved in the dispute in front of any court or any other entity. Also, the mediation judge may not look into the merits of the case.

9.4 Evidence in ADR

In mediation, the evidences will be the same as those submitted to the court, and copies thereof will be provided.

The parties to an arbitration agreement may agree on the method for submission of evidences. If not specified, the arbitrators will determine this matter.

As per above in question 31, the mediation procedures are considered confidential and may not be objected to, nor can the concessions made by the parties to the dispute be objected to before any court or other entity.

There is no provision under Jordanian legislation which prohibits arbitration proceedings from being confidential.

9.5 ADR reform

We are not aware of any proposals for dispute resolution reform.

9.6 ADR organizations

Article (2) of the Mediation Law provides for the establishment of a judicial authority called the Mediation Authority within first instance courts as determined by the Minister of Justice. This authority comprises a number of first instance and magistrate judges called (mediation judges) who are appointed by the chief of the first instance court for the period he specifies, and he chooses from the employees of the court the necessary number required for this authority.

With the recommendation of the Minister of Justice, the chief of the judicial council appoints specialised mediators from amongst retired judges, lawyers, professionals, and other individuals with experience who are acclaimed for their impartiality and integrity.

There are currently no arbitration centres in Jordan; though it is being contemplated/currently under process to establish an arbitration centre through the Jordan Chamber of Commerce for dealing with commercial matters.

Lebanon

Elias R. Chedid and Georgette Salamé

1. OVERVIEW

1.1 Overview

Both the Lebanese Code of Civil Procedure (the "CCP") and the Code of Obligations and Contracts (the "COC") address settlement agreements. These can occur before a law suit is filed (e.g. after contentious exchanges have taken place), or after a law suit has been filed. Settlement agreements that are entered into after a law suit has been filed can relate to all or only part of the dispute (article 461 of the CCP). The parties can ask the judge or the court to homologate the settlement (article 461 of the CCP), in which case it will have judicial weight.

The principal alternative dispute resolution method utilized in Lebanon is arbitration. Parties also often resort to conciliation and negotiation to settle commercial disputes. Mediation is beginning to develop as an alternative dispute resolution technique, but there is no governing legal framework.

Lebanon is an arbitration-friendly jurisdiction: it is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has developed a liberal approach to arbitration that affords procedural flexibility and facilitates the recognition of arbitral awards. Also, a 2002 reform (Law No. 440/2002) has explicitly confirmed the arbitrability of disputes involving the State.

Conciliation is a long-standing method for resolving commercial disputes. The CCP deems that conciliation comes within the mission of the judge and contemplates the possibility for arbitrators to take up the role of conciliators where the parties assign such mission to them (articles 375 and 775 of the CCP).

Negotiation is not specifically regulated by Lebanese law save with respect to the aforementioned provisions of the COC that address settlement agreements. A settlement agreement is defined as a contract whereby the parties, through mutual compromise, resolve an existing dispute or prevent such dispute from arising between them. The law defines the form that such agreements take, the circumstances where they may be entered into as well as those where they must be registered. It also determines the effects of such contracts as well as the grounds for challenging them (articles 1035 et seq. of the COC).

Despite renewed efforts to prepare a draft law and despite the enactment of a law establishing a mediator in governmental administrations (Law No. 664/2005), there is no rule providing for the referral of private disputes to mediation. Where a dispute between two commercial entities arises, the parties sometimes agree to refer such dispute to a mediator: in practice, they often resort to the services of professional mediation centers.

2. LITIGATION

2.1 Court system

The structure of Lebanese courts is generally inspired by the French judiciary system which differentiates between "private" and "public" courts and establishes separate courts for the settlement of each of these categories of disputes.

Lebanon does not have commercial courts which would be the equivalent of the French "*Tribunaux de commerce*".

Commercial contracts entered into between two private persons will, depending on the circumstances of the case and based on the criteria defined by the CCP (articles 85 et seq. of the CCP), be referred to the Court of First Instance (*Tribunal de Première instance*) or to a single/sole judge belonging to such court ("*juge unique*").

There are, however, specialized divisions within each of the Court of First Instance, the Court of Appeals and the Court of Cassation (the Lebanese "Supreme Court" for civil and commercial matters) which are to deal with commercial matters and which have therefore a certain degree of expertise in relation to same.

2.2 Pre-action conduct

The court does not impose any rules on the parties in relation to pre-action conduct.

However, the claimant and the defendant are required to exercise their right to bring an action to court and to defend their claims in good faith. Where a court finds that such rights were exercised abusively, it can order the party to pay damages (article 124 of the COC and articles 10 and 11 of the CCP). It should also be noted that the defendant may claim damages in the event that it encounters loss or harm as a result of the other party bringing a case to court or as a result of a specific court proceeding (article 32 of the CCP).

2.3 Typical proceedings

The stages of civil/commercial court proceedings depend on the complexity of the dispute and on the parties' positions.

For instance, a claimant may file its claim with the clerk of the court without consulting the other party or it can file its claim jointly with the other party, in which case the defendant does not need to file its defense at a later stage. The parties then typically exchange briefs under the supervision of

the court/its president. The President of the Court of First Instance (or the judge appointed by the latter) reviews the files, requests clarifications and/or documents from the parties where needed and prepares the case for a hearing; he/she also attempts to reconcile the parties. The court hears the parties and undertakes the investigation (hears witnesses, orders an expertise…) that it deems necessary. The president of the court then sets a date for the issuance of the judgment. Following such decision, the parties may submit a written brief to clarify or complete their former briefs. The court finally issues its judgment.

2.4 Limitation periods

As a general matter, the applicable time bar in Lebanon is ten years unless the law provides otherwise (article 349 of the COC).

Limitation periods vary for different causes of action. For example, the limitation period is five years for the distribution of dividends (article 350 of the COC) and two years for a manufacturer, seller or supplier seeking the payment of the purchase price of its products (article 351 of the COC).

The limitation period is triggered as from the date that a debt falls due ("*dette exigible*") (article 348 of the COC).

2.5 Confidentiality

Court proceedings are public in Lebanon (article 376 of the CCP).

However, the Court can decide that the proceedings will not be public based on its own assessment of the case or on a request made by a party to this effect, if it deems that it is necessary to safeguard public policy, public morals or to protect secrets. In such instances however, the Court's decision will still be published (article 484 of the CCP).

It should also be noted that the law prohibits in certain instances the publication in the media of facts relating to court proceedings. For example, this is the case for proceedings relating to slander (article 486 of the CCP).

2.6 Class actions

Associations such as consumers associations may initiate legal proceedings (article 67 of law No. 659/2005) but Lebanese law does not provide for class actions.

3. INTERJURISDICTIONAL PROCEDURES

3.1 Audience rights

Lawyers that are duly registered with the Beirut or Tripoli Bar Association and meet the conditions set forth in the law regulating the lawyers' profession have rights of audience. This law notably requires that lawyers be Lebanese nationals (having held the Lebanese nationality for 10 years at least), that they hold a law degree from a Lebanese law school as well as a practicing certificate (articles 5, 7 et seq. and 61 of Law No. 8/1970).

In order to conduct cases in court involving large commercial disputes, one must resort to a lawyer registered with the Court of Appeals.

Foreign lawyers cannot conduct cases in Lebanese courts save where they are granted an authorization to conduct a specific case by the bar association (article 115 of Law No. 8/1970).

Not all court proceedings require the appointment of a lawyer, but large commercial disputes will require the appointment of a lawyer (article 378 of the CCP and article 61 of Law No. 8/1970).

3.2 Rules of service for foreign parties

Lebanon is not party to multilateral conventions such as the 1954 Hague Convention on Civil Procedure or the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The main process to serve proceedings on a party in Lebanon consists of following the so-called "diplomatic" channel: the foreign consulate in Lebanon notifies the Ministry of Foreign Affairs, which in turn notifies the Ministry of Justice, which in turn notifies the bailiffs department within the latter Ministry, which handles service of process.

3.3 Forum selection in a contract

As a general matter, choices of jurisdiction clauses included in international commercial contracts are upheld.

There are exceptions to this rule, for instance with respect to commercial agency agreements or bankruptcy proceedings initiated against a Lebanese entity. The jurisdiction of Lebanese courts is deemed in such instances to be of a public policy nature.

Choice of jurisdiction clauses included in domestic contracts will also be effective save where the law provides for the mandatory jurisdiction of a given court (articles 108 et seq. of the CCP).

3.4 Choice of law in a contract

The choice of a foreign law as a substantive governing law for a contract would in principle be upheld by the Lebanese courts based on the freedom of contract and the principle of autonomy. A well-established rule of private international law provides that the parties may determine the "proper law of the contract", and such rule has been acknowledged by the Lebanese courts (Lebanese Court of Cassation, March 4, 1968, Rev. Jud., Lib., 1968-2, p. 812), except where such choice of law is in contradiction with Lebanese laws that are of a public policy nature. Lebanese labor law will, for instance, apply to employment contracts performed in Lebanon. The rules relating to the termination of a commercial agency agreement will also apply where the agent is operating in Lebanon.

It should be noted, however, that the Lebanese courts will apply a foreign law to a given contract pursuant to a choice of law only where such contract is characterized as being international in nature.

3.5 Gathering evidence in a foreign jurisdiction

Lebanon is not a party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, so there is no framework for taking evidence from a witness in Lebanon for use in proceedings in another jurisdiction.

The procedure to take evidence from a witness is subject to the law of the court that collects such evidence.

The CCP specifies that a Lebanese court may request a foreign court take evidence abroad (article 140 of the CCP).

3.6 Enforcing a foreign judgment in local courts

The recognition and enforcement of any foreign judgment is subject to the party seeking the enforcement of such judgment obtaining, from the Lebanese courts, an exequatur judgment.

Such judgment shall not entail any review on the merits, but the foreign judgment must meet the following conditions, which are set out in the CCP (article 1014 thereof):

- the judgment must have been rendered by a court that had jurisdiction under foreign law unless the jurisdiction of such court was based on the plaintiff's nationality;
- the judgment must be final and enforceable in the foreign State where it was rendered (res judicata condition);
- the proceedings that led to the judgment must not have been conducted in violation of the rights of defense;
- the foreign jurisdiction where the judgment was rendered must recognize and enforce Lebanese court decisions via an exequatur procedure (reciprocity condition);
- the recognition and enforcement of the judgment must not be in contradiction with the Lebanese laws that are of a public policy nature (this provision is meant to address situations where the results achieved by the judgment clearly appear to be egregious as a result of a superficial review of such judgment; it is not interpreted by the Lebanese courts as opening the door to a general review of the merits of the foreign judgment).

The party seeking exequatur must provide the documents listed in the CCP (article 1017 thereof):

- a copy of the judgment duly certified by the court that issued it and meeting the requirements that establish such judgment's validity in the foreign country where it was issued (along with the required stamps, certifications, signatures, legalizations...);
- the documents that establish that the judgment is final and enforceable in the foreign country in which it was rendered;
- if the judgment was issued in absentia (including against only some of the parties to the law suit), a certified copy of the documents that establish that the party that failed to attend the proceedings was duly notified of the law suit and of the documents relating to the proceedings; and
- a translation of all the aforementioned documents certified by a sworn translator.

4. EVIDENCE

4.1 Fact witnesses

Testimonies are admissible evidence in commercial disputes (article 257 of the CCP).

As a general matter, testimonies are delivered orally in Lebanese courts (article 290 of the CCP). Where a witness is required to deliver a testimony in the context of a commercial dispute, the court issues a decision which must specify the date of the hearing where the witness must appear before the court (article 267 of the CCP). Witnesses are heard by the court

unless the court decides that only one of its judges will hear the witnesses (article 269 of the CCP).

The court/judge appointed to conduct the hearings may decide that a testimony can be submitted in writing provided that the nature of the dispute allows for this (article 290 of the CCP).

Minutes of the hearing during which a witness is heard orally must be drawn and submitted to the witness, who can make the corrections that he/she deems necessary. The minutes will specify that corrections have been made where the witness makes such corrections (article 292 of the CCP).

The court or the judge appointed by the court to conduct the hearing directs the questions to the witness in the presence of the disputing parties. The court/judge may direct a question that a party/lawyer has suggested if it deems that such question is relevant. The parties are not allowed to interrupt the hearing or to address a question directly to the witness during the hearing (articles 286 and 287 of the CCP). The court/judge may also request that a party leaves the court to secure that the witness can freely deliver his/her testimony provided that the party can re-enter the court after the testimony has been delivered and later provided that such party is provided with a copy of the testimony (article 289 of the CCP).

4.2 Expert witnesses

The court may appoint an expert to conduct a specific inspection, to submit an expertise or conduct an investigation where the skills of an expert are required to this effect (article 313 of the CCP).

As a general matter, the court can only appoint an expert whose name is featured on a list of registered court-experts unless it can set out the reasons that require the appointment of another person and provided such person delivers his/her expertise after taking an oath (article 314 of the CCP). The CCP determines the conditions that allow for the revocation of an expert (articles 316 et seq. of the CCP).

The court determines the mission of the expert as well as the time period within which it must submit its expertise (articles 320 and 321 of the CCP). It also sets the fees of the expert and determines the advances that both parties, or one of them, must make in relation to these fees (articles 333, 335, 39, 341, 344, 354 and 361 of the CCP).

The expert may request that a disputing party or a third party submits to it a given document and the court may issue an injunction to this effect (article 324 of the CCP).

In any event, the court is not bound by the opinion of the expert (article 327 of the CCP).

4.3 Documentary disclosure

A party must disclose to the court as well as to the other party any document that it produces in support of its claims (article 132 of the CCP).

A party may request that the other party produce a document in court where (i) the law authorizes it to request that such document be produced in court or delivered to it, or (ii) if the document is deemed common to both disputing parties (i.e. it was drawn to serve their common interests or it evidences reciprocal obligations), or (iii) the other party invoked the said document in the course of the proceedings (article 203 of the CCP).

Where a party requests the production by the other party of a document in court, it must: (i) describe the nature and content of such document; (ii) specify the fact(s) that the document it claims will establish; (iii) set out the circumstances that evidence that the other party holds the document and (iv) provide the legal grounds that allow it to claim the document (article 204 of the CCP).

The court issues an order to produce a document within a given time limit, where a party acknowledges that it holds such document or where the party claiming such production provides the required justifications for its request. Where neither of these circumstances is met, the party that refrains from producing a document must declare under oath that such document does not exist, that it is not aware of its existence or does not know where it can be found, or that it is not neglecting to undertake any action in order to find such document with a view to harming the other party's interests, or make any other declaration under oath that the court deems appropriate (article 205 of the CCP). If the party refrains from producing the document in a timely manner or from making the aforementioned declaration under oath, the court may base its decision on the claims of the other party and on a copy of the document produced by the latter (if any) (article 206 of the CCP).

Finally, the court is entitled to issue a decision in relation to the intervention of a third party in the proceedings where such party holds a document that is relevant to the case. The court may also request, at its own initiative or pursuant to the claim made by a party to this effect, that a governmental administration provides it with one or several documents (article 208 of the CCP).

On a final note, the court may sentence a party that refrains from producing a document in a timely fashion with a fine. Such decision may not be challenged; however, the court may ultimately decide to release a party form the payment of such fine where the latter provides reasons to justify its failure to produce the said document (article 209 of the CCP).

4.4 Privileged documents

Where the content of a letter is not secret, the recipient of such letter may disclose it; commercial correspondence is deemed not to be confidential. In contrast, civil correspondence may only be disclosed with the approval of both the sender and the recipient (articles 159 and 160 of the CCP).

Also, the Lebanese Criminal Code affords protection to the secrets that persons come across as a result of their position, job/function, profession or art: any disclosure without a legal reason or any use of any such secrets to serve their personal interest or that of a third party is punished by a prison sentence (of up to one year) as well as by a fine (of up to LBP 400,000) where such disclosure or use can result in a damage to a third party, including where such damage is only a of a moral nature (i.e. a non-economic damage) (article 579 of the Criminal Code, as amended by Legislative Decree No. 112/1983 and Law No. 239/1993).

The law governing the lawyers' profession specifically prohibits a lawyer from disclosing any secret that he/she came across in the course of the exercise of his/her profession even after the expiry of his/her power of attorney. The same law prohibits a lawyer from testifying against his/her client where he/she is or was appointed by such client to act as its attorney in a trial (article 92 of law No. 8/1970).

Finally, lawyers, agents, doctors and any individual that comes across a fact or information in the course of the exercise of his/her profession, may not disclose such information even after he/she has performed the services they were entrusted with and even after he/she is no longer acting in his/her professional capacity, save in certain specific instances where criminal offenses are involved. Such individuals may, however, upon the request of the person that revealed to them a given fact or information, disclose in turn such matters, where the rules governing their profession authorizes them to make such disclosure (article 264 of the CCP).

5. REMEDIES

5.1 Dismissal of a case before trial

A party can request that a case be dismissed before the trial begins and before the court looks into the merits of the dispute under a certain number of limited circumstances. Its claim will be based in such instance on procedural defenses or on defenses seeking the rejection of the other party's right to bring the case to trial.

In order to avoid dilatory tactics, the law punishes parties that abuse their right to make such claims and allows in certain instances for the possibility to remedy a flaw that would otherwise have allowed for the dismissal of the trial.

The main circumstances that allow for the dismissal of a case before a full trial are the following:

- the court seized by the other party does not have jurisdiction to determine the dispute. Where the jurisdiction of another court is mandatory/of a public policy nature, the request for a dismissal of the trial may be made at any time during the course of the proceedings;
- another court that is also of competent jurisdiction has been seized and is looking into the merits of the same dispute;
- another court that is also of competent jurisdiction is determining claims that are interconnected with the claims that are referred to the court for a ruling;
- there exists a form/procedural flaw and (i) the law explicitly provides that this flaw nullifies the proceedings or (ii) the flaw relates to a fundamental rule that governs the proceedings or is of a public policy nature; or (iii) the party establishes that it suffered a loss as a result of the occurrence of the procedural flaw;
- (i) the lack of capacity to litigate or (ii) the lack of capacity of a disputing party, the person acting in the name and on behalf of a legal entity or of a person under guardianship or (iii) the lack of capacity or power or the representative of a disputing party (article 60 of the CCP);
- the lack of capacity of the other party to bring a claim to court;
- the absence of an interest of the other party in the dispute;
- the issuance of a former final judgment relating to the matter (*res judicata*);
- the existence of a statute of limitations and the expiry of the time limit granted by law to bring an action in court.

5.2 Interim or interlocutory injunction before trial

Interim relief is granted by a single judge following the procedure that governs urgent matters or by the court that is seized to settle the merits of a dispute (article 589 of the CCP). An arbitral tribunal is also entitled to grant interim and conservatory relief (article 789 of the CCP).

Either party may claim interim and/or conservatory relief (article 35 of the CCP). However, where a dispute has reached the appeals stage, only the party successful at first instance can request from the judge of urgent matters such measures (article 581 of the CCP).

A party claiming interim and conservatory relief must establish that such relief is required to safeguard its rights or prevent imminent damage (article 589 of the CCP). The court/judge of urgent matters may not, in such instance, look into the merits of the case.

Interim and conservatory measures are enforced following an expedient procedure (article 557 of the CCP) and are immediately enforceable (article 592 of the CCP).

The court may request from the party seeking interim and conservatory measures the provision of a bond/guarantee (article 589 of the CCP).

Pursuant to a change of circumstances, the judge/court may go back on its interim and conservatory decisions or amend them (article 591 of the CCP).

The interim and conservatory decisions issued by the judge of urgent matters may be appealed where the decision of the court of first instance relating to the subject matter of these decisions is open to appeal. A party can appeal these decisions within eight days of receiving notice thereof. The appeal does not result in a stay of execution. The Court of Appeals follows in such instances the procedure that governs urgent matters (articles 586 and 590 of the CCP).

Interim and conservatory measures may be granted ex parte (article 593 of the CCP).

5.3 Interim attachment orders

The chief of the execution department of the court has jurisdiction to authorize the interim attachment of assets pending a judgment. He/she may authorize such attachments without delivering to the obligor a prior notice thereof (articles 866 and 868 of the CCP). Such decision can however be challenged but the procedure for challenge as well as the judiciary authority before which such decision may be challenged vary depending on whether the request for attachment was granted or denied (article 868 of the CCP).

Movables, real property as well as any asset held by a third party can be subject to a conservatory attachment.

Interim attachments may only be ordered where the debt of the creditor has fallen due and is not subject to a condition precedent (article 866 of the CCP).

Where the amount of the debt is not determined, the chief of the execution department of the court assesses such amount, which must take into account any interest due, the provisional interest that will fall due in the coming year as well as any expenses that will be incurred and any taxes that are expected to be levied (article 867 of the CCP).

The enforcement officer undertakes the required steps to secure the attachment and notifies the obligor as well as any relevant governmental administration (such as the Land Register) thereof (article 869 of the CCP).

The creditor must initiate legal proceedings within 5 days of the attachment having been granted or must have initiated such legal proceedings before requesting the attachment, in order for the latter to be recorded (article 870 of the CCP).

Conservatory attachments are automatically converted into execution attachments upon the issuance of a final enforceable judgment in favor of the creditor (articles 871 of the CCP).

5.4 Other interim remedies

The following interim measures are commonly available and obtained: sealing properties, the sale of perishable goods, establishing an inventory or drafting minutes to establish the facts of a case (article 589 of the CCP).

5.5 Remedies at trial

Lebanese courts typically award damages to any party that has suffered a loss, including a non-economic loss or an indirect loss. Loss of profit is also taken into account and compensated by the award of damages. A party can however escape its contractual liability if it can establish that its obligations were impossible to perform (articles 254, 259, 260, 261 and 263 of the COC).

Courts can also issue injunctions requesting specific performance and sentence a party to a daily penalty until it performs its contractual obligations (article 251 of the COC).

A party may also request from the court the authorization to perform the other party's obligations at the cost and expense of the latter (article 250 of the COC).

Civil and commercial law do not provide for punitive damages.

The parties' agreement can and often provides for a penalty in the event of the breach of a contractual clause *(clause pénale)*. In such instance, however, the court is entitled to decrease the amount of the penalty agreed to by the parties in the event that it deems that it is excessive (article 266 et seq. of the COC).

5.6 Security for costs

The law does not provide for the right of a party to claim security for its costs in the course of the proceedings. The CCP provides that the final judgment must allocate among the parties the costs of the proceedings, as defined by the CCP (article 540 thereof); as a general matter, the losing party will bear such costs (article 541 of the CCP).

6. FEES AND COSTS

6.1 Legal fees

The lawyer and his/her client are free to determine the lawyer's fees by agreement between them. Lawyers are also entitled to obtain from their clients the payment of any expenses incurred on their behalf (articles 68 and 69 of Law No.8/1970).

Different fee structures can be adopted which notably include annual fees for the companies that are required to appoint a lawyer, hourly fees and fixed/flat fees.

Lawyers' fees are not fixed by the law. The law grants the court the right to decrease these fees where these exceed 20% of the amount disputed by the attorney's client (article 69 of Law No. 8/1970).

6.2 Funding and insurance for costs

In normal circumstances, litigation is usually funded by the parties to the proceedings. Third parties can fund the proceedings on behalf of a client but this arrangement is not regulated by the law. It is not common for clients in Lebanon to seek insurance to cover their litigation costs.

6.3 Cost award

The costs of the proceedings include stamps and duties, any compensation to witnesses, experts' fees as well as the costs of any proceedings whose amount is determined officially (article 540 of the CCP).

The court determines the allocation of these costs in its final judgment. As a general matter, the costs of the proceedings are borne by the losing party. In certain instances, however, the court may determine that the successful party will bear all or part of the cost of the proceedings, where the losing party acknowledged the wining party's rights prior to the commencement of the proceedings, where a fault of the wining party caused additional or inadequate costs or where the wining party retained documents that have a critical impact on the case (articles 541 and 542 of the CCP).

The court may award damages to compensate for any loss suffered pursuant to any malicious claim or defense; it may also decide that costs other than the costs of the proceedings (as defined above) will be borne by one of the parties (article 551 of the CCP).

6.4 Cost interest

The law does not provide that interest must be awarded on costs and we are not aware of any decision awarding interest on costs.

7. APPEAL

7.1 Appeal

Save where the law specifically provides otherwise, all first instance judgments may be appealed (article 639 of the CCP).

Also, except where the law provides otherwise (for instance with respect to interim rulings), a party is only allowed to appeal a final judgment (article 615 of the CCP).

A party is required to file an appeal within 30 days of receiving notice of a judgment. There are exceptions to this general rule: for instance, where the appealed judgment was issued by the judge of urgent matters or where it relates to the enforcement of a judgment, a party has only 8 days to file an appeal (article 643 of the CCP).

A party may waive its right to appeal in all matters that can be the subject matter of a settlement under Lebanese law; the parties may agree to such waiver only after court proceedings have been initiated before the Court of First Instance. Their agreement has to be explicit where the Court of First Instance has not yet issued its decision. Such waiver may be implicit (for instance by the spontaneous execution/ performance of a court ruling) after the judgment of first instance has been issued (article 653 of the CCP).

Appeals must be filed with the clerk of the Court of Appeals. The application must be signed by a lawyer registered with the Court of Appeals and must include the following items: (i) a reference to the judgment of first instance (the date thereof and court that issued it) and a certified true copy thereof, (ii) the explicit basis for the appeal, (iii) the claims of the appellant as well as (iv) any supporting documents. The appellant must also provide a bond/guarantee,

the amount of which will be returned to the applicant in the event that the Court of Appeals issues a ruling in its favor or in the event that the appellant retrieves its application (article 655 of the CCP).

8. ENFORCEMENT OF JUDGMENT

8.1 Enforcement of judgment

After verifying that the judgment is enforceable, the chief clerk of the court delivers the requesting party a certified true copy of the court judgment, stamped and signed (article 565 of the CCP).

Each Court of First Instance has an enforcement department. A request for enforcement must be filed with the enforcement department of competent jurisdiction along with a copy of the judgment.

Only judgments that are final and that may no longer be challenged via the regular channels of appeal (save for judgments that benefit from accelerated enforcement) may be enforced (articles 553 and 836 of the CCP).

Save where the law or the judgment provides otherwise, a court judgment may not be enforced before the party seeking enforcement serves the other party notice thereof (articles 566 and 838 of the CCP).

The Court may sentence a party to a daily fine in order to secure the performance of its judgment (article 569 of the CCP).

The enforcement of judgements typically involves the seizure and sale of assets. The rules vary depending on the nature of the assets involved. Save where the court decides otherwise, the enforcement department delivers a notice of payment to the obligor against whom the judgment was issued prior to undertaking the seizure of its assets. The process involves an assessment of the value of the assets, which assessment requires in most cases the participation of an expert. Measures are taken where needed to safeguard these assets. The assets are sold at a public auction after the required publicity formalities are undertaken. Where real property is involved, the process is lengthier as it notably involves the drafting of a *cahier des charges*, the notification of the Land Register... The proceeds of the assets are then allocated among the creditors involved in the enforcement proceedings following the order of priority defined by the law (articles 900 et seq. of the CCP).

9. ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

9.1 ADR procedures

Arbitration is the main ADR method used to settle large commercial disputes, especially international commercial disputes. The possibility of referring certain disputes – such as those relating to commercial agency – to arbitration has been the matter of controversy. It is worth noting, however, that despite the courts' attempt to set aside arbitration clauses included commercial agency agreements, parties have continued to provide for arbitration and challenge court decisions that have refused to give effect to such clauses.

To the extent that most arbitral awards are not published and not systematically challenged, it is difficult to assess the proportion of large commercial disputes that are settled through arbitration.

9.2 Costs in ADR

The arbitrator/arbitration panel will typically allocate the costs among the parties in the arbitral award. They can also request that advances on costs be paid by the parties. When mediation or conciliation are involved, the costs are generally agreed between the disputing parties and the mediator or conciliator.

9.3 ADR and the court rules

ADR only applies if the parties agree. However, Lebanese law deems that conciliation comes within the mission of the court (article 375 of the CCP).

Courts cannot compel the use of ADR.

9.4 Evidence in ADR

In domestic arbitration, save where the parties have elected for arbitration in equity or agreed to set aside the ordinary rules that govern civil proceedings, the arbitrator applies the latter rules to the extent that such rules are consistent with arbitration and that the specific legal provisions that govern arbitration do not provide otherwise (article 776 of the CCP). Arbitrators may hear the testimony of any third party without the latter having to take an oath; they may resort to the courts to set up a rogatory commission or issue a decision in relation to a witness that refuses to appear before the arbitral tribunal (article 779 of the CCP). Finally, the arbitral tribunal may issue an injunction against a disputing party that refrains from

producing the evidence requested by it (article 780 of the CCP). In international arbitration, the parties are free to determine the procedural rules or the law that should apply to their arbitration; where the parties' agreement does not address this matter, the arbitrator elects the procedural rules or law that he/she deems appropriate (article 811 of the CCP).

The law does not specifically protect the documents produced in the course of ADR from disclosure, but the parties may agree that such documents are to be treated as confidential, in which case their agreement will be binding on them.

9.5 ADR reform

Several draft laws have been prepared to introduce and regulate mediation in the context of court proceedings. Currently, the parliament has not been very active due to the enduring political crisis; it is therefore difficult to assess if and when a law relating to ADR will eventually be enacted.

9.6 ADR organizations

There are several bodies that offer ADR services. Parties often resort to the Chamber of Commerce, Industry and Agriculture for its arbitration services. The Centre Professionel de Mediation of Saint Joseph University trains professional mediators and offers mediation services.

Saudi Arabia

Mahmoud Abdel-Baky & Jonathan Burns

1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

The principal dispute resolution methods utilised in Saudi Arabia are negotiation, mediation, arbitration, conciliation, and litigation.

a. Negotiation

Negotiation refers to a structured meeting between the parties to try to compromise the dispute. Negotiation may take place before or after the commencement of litigation. Negotiation is non-binding and a third party mediator, arbitrator, or judge is not involved.

b. Mediation

Mediation is a non-binding structured negotiation process assisted by a third-party independent mediator, who assists the parties to reach their own private resolution of the dispute.

c. Conciliation

Conciliation is a non-binding method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles.

d. Arbitration

Arbitration is, effectively, private litigation whereby an arbitrator hears the evidence of the parties and makes a binding determination. The arbitrator may be appointed under the terms of an agreement with the parties or by a court under a court-annexed arbitration scheme.

An arbitrator is usually given the power to impose a binding decision on both parties. Arbitration can, in that sense, be seen as a direct replacement for litigation and is usually complex and potentially expensive.

In Saudi Arabia, arbitration is overseen by the Board of Grievances – which is the commercial court. Thus, arbitration in Saudi Arabia generally does not provide any advantage over litigation and can serve to add an additional layer of bureaucracy to an already time consuming and unpredictable process.

e. Litigation

The *Shari'a* Courts are the courts of general jurisdiction for litigation in Saudi Arabia. Specialized tribunals with limited jurisdiction also exist. For example, labor disputes are resolved by the labor courts under the auspices of the Ministry of Labor.

Pursuant to Article 1 of the Legal Procedures Law (the **LPL**), courts in Saudi Arabia shall apply provisions of the *Shari'a* in accordance with the Holy Qur'an and Sunnah and statutory law that does not conflict therewith, and their proceedings shall comply with the LPL.

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

The general rule is that there are no statutes of limitations periods for claims brought in Saudi Arabia.

However, a small number of specific types of claims are subject to limitations periods by statute. For example, an employer has one year from the discovery of a former employee's violation of post-employment non-compete and/or confidentiality requirements to sue the former employee pursuant to Article 83.3 of the Labor Law.

3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of disputes allocated to particular divisions of this court?

The court of general jurisdiction is the *Shari'a* Court – this would involve most issues. However, claims involving traders of goods and most commercial disputes are subject to the jurisdiction of the Board of Grievances.

a. *Shari'a* Courts

The *Shari'a* courts have jurisdiction over all family law, real property matters and the majority of criminal matters. The *Shari'a* courts system includes summary courts, general courts, and an appellate court. The summary and general courts have original jurisdiction and are presided over by one judge, except in serious criminal matters. The appellate court sits solely to assure lower court decisions comply with the *Shari'a*. Theoretically, courts are bound to adhere to the Law of Procedure Before *Shari'a* Courts, adopted 19 August 2000, and the Law of Criminal Procedure, adopted 16 October 2001.

1. Summary Courts

Summary Courts (المحاكم الجزئية) handle the most minor cases in the *Shari'a* courts system. Usually, only one judge presides over one of the fourteen Summary Courts in Saudi Arabia. For civil suits involving claims for less that SR 8,000 (US $2,133), Summary Courts have jurisdiction. Furthermore, in criminal cases where the punishment is less than SR 20,000 (US $6,000) in blood money or where the fixed punishment is minor (short-term imprisonment, for example), Summary Courts have jurisdiction. Finally, Summary Courts hear cases involving juvenile delinquency.

2. General Courts

General Courts have jurisdiction over matters in which the Summary Courts lack jurisdiction. So, cases involving severe penalties and claims for more than SR 20,000 are heard by one of the Saudi General Courts. For crimes where the punishment is death or amputation, the General Courts sit as three-judge panels; otherwise, they are presided over by only one judge.

3. Appeals Courts

The Appeals Courts in Saudi Arabia sit as three-judge panels. They review lower court decisions for compatibility with the *Shari'a*. However, lower court opinions are not reversed or altered in any way by the Appeals Courts. Rather, questionable decisions are remanded to the lower court with the comments of the Appeals Court judges. The administration of the Appeals Courts is presided over by a Chief Judge. The Chief Judge makes sure that enough judges are available to fill the necessary amount of panels for the amount of cases that are appealed. Furthermore, the Chief Judge supervises the lower courts to make sure that their decisions are consistent with the higher authorities, including royal decrees and *fatwas*.

4. Supreme Judicial Council

Besides the King and the ulema', the Supreme Judicial Council (مجلس القضاء الأعلى) is the court of last resort in Saudi Arabia. It is comprised of eleven judges, five of which are permanent, full time judges. Another five judges are part-time, three of which rotate based on seniority and two of which hold positions as Appellate Court Chief and Deputy Minister of Justice. Finally, the Council is directed by a chairman. The Council fulfils both a judicial and administrative role. As a judicial body, the Council reviews lower court decisions. Mainly, the Council reviews cases involving major punishments, such as the death penalty or amputation. The Council creates binding precedent on lower courts based on a consensus of the Council members. Furthermore, the Council advises the King in his tasks. As an administrative body, the Council oversees the entire court system in Saudi Arabia. As such, it determines the qualifications required to be a judge and appoints candidates as judges. Furthermore, the Council considers complaints against judges and takes measures to investigate and discipline, if necessary, insubordinate judges.

b. Board of Grievances

The Board of Grievances is comprised of four committees that act as "courts": commercial disputes, criminal/penal matters relating to government employees, administrative and a review circuit comprised of appellate committees. Three judge panels sit on the final review/appellate committee and review every judgment made by the other committees. All judges sitting on the Board's committees face the same requirements as the aforementioned judges on the *Shari'a* courts. Appeal of a final Board decision goes to the *Shari'a* judiciary's Appellate Court. The Board is an autonomous judicial body, separate and independent from the *Shari'a* courts. It is the court of general jurisdiction for commercial matters involving traders and it also holds jurisdiction for government contract disputes. The main goal of the Board is to ensure equity between parties. In this vein, the Board can hear cases involving disputes with the Saudi government. The Board also acts as a prosecutorial body in relation to corruption, forgery and bribery laws. It has the power to summon government officials and ascribe disciplinary measures for wrongful behaviour.

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Only duly licensed Saudi Arabian lawyers have rights of audience before the Saudi Arabian courts and tribunals where cases are brought. Foreign lawyers may not represent clients before Saudi Arabian courts and tribunals. To be considered for a license, Saudi lawyers must have a degree in law and must complete an initial training period. Thereafter, licensing is subject to the discretion of the bar.

5. What legal fee structures can be used? Are fees fixed by law?

Hourly billing, fixed fees, and contingency fees are the predominant legal fee structure. Fees are not fixed by law.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Litigation is usually funded by the parties to proceedings. Third party litigation funding is not generally in use in Saudi Arabia because large punitive damages awards are generally not available. Rather, Saudi Arabian courts generally only issue

awards that cover a harmed party's actual damages. This reduces the usefulness of litigation financing in Saudi Arabia.

Litigation insurance is available in Saudi Arabia. Insurance products are available to cover the legal costs incurred in bringing or defending litigation, including the defendant's costs and disbursements, as well as the plaintiff's disbursements.

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

Per LPL Art. 64, "argument shall be open, unless the judge – on his own or upon a request from a litigant – deems it appropriate to make it closed in preservation of the general order, consideration of public morals, or on account of the family's privacy."

Nevertheless, court proceedings are generally entirely confidential. Judges do have discretion to open or close their courtrooms to the public, as well as discretion to publish their decisions. However, there is no requirement to do so. This is reflective of Saudi Arabian culture generally, which is strongly rooted in individual privacy.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

The general rule is that courts do not impose any rules on the parties in relation to pre-action conduct.

However, some bodies do impose such rules. For example, prior to pursuing a claim before the labor courts, the parties must first attempt to resolve the dispute via mediation before the labor office.

9. What are the main stages of typical court proceedings?

1. Filing of originating process (e.g. statement of claim, summons, originating process) by plaintiff;
2. Filing of defense memorandum in support of the claim by plaintiff (LPL Art. 45);
3. Attendance of plaintiff and defendant for initial hearing before the court;
4. Attendance of plaintiff, defendant, and witnesses and third party experts (as applicable) at several more hearings to submit defensive and responsive pleadings, argue merits, and respond to questions of the judge;
5. Judgment.

Interposed in the above list will be initial and ongoing hearings, as required.

10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

A claim may be summarily dismissed before a full trial, but this is very rare. There is no specific procedure except to petition the judge to dismiss the case. This may occur if the claim is frivolous or vexatious; discloses no reasonable cause of action; is an abuse of process of the court; or where a litigant fails to appear.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

No.

12. What are the rules concerning interim injunctions granted before a full trial?

Saudi Arabian courts generally do not grant equitable remedies such as interim injunctions. It may be possible to persuade a judge to issue an interim injunction before a full trial, but there are no specific rules for doing so.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

We are not aware of any specific rules relating to interim attachment orders to preserve assets pending judgment or a final order. However, pursuant to the Enforcement Law, the enforcement judge may attach a judgment debtor's assets after final judgment.

14. Are any other interim remedies commonly available and obtained?

No.

15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

Legal remedies (i.e., money damages) are generally the only remedies available – Saudi Arabian courts generally do not award specific performance such as injunctions.

When money damages are awarded, they are generally only awarded in an amount to cover the harmed party's actual damages – no more and no less. Liquidated damages provisions are acceptable in Saudi Arabia, but may be subject to scrutiny based on this principle.

Punitive damages and the like that go beyond a harmed party's actual damages are not available.

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

There are no detailed rules governing this procedure. In essence, parties must disclose whatever documents the judge in his discretion orders to be disclosed.

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

There are no specific rules, but judges generally recognize and respect privileges such as attorney-client and doctor-patient privileges and the like.

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Generally, testimony of fact witnesses is mostly given orally. If this is not possible or unduly burdensome, testimony may be produced via written affidavit. In circumstances where the judge or the counterparty wishes to question or cross-examine the witness, the witness can be compelled to appear before the court.

19. What are the rules in relation to third party experts?

Per LPL Art. 118, the court or judge may appoint a third party expert to advise on the inspection of evidence. In general, the judge will almost always appoint a third party expert to give an opinion on even moderately complex issues, which would include large commercial disputes.

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Per LPL Art. 185.1, all first instance judgments are appealable except for judgments rendered in petty cases. Per Art. 187, appeals must be filed within thirty days, or ten days if the matter is expeditious.

21. Are there any mechanisms available for collective redress or class actions?

We are not aware of any special mechanisms available for collective redress or class actions.

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

The general rule is that only a party's actual damages may be recovered. Attorneys fees and costs are generally not considered within the ambit of actual damages by most judges.

23. Is interest awarded on costs? If yes, how is it calculated?

No.

24. What are the procedures to enforce a local judgment in the local courts?

Enforcement of local judgments is subject to the exclusive jurisdiction of the Enforcement Court. Pursuant to the Enforcement Law, local judgments should not be subject to any further examination by the Enforcement Court except for what is necessary to enforce the judgment against the judgment debtor.

25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

Local courts only apply Saudi Arabian law and, thus, do not respect choice of law provisions that subject an agreement to non-Saudi Arabian law.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Local courts generally respect choice of jurisdiction clauses to the exclusion of the Saudi Arabian courts. However, in cases, for example, where a shareholders agreement regarding a Saudi Arabian joint venture entity is subject to non-Saudi Arabian jurisdiction, Saudi Arabian courts will generally take jurisdiction over the dispute by virtue of the fact that the entity is incorporated in Saudi Arabia.

27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

Saudi Arabia is not a member of the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965*, which can be used to transmit documents for service between two countries party to the convention.

Pursuant to LPL Art. 13, service of process must be in duplicate and must contain the following:

a) Subject and date of the process, with day, month, year and time of service;

b) Name, ID number, occupation, place of residence, and place of work of both the person requesting the process and his representative;

c) Name and, to the extent available, the occupation, place of residence, and place of work of the individual being served. If place of residence is unknown, process shall be served at the last known address;

d) Name of the process server and the court where he works;

e) Name and capacity of the person who received the process and his signature on the original, or an entry showing his refusal of service and reasons thereof;

f) Signature of the process server on both the copy and original.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

Saudi Arabia is not signatory to the *Hague Convention of 18 March 1970* on the *Taking of Evidence Abroad in Civil or Commercial Matters*, and there are no specific procedures for taking evidence from a witness in Saudi Arabia for use in proceedings in another jurisdiction.

29. What are the procedures to enforce a foreign judgment in the local courts?

Any party seeking to enforce a foreign judgment in Saudi Arabia must satisfy the requirements of the Enforcement Law, which requires that all foreign judgments be submitted to the Enforcement Court. Thereafter, the Enforcement Court shall enforce the foreign judgment upon satisfaction of the following:

a) Reciprocity
The jurisdiction in which the foreign judgment was issued must reciprocally enforce judgments of the Saudi Arabian courts. Usually, this is guaranteed through a bilateral or multilateral agreement or treaty between Saudi Arabia and the country in which the foreign judgment or arbitral award was issued that provides for the reciprocal enforcement of foreign judgments or arbitral awards.

b) Jurisdiction
That the Saudi Arabian courts do not have jurisdiction to consider the dispute in which the award, judgment, or order is issued and that the foreign court or tribunal who issued the award, judgment, or order has jurisdiction in the same pursuant to the rules of international jurisdiction provided for in their regulations. This is most easily satisfied with a choice of forum clause to the exclusion of the Saudi Arabian courts.

c) Finality
The award, judgment, or order issued by the foreign court or tribunal must be final prior to its submission to the Enforcement Court.

d) Consistency
The award, judgment, or order must not be inconsistent with a judgment or order issued in the same subject by a competent judicial authority in Saudi Arabia.

e) Public order/policy
The foreign award, judgment, or order must be consistent with the laws and public policy of Saudi Arabia as interpreted and applied in Saudi Arabia.

f) Summons; adequate representation
The parties to the claim in which the foreign judgment was issued were summoned, adequately represented, and were able to defend themselves.

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

Dispute resolution and enforcement of the final judgment in Saudi Arabia is highly time-consuming and unpredictable. The most efficient method to resolve a dispute and enforce a final judgment is through litigation before the local courts and enforcement before the Enforcement Courts. But even so, this process can require several years.

For this reason, non-binding forms of ADR, such as mediation, are generally not used because they tend to only add additional time to an already time-consuming process.

Likewise, binding forms of ADR, such as arbitration, are also not generally used because they tend to only add an additional layer of bureaucracy to an already time-consuming process. Arbitration in Saudi Arabia is supervised by the Board of Grievances (the commercial court) and, thus, the same delays involved in litigating disputes are also encountered in arbitration. Furthermore, under the Arbitration Law (**AL**), there are numerous grounds on which a losing party can challenge an arbitral award against it.

31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

In general, ADR does not form part of court procedures and will only apply if the parties agree. However, some specialized judicial bodies require the parties to undergo ADR before litigation ensues. For example, under the Labor Law, the parties to labor and employment law disputes must first engage in mediation within the Labor Office prior to engaging in full-fledged litigation before the Labor Courts.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

There are no specific rules with respect to ADR in general.

However, with respect to arbitration, pursuant to AL Art. 30.3, evidence is given by including it as an attachment to each party's initial statement of claim. There are no particular rules in the AL that would protect documents produced or admissions made during (or for the purposes of) the arbitration from disclosure by privilege, and no particular rules making arbitration confidential.

33. How are costs dealt with in ADR?

There are no specific rules for ADR in general.

In case of arbitration, costs are dealt with subject to the agreement of the disputants. Pursuant to AL Art. 9.2, the disputants must have an arbitration agreement reduced to writing and, pursuant to AL Art. 24.2, if said agreement fails to specify the details related to compensation of the arbitrator(s), it shall be subject to decision of the competent Saudi Arabian court which would have had jurisdiction over the dispute.

34. What are the main bodies that offer ADR services in your jurisdiction?

Formal ADR is generally not a popular form of dispute resolution in Saudi Arabia due in large part to the drawbacks of the Arbitration Law. For that reason, there is no particular main body or bodies that are recognized for offering ADR services in Saudi Arabia.

However, the Saudi Center for Commercial Arbitration operates under the umbrella of the Council of Saudi Chambers pursuant to a Council of Ministers Resolution approved in April 2014. Given its short time period of existence, the Center's effectiveness as yet cannot be described as significant or meaningful.

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

We are not aware of any proposals for dispute resolution reform.

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